NEW YORK APPELLATE PRACTICE

Friday, October 25, 2013
Melville, L.I.

Tuesday, October 29, 2013
Rochester

Monday, November 4, 2013
Albany

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Lawyer Assistance Program 1.800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

ACCESSING THE ONLINE ELECTRONIC COURSE MATERIALS

All program materials will be distributed exclusively online in searchable PDF format, allowing attendees more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. **It is strongly recommended that you save the course materials in advance in the event that you will be bringing a computer or tablet with you to the program.**

Prior to a scheduled program date, all registrants will receive an email message containing a hyperlink that when clicked will provide you with access to the complete course materials in a searchable PDF format which can be downloaded to your computer using the "Save As" option under your "File" tab. **Printing the complete materials is not required for attending the program**. Online materials are updated periodically to reflect last minute submissions from program faculty, guaranteeing that you will always have the latest version of the materials.

To access the complete set of course materials, please insert the following link into your browser's address bar and click 'enter': www.nysba.org/NYAppellateECM

A CLE NotePad© (paper) will be provided to all attendees at the live program site. The *CLE NotePad©* includes lined pages for taking notes on each topic, as well as any PowerPoint presentations submitted prior to printing.

Traditional printed course books may be ordered at the program site for a discounted price and will be shipped subsequent to the program date.

Please note:

You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at this link: **http://get.adobe.com/reader/**

In the event that you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance as additional electrical outlets may not be available at your program location.

NYSBA cannot guarantee that free or paid WI-FI access will be available for your use at your program location, even if you can see a connection.

ATTENDANCE VERIFICATION FOR NEW YORK MCLE CREDIT AND PROGRAM EVALUATION PROCESS

Attendance Verifications: In order to receive your New York MCLE credit, you are required to complete and return the Verification of Attendance form. If you are attending a two-day program, you will receive a separate form on each day of the program.

The bottom half of the form should be filled out and returned to the Registration Staff after the morning session has ended. The top half should be filled out and returned to the Registration Staff at the end of the program. **Please be sure to turn in your form at the appropriate times – we cannot issue your New York MCLE credit without it**. Your MCLE Certificate will be emailed to you a few weeks after the program.

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Evaluations: Program evaluations are processed online. After the program is over, you will receive an email from NYSBA CLE with a link to the online evaluation form.

To complete your registration process, click on the link in the email within the next 72 hours and fill out your confidential online program evaluation.

If you are not able to access the evaluation form by clicking on the link in the email, you can type the appropriate URL below for your program location into the address bar of your web browser to access the evaluation.

Melville	http://survey.vovici.com/se.ashx?s=109446F36D882BFA
Rochester	http://survey.vovici.com/se.ashx?s=109446F36D882C50
Albany	http://survey.vovici.com/se.ashx?s=109446F36D882BF8

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This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed. Further, the statements made by the faculty during this program do not constitute legal advice.

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Melville Program Agenda

8:30-9:00 a.m.
REGISTRATION (outside meeting room)

9:00-10:00
APPELLATE DIVISION PRACTICE
Appealability * Jurisdiction and Scope of Review * Rules of the Second Department * Perfecting the Appeal * Decisional Process

10:00-10:45
APPELLATE TERM PRACTICE
Differences from Appellate Division * Jurisdiction

10:45-11:00
Coffee Break

11:00-12:00 noon
COURT OF APPEALS PRACTICE

12:00-12:30 p.m.
ADVANCED CONCEPTS IN APPELLATE PRACTICE

12:30-1:30
LUNCH (on your own)

1:30-2:15
CIVIL APPEALS v. CRIMINAL APPEALS
Differences in Procedure * Preservation Issues * Leave Applications

2:15-3:00
VIEW FROM THE BENCH
Briefs * Oral Arguments

3:00-3:10
Coffee/Soft Drink Break

3:10-3:55
VIEW FROM THE BAR
Brief Writing * Oral Argument

3:55-4:20
ETHICAL CONSIDERATIONS
Obligations Prescribed by Court Rules * Duty to Notify re: Settlement * Duty to Disclose Unfavorable law * Matters dehors the Record * Frivolous Appeals

4:20-4:30
Question and Answer Period

4:30 p.m.
ADJOURNMENT

Rochester Program Agenda

8:30-8:50 a.m.
REGISTRATION (outside meeting room)

8:50-9:00
INTRODUCTION AND OVERVIEW
Alan J. Pierce, Esq.; David H. Tennant, Esq.

9:00-9:30
OVERVIEW OF APPELLATE PRACTICE IN NEW YORK STATE COURTS – ARE YOU AGGRIEVED? DO YOU HAVE A PRESERVED ERROR AND APPEALABLE PAPER?
Julian B. Modesti, Esq.

9:30-10:15
ADVANCED CONCEPTS IN APPELLATE PRACTICE
Elliott Scheinberg, Esq.

10:15-10:25
THE SECRET LIFE OF A BRIEF: AN INSTRUCTIONAL VIDEO FROM THE FOURTH DEPARTMENT
With an Introduction by Hon. Frances E. Cafarell

10:25-10:40
WHAT EVERY LAWYER SHOULD KNOW ABOUT THE FOURTH DEPARTMENT'S CLERK'S OFFICE
Hon. Frances E. Cafarell

10:40-10:55
Coffee Break

10:55-11:45
WHAT WOULD YOU DO? REAL WORLD ETHICAL DILEMMAS FACED BY APPELLATE COUNSEL
David H. Tennant, Esq. and Matthew K. Corbin, Esq.

11:45-12:30 p.m.
BRIEF WRITING - TOP TEN TIPS
Alan J. Pierce, Esq.

12:30-1:30
LUNCH (on your own)

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1:30-1:55
ORAL ARGUMENT - TOP TEN TIPS
A. Vincent Buzard, Esq.

1:55-2:45
APPELLATE TIPS FROM THE JUSTICES OF THE FOURTH DEPARTMENT
Hon. Nancy E. Smith; Hon. John V. Centra; Hon. Erin M. Peradotto; Hon. Eugene M. Fahey

2:45-3:15
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Panel

3:15-3:30
Coffee/Soft Drink Break

3:30-4:15
APPELLATE PRACTICE IN THE NEW YORK COURT OF APPEALS
Hon. Eugene F. Pigott

4:15-5:00 p.m.
PERSPECTIVES ON APPELLATE PRACTICE FROM SEVERAL APPELLATE BENCHES
Hon. Richard C. Wesley

5:00 p.m.
ADJOURNMENT

Albany Program Agenda

8:15-8:45 a.m.
REGISTRATION (Outside meeting room)

8:45-8:50
WELCOME
Nicholas E. Tishler, Esq.

8:50-9:40
TAKING THE APPEAL
Robert A. Rausch, Esq.

9:40-10:30
PERFECTING THE APPEAL, PART I - THE RECORD ON APPEAL AND APPENDICES, AND MOTION PRACTICE
George J. Hoffman, Jr., Esq., James S. Ranous, Esq.

10:30-10:40
Coffee Break

10:40-11:30
PERFECTING THE APPEAL, PART II - BRIEF WRITING
Michael J. Hutter, Jr., Esq.

11:30-12:20 p.m.
ORAL ARGUMENT
Cynthia F. Feathers, Esq., Denise A. Hartman, Esq., Nicholas E. Tishler, Esq.

12:20-12:30
AUDIENCE QUESTIONS

12:30-1:30
LUNCH (on your own)

1:30-2:20
PARTICULARS OF COURT OF APPEALS PRACTICE
Stuart M. Cohen, Esq., Hon. Richard A. Reed

2:20-3:10
APPELLATE ETHICS
Alan J. Pierce, Esq.

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3:10-4:00
ADVANCED CONCEPTS IN APPELLATE PRACTICE
Elliott Scheinberg, Esq.

4:00-4:10
Coffee/Soft Drink Break

4:10-5:00
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Hon. William E. McCarthy, Hon. Elizabeth A. Garry, Hon. John C. Egan, Jr.

5:00 p.m.
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HELPFUL HINTS FOR A SMOOTH RIDE THROUGH

THE APPELLATE PROCESS

by

APRILANNE AGOSTINO, Esq.

Clerk of the Court
Appellate Division
Second Judicial Department
Brooklyn

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Helpful Hints for a Smooth Ride through the Appellate Process

Aprilanne Agostino
Clerk of the Court
Appellate Division
Second Department

1. Emergency Applications

(a) Order to Show Cause - 22 NYCRR § 670.5(e)

(i) must invoke the court's jurisdiction

(ii) need appealable paper

(iii) must order appealed from have been entered ?

(iv) require reasonable (24 hour) notice to your adversary

(v) will not temporarily stay proceedings before Appellate Division or time within which to file a brief

(vi) $45 fee required

(vii) reply papers not permitted without leave of court

(b) Application pursuant to CPLR 5704(a)

(i) order from which you seek review must have been issued ex parte

(ii) order from which you seek review must be one from which, had it not been issued ex parte, an appeal would lie

(iii) four judge vs one judge applications

(iv) require reasonable (24 hour) notice to your adversary

(v) no fee required

(vi) the leave to appeal option

2. *Appealability*

(a) Appealable papers - CPLR 5512 (a)

(b) Appeals as of right - CPLR 5701 (a)(1), (2)

(c) Appeals by permission - CPLR 5701 (c)

(i) orders which do not decide motions made on notice

(ii) orders which direct a hearing to aid in the disposition of a motion

(iii) orders issued in a proceeding pursuant to CPLR article 78

(d) Not appealable under any circumstances

(i) decision

(ii) order deciding a motion in limine

(iii) evidentiary rulings made during trial

(iv) order denying a motion to reargue

(e) Family Court appeals - Family Court Act § 1112

(i) cases involving abuse and neglect

(ii) dispositional order - appealable as of right

(iii) nondispositional order - appealable by permission

3. *Withdrawing appeals*

(a) Requirements

(i) unperfected appeals

(ii) fully-briefed appeals

(iii) calendared appeals

(iv) post-argument withdrawals

(b) Timing

(c) Dismissal of abandoned appeals

(i) the dismissal calendar

(ii) preclusive effect - *Bray v Cox* (38 NY2d 350 [1976]); *Rubeo v National Grange Mut. Ins. Co.* (93 NY2d 750 [1999])

4. Enlargement applications

(a) By stipulation or letter application

(b) By motion

5. Form and content of records, appendices and briefs

(a) Generally - 22 NYCRR §§ 670.10.1, 670.10.2, 670.10.3

(b) Specific recurring issues

(i) oversized brief request - 22 NYCRR § 670.10.3(e)

(ii) addenda to briefs generally not permitted - 22 NYCRR § 670.10.3(h)

(iii) minuscript not permitted - 22 NYCRR § 670.10.2(d)

(iv) charts

(v) photographs

(vi) exhibits - 22 NYCRR § 670.10.2(b)(6)

(c) Requests to take judicial notice

6. Actively-Managed Appeals

(a) Generally - 22 NYCRR § 670.4

(b) Scheduling orders

(c) Minutes of in camera proceedings

(d) Utilize your case manager

7. *Calendaring appeals*

(a) When will my appeal be calendared ?

(i) timing

(ii) avoiding calendaring conflicts

(b) Application to adjourn calendar date

8. *Oral Argument*

(a) Requests for time must appear on cover of brief - 22 NYCRR § 670.20(f)

(b) When not permitted - 22 NYCRR § 670.20(c)

(i) making determination and advising counsel

(ii) application for permission to orally argue

(c) How much time permitted - 22 NYCRR § 670.20(a), (b)

(d) Rebuttal not generally permitted

(e) The submission calendar - 22 NYCRR § 670.20(d)

9. *Finality*

(a) Post argument submissions - 22 NYCRR § 670.20(i)

(b) Certificate of no appeal

10. *For further information consult the court's website*
www.courts.state.ny.us/courts/ad2

(a) Forms

(b) Guide to Civil Practice

(c) Calendars

(d) Decisions on motion and on appeal

GUIDE TO CIVIL PRACTICE

WITH FORMS & PRACTICE AIDS

by

APRILANNE AGOSTINO, Esq.

Clerk of the Court
Appellate Division
Second Judicial Department
Brooklyn

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Guide to Civil Practice

With Forms & Practice Aids

Revised November 6, 2008

Visit the court's web site at www.nycourts.gov/courts/ad2/

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1. Introduction.

This pamphlet is intended as a general guide to assist a person in prosecuting a civil matter in the Appellate Division, Second Department. It is not intended to cover all situations but, rather, to assist in the general steps needed to invoke the jurisdiction of this court, to perfect an appeal, and to submit a motion. For more information, the reader's attention is directed to the Civil Practice Law and Rules (CPLR) articles 55 and 57 and the Rules of this court.

§ 1.1 Jurisdiction; counties; courts.

The Appellate Division is an intermediate appellate court. There are four departments of the Appellate Division in New York State: the First Department is located in Manhattan, the Second Department in Brooklyn, the Third Department in Albany, and the Fourth Department in Rochester. The jurisdiction of the Second Department encompasses the counties of Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam.

The Second Department hears appeals in civil cases from orders, judgments, and decrees of the Court of Claims, the Supreme Court, the Family Court, and the Surrogate's Court and, if permission is granted, of the Appellate Terms of the Supreme Court. In addition, the court has original jurisdiction in a limited number of other matters (e.g., CPLR article 78 proceedings against a Supreme Court Justice or County Court Judge and CPLR 5704[a] applications).

2. Standing; Aggrievement.

There are certain limitations on a party's right to appeal. To take an appeal a party must have standing, meaning that the party is "aggrieved" by the determination made by the trial court (CPLR 5511). Basically, a party is "aggrieved" if an application that party made was denied or not fully granted, or if an application made by the party's adversary, which the party opposed, was fully or partially granted.

3. Appealability.

§ 3.1 Appealable paper.

An appeal may be taken only from an "appealable paper," that is, an order, judgment, or decree of a court, signed by a Judge, which formally grants or denies relief after a hearing or trial, or requested in a motion made on notice. A decision, whether transcribed in the minutes or in writing, is not appealable. Rulings made during a hearing or trial are not appealable. Often a Judge will issue a written memorandum which concludes "submit order" or "settle order on notice"; such a paper is merely a decision from which no appeal lies.

§ 3.2 Appeal as of right.

Not all orders are appealable as a matter of right; some may be appealed with permission of this court, others may not be appealed at all.

Generally, an appeal may be taken as of right from a final or interlocutory judgment and from an order which determines a motion made on notice and which adversely affects a substantial right of the appellant (CPLR 5701).

§ 3.3 Appeal by permission.

The most common orders which are not appealable as of right but which may be appealed with permission of this court include orders made in CPLR article 78 proceedings (CPLR 5701[b][1]), and nondispositional orders of the Family Court, other than those made in an abuse or neglect proceeding (Family Court Act § 1112[a]). Orders of the Appellate Term that determine an appeal from a judgment or order of a lower court are appealable by permission of the Appellate Term or, in case of refusal, by order of this court (CPLR 5703[a]); other orders of the Appellate Term are not appealable. Leave to appeal may be sought from this court by motion on notice to the other parties (a discussion on motion practice may be found in Part 8 of this pamphlet).

§ 3.4 Nonappealable orders.

No appeal at all lies from an order entered upon the default or consent of the appealing party, or from an order that denies reargument, or from an order which denies an adjournment of an ongoing proceeding.

4. Invoking the Appellate Jurisdiction of the Court.

§ 4.1 Notice of appeal.

If a party decides to appeal as of right from an order, judgment, or decree, he or she must file a notice of appeal in triplicate. The notice of appeal must be filed in the office of the clerk of the court which made the paper appealed from and an additional copy must be served on each adversary (CPLR 5515; Rules of the Appellate Division, Second Department § 670.3[a]; a sample notice of appeal is annexed to this pamphlet). On an appeal from a judgment or order of the Supreme Court, CPLR 8022(a) requires a party to pay a filing fee of $65 to the County Clerk upon the filing of a notice of appeal. A notice of appeal must be filed and served within 30 days after the appellant is served with a copy of the order, judgment, or decree, with notice of its entry, or, if the appellant has served a copy of that paper on his or her opponent with notice of its entry, within 30 days after such service (CPLR 5513[a]).

§ 4.2 Request for Appellate Division Intervention.

The appellant in a civil cause must file a Request for Appellate Division Intervention - Civil (Form A), known as a RADI (see Rules § 670.3[a]) with the notice of appeal. The RADI may be purchased at a store that sells legal forms (a copy of the RADI is annexed to this pamphlet). The notice of appeal must be filed in triplicate and annexed to two of the copies must be the RADI, a copy of the paper appealed from, and a copy of the decision leading to that paper, if any. If a party wishes to appeal from more than one paper, made in the same case, with the same notice of appeal, he or she must attach to each Form A an Additional Appeal Information form (Form B, a copy of which is annexed to this pamphlet).

Where a proceeding commenced in the Supreme Court is transferred to this court, the petitioner must file forthwith in this court two copies of the order of transfer, to each of which must be affixed a Request for Appellate Division Intervention - Civil (Form A) and any opinion or decision of the transferring court (Rules § 670.3[c]).

On the RADI, the title should be set forth as it appears on the summons, notice of petition or order to show cause commencing the civil cause. The names of all parties must be listed, together with their status in the trial court (e.g., plaintiff, petitioner, claimant, defendant, respondent, defendant third-party plaintiff, third-party defendant) and their status in the Appellate Division (e.g., appellant, respondent, appellant-respondent, respondent-appellant). If a party to the action has no status in the Appellate Division, the word "none" is to be entered in the space provided on the form. Where the Appellate Division is the court of original instance (e.g., the matter is a proceeding pursuant to CPLR article 78 against a Supreme Court Justice or County Court Judge commenced in this court pursuant to CPLR 506[b][1] or an application for a writ of habeas corpus) only the column entitled "Appellate Division Status" need be completed.

§ 4.3 Docket Number

An Appellate Division docket number will be assigned to each cause. The docket number must appear in the upper right hand corner, opposite the title, on all papers thereafter filed with the court. If the papers relate to multiple causes, they must bear the docket numbers of all those causes.

5. Perfecting an Appeal.

An appeal is perfected by the filing of a brief and a record. The record may be a full reproduced record, an appendix, an agreed statement of facts, or, when authorized, the original papers.

§ 5.1 Preparing to perfect — the record.

CPLR 5526 specifies the papers which constitute the record on appeal from a judgment or order, stating in relevant part:

> "The record on appeal from a final judgment shall consist of the notice of appeal, the judgment-roll, the corrected transcript of the proceedings * * * if a trial or hearing was held, any relevant exhibits, or copies of them, in the court of original instance, any other reviewable order, and any opinions in the case. The record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other exhibits upon which the judgment or order was founded and any opinions in the case."

Generally, the judgment, order, or decree will specify the papers upon which it was made. It is the appellant's responsibility to obtain accurate and complete copies of the papers comprising the record on file in the office of the clerk of the court that made the paper appealed from, and in the event that it was made after a trial or hearing, to obtain the transcript of the proceedings.

§ 5.2 Obtaining and settling the 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). Different rates are specified for furnishing minutes in the regular course of the reporter's business and for expedited production of the transcript. In order to meet the time limits for perfecting an appeal set by the rules of the court, it is imperative that the transcript be ordered from the court reporter promptly after the filing of the notice of appeal.

After the transcript is received from the court reporter, it must either be stipulated as correct by the parties or settled pursuant to CPLR 5525 (Rules § 670.10.2[e]). The procedure for settlement of a transcript is set forth in CPLR 5525(c), which states:

> "(c) Settlement of transcript.
>
> "1. Within fifteen days after receiving the transcript from the court reporter or from any other source, the appellant shall make any proposed amendments and serve them and a copy of the transcript upon the respondent. Within fifteen days after such service the respondent shall make any proposed amendments or objections to the proposed amendments of the appellant and serve them upon the appellant. At any time thereafter and on at least four days' notice to the adverse party, the transcript and the proposed amendments and objections thereto shall be submitted for settlement to the judge or referee before whom the proceedings were had if the parties cannot agree on the amendments to the transcript. The original of the transcript shall be corrected by the appellant in accordance with the agreement of the parties or the direction of the court and its correctness shall be certified to thereon by the parties or the judge or referee before whom the proceedings were had. When he serves his brief upon the respondent the appellant shall also serve a conformed copy of the transcript or deposit it in the office of the clerk of the court of original instance who shall make it available to respondent.
>
> "2. If the appellant has timely proposed amendments and served them with a copy of the transcript on respondent, and no amendments or objections are proposed by the respondent within the time limited by paragraph 1, the transcript, certified as correct by the court reporter, together with appellant's proposed amendments, shall be deemed correct without the necessity of a stipulation by the parties certifying to its correctness or the settlement of the transcript by the judge or referee. The appellant shall affix to such transcript an affirmation, certifying to his compliance with the time limitation, the service of the notice

provided by paragraph 3 and the respondent's failure to propose amendments or objections within the time prescribed.

"3. Appellant shall serve on respondent together with a copy of the transcript and the proposed amendments, a notice of settlement containing a specific reference to subdivision (c) of this rule, and stating that if respondent fails to propose amendments or objections within the time limited by paragraph 1, the provisions of paragraph 2 shall apply."

§ 5.3 Time limitations.

The court has imposed time limits upon the perfection of a civil cause. Section 670.8(e) of the Rules provides:

"a civil appeal or proceeding shall be deemed abandoned unless perfected

'(1) within six months after the date of the notice of appeal, order granting leave to appeal, or order transferring the proceeding to this court, or,

'(2) within six months of the filing of the submission with the county clerk in an action on submitted facts pursuant to CPLR 3222,

"unless the time to perfect shall have been extended pursuant to subdivision (d) of this section. The clerk shall not accept any record or brief for filing after the expiration of such six-month period or such period as extended."

A party needing additional time to perfect a cause or serve and file a brief must obtain an enlargement of time to do so. Such an enlargement may be obtained by agreement with the other parties to the cause, embodied in a written stipulation so ordered by the clerk, or by an application in the form of a letter addressed to the clerk setting forth a reason why more time is needed (Rules § 670.8[d]).

§ 5.4 General requirements of records, appendices, briefs (see, Rules §§ 670.8, 670.9, 670.10.1).

An appeal may be prosecuted upon a full reproduced record (CPLR 5528[a][5]), an appendix (CPLR 5528[f][5]), an agreed statement of facts in lieu of record (CPLR 5527), or, where authorized by statute, the Rules of this court, or an order of this court, upon a record consisting of the original papers.

A party must file nine copies of a record, appendix, or agreed statement, and of the brief, one of which should be marked "original", with proof of service of two copies on each adversary (Rules § 670.9[a], [b][4], [c]). The document must be bound on the left side; the pages must be 8 l/2 by 11 inches; no metal fasteners or similar hard material may protrude; volumes may not exceed two inches in thickness.

There must be a cover which, among other things, sets forth the title of the action with the parties' status in the trial court as well as in the Appellate Division (e.g., plaintiff-appellant; defendant-respondent). The cover of a record, appendix, or agreed statement should include the names, addresses, and telephone numbers of all attorneys and the parties they represent, and the index number of the matter in the trial court (a sample cover for a record is annexed to this pamphlet).

A record, appendix, agreed statement and brief must contain a statement pursuant to CPLR 553l, setting forth the information required by that statute (a sample statement pursuant to CPLR 5531 is annexed to this pamphlet).

The clerk may refuse to accept any document which does not comply with the Rules, is not legible or is otherwise unsuitable (Rules § 670.10.1[f]).

If appeals are taken from more than one paper in the same matter, they may be consolidated and prosecuted in one record and brief (Rules § 670.7[c]). Each appeal must be timely perfected in accordance with the Rules (§ 670.8[e]).

A record or appendix may not contain a transcript of testimony given at a trial, hearing, or deposition reproduced in a condensed format such that two or more pages in standard format appear on one page (Rules § 670.10.2[d]).

§ 5.5 Certification of the record or appendix.

The record or appendix must be certified as a true and complete copy of the original documents on file with the clerk of the court from which the appeal is taken. The certification may be made in one of the following three ways (Rules § 670.10.2[f]): (1) by the certificate of the appellant's attorney pursuant to CPLR 2105, (2) by the certificate of the clerk of the court from which the appeal is taken, or (3) by stipulation of counsel or the parties pursuant to CPLR 5532. A party proceeding *pro se* who cannot obtain a stipulation of his or her opponent as to the correctness of the record or appendix, and who cannot afford the cost of obtaining the certification of the appropriate clerk, may move to dispense with the certification requirement of the court's rules. The motion must be supported by a copy of the movant's proposed appendix. Such a motion must be made before or simultaneously with the filing of the record or appendix.

§ 5.6 Concurrent and cross appeals.

When appeals are separately taken from the same judgment, order, or decree by parties whose interests are not adverse to one another, they are called concurrent appellants. If the interests of the appellants are adverse, they are called cross appellants (Rules § 670.2[a][6]).

Unless the court orders otherwise, concurrent and/or cross appellants are required to consult and file a joint record or appendix, which shall include the respective notices of appeal of the parties (Rules § 670.8[c][l]). The filing deadlines for concurrent and cross appeals can be found in section 670.8(c)(2) of the Rules.

§ 5.7 The record.

The full reproduced record is the most common way of perfecting a civil appeal. It must include a table of contents, a statement pursuant to CPLR 5531, a copy of the notice of

appeal (or order of transfer, or order granting leave to appeal), a copy of the paper appealed from, the underlying decision, if any, and the papers submitted to the trial court (e.g., motion papers, trial testimony). Materials not submitted to the trial court are not part of the record.

The record and brief may not be bound together and filed as a single document.

§ 5.8 The appendix.

Like a record, an appendix must contain a table of contents, a statement pursuant to CPLR 5531, a copy of the notice of appeal (or order of transfer, or order granting leave to appeal), a copy of the paper appealed from, and the underlying decision, if any. However, unlike a record, a party need only submit so much of the papers (or testimony) that were before the trial court as the party deems necessary to determine the issues raised; the party must include papers (or testimony) benefitting the adversary as well as his or her own position (CPLR 5528[a][5]; Rules § 670.10.2[c]). A brief and appendix may be combined in one document (CPLR 5528[a][5]; Rules § 670.9[b][4]).

When an appendix is filed, the party must arrange with the clerk of the court from which the appeal was taken to send the entire original file to the Appellate Division. If a trial or hearing was held and all of the testimony is not included in the appendix, a complete set of the minutes must be submitted to this court.

§ 5.9 The agreed statement.

The statement, in proper form and properly bound, must be submitted as a joint appendix. It must also contain a table of contents, a statement pursuant to CPLR 5531, a copy of the notice of appeal (or order of transfer, or order granting leave to appeal), a copy of the paper appealed from, the underlying decision, if any, and a statement of the issues to be determined (CPLR 5527; Rules § 670.9[c]).

§ 5.10 The original record.

Certain matters may be prosecuted as a matter of right upon a record consisting of the original papers. These include appeals from Family Court orders (Family Court Act § 1116), appeals or transferred proceedings under the Human Rights Law (Executive Law § 298; Rules §§ 670.9[d]; 670.17), proceedings commenced in the Appellate Division pursuant to Eminent Domain Procedure Law § 207, Public Service Law §§ 128 and 170, and Labor Law § 220 (Rules § 670.18[d]), appeals arising under the Election Law, and appeals from the Appellate Term. In addition an appellant or petitioner may be granted leave to perfect using the original record method by order of this court upon motion (Rules § 670.9[d]).

§ 5.11 Briefs.

Briefs prepared on a computer shall be printed in either a 14-point serifed, proportionally spaced typeface (expect that footnotes may be printed in type of no less than 12 points), or a 12-point serifed, monospaced typeface containing no more than 10½ characters per inch (except that footnotes may be printed in type of no less than 10 points). Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch. Computer-generated appellant's and respondent's briefs must not exceed

14,000 words, and reply and amicus curiae briefs must not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of pages containing the table of contents or table of citations. Typewritten appellants' and respondents' briefs must not exceed 70 pages, and reply briefs and amicus curiae briefs must not exceed 35 pages, exclusive of pages containing the table of contents or table of citations. If a party's brief exceeds these limitations, he or she must seek advance permission from the clerk of the Appellate Division by a letter annexed to a draft of the brief (Rules § 670.10.3[e]).

In the upper right hand corner of the cover of a brief, the party upon whose behalf it is filed must state the time requested for argument and who will argue, or the court will deem that brief submitted without oral argument (a sample cover for a brief is annexed to this pamphlet).

The appellant's brief must contain a statement pursuant to CPLR 5531; a table of contents, including the points urged in the brief; a concise statement of the facts of the case; a statement of the questions raised; the arguments divided by the points urged; and, if the appeal is being prosecuted on the original record, a copy of the paper appealed from, the underlying decision, if any, and a copy of the notice of appeal (Rules § 670.10.3[g][2]).

The respondent's brief must contain a table of contents, including the points urged in the brief; a counterstatement of the questions raised and of the facts; and argument arranged under the point headings urged (Rules § 670.10.3[g][3]). The respondent's brief is due 30 days after service of the appellant's brief (Rules § 670.8[b]).

The reply brief must contain a table of contents and reply to the respondent's arguments (Rules § 670.10.3[g][4]). A reply brief may be filed no later than 10 days after service of the respondent's brief (Rules § 670.8[b]).

A party must file nine copies of the brief and serve two on each adversary; if a party is proceeding on the original record pursuant to statute, rule or court order, he or she need only serve one copy on each adversary (Rules § 670.8[a], [b]).

Briefs must be signed in accordance with § 130-1.1-a(a) of the Rules of the Chief Administrator of the Courts (22 NYCRR § 130-1.1-a[a]; see, § 10.3 of this pamphlet). All briefs, except those that are handwritten, must also contain a certificate of compliance with § 670.10.3(f) of the rules of this court (Rules § 670.10.3[f]).

§ 5.12 Constitutionality of statute.

If the constitutionality of a State statute is involved, and the State is not a party, the party raising the issue must serve a copy of his or her brief on the State Attorney-General (Rules § 670.10.3[i]).

§ 5.13 Filing fee.

CPLR 8022(b) requires that a fee of $315 be paid upon the perfection of a civil appeal. The fee must be paid irrespective of the method by which an appeal is perfected, i.e., by the full record, appendix, or original papers method, unless the party is exempt (e.g., has been granted poor person relief pursuant to CPLR 1102).

§ 5.14 Request for argument.

A party who wishes to argue a cause must make a request for time to do so. The request is made at the time the brief is filed in the form of a notation in the upper right hand corner of its cover stating that the cause is to be argued, the time actually required for argument, and the name of the attorney or party *pro se* who will argue (Rules § 670.10.3[g][1]; a sample cover of a brief is annexed to this pamphlet). Parties who do not wish to argue should mark their brief: "To be submitted."

Court rules permit argument of up to 30 minutes on appeals from judgments, orders or decrees made after a trial or hearing, appeals from orders of the Appellate Term and special proceedings transferred to or instituted in the Appellate Division to review administrative determinations made after a hearing (Rules § 670.20[a]). Up to 15 minutes of argument time is permitted for all other appeals in which argument is allowed (Rules § 670.20[b]).

Argument is not allowed as to certain issues. Section 670.20(c) of the Rules provides:

> "(c) Argument is not permitted on issues involving maintenance; spousal support; child support; counsel fees; the legality, propriety or excessiveness of sentences; determinations made pursuant to the sex offender registration act; grand jury reports; and calendar and practice matters including but not limited to preferences, bills of particulars, correction of pleadings, examinations before trial, physical examinations, discovery of records, interrogatories, change of venue, and transfers of actions to and from the Supreme Court. Applications for permission to argue such issues shall be made at the call of the calendar on the date the cause appears on the calendar. Notice of intention to make such an application shall be given to the court and the other parties at least seven days before the cause appears on the calendar."

A party who has not filed a brief may not orally argue (Rules § 670.20[e]). The court retains the right to deny oral argument of any cause (Rules § 670.20[d]).

6. Special Proceedings.

§ 6.1 Original CPLR article 78 proceedings.

The most common form of invoking the original jurisdiction of this court is a CPLR article 78 proceeding against a Supreme Court Justice or County Court Judge commenced in this court pursuant to CPLR 506(b)(1) (e.g., to prohibit the Justice or Judge from performing an act or to compel him or her to perform an act mandated by law). The proceeding may be commenced by notice of petition and petition or by order to show cause and petition. If the proceeding is commenced by notice of petition, the party must give the adversary 20 days notice (CPLR 7804[c]). Orders to show cause are explained in § 8.2 of this pamphlet.

§ 6.2 Transferred CPLR article 78 proceedings.

One of the issues that may be raised in a CPLR article 78 proceeding commenced in the Supreme Court is whether an administrative determination made after a hearing at which evidence is taken is supported by substantial evidence (CPLR 7803[4]). Where such an issue is raised, the proceeding must be transferred to this court for disposition (CPLR 7804[g]).

A CPLR article 78 proceeding transferred to this court must be perfected by a method specified by section 670.9 of the Rules, e.g., upon a full reproduced record, an appendix, an agreed statement or, if authorized by statute, rule, or order of this court, the original record (see, Rules § 670.l6).

§ 6.3 Writ of habeas corpus.

A Justice of this court may issue a writ of habeas corpus or an order to show cause commencing a habeas corpus proceeding to challenge the legality of the detention of a person held within the jurisdiction of this Department (CPLR 7002[b][2]). Generally, this court will entertain original jurisdiction over, and hear argument on, only those habeas corpus proceedings challenging bail as being excessive. Ordinarily, the resolution of a habeas corpus proceeding raising issues other than the excessiveness of bail will involve disputed questions of fact and an application for a writ in such a case should be presented to the appropriate trial level court in the county in which the individual who is the subject of the writ is detained. If presented to a Justice of this court for signature, such a writ will usually be made returnable in the appropriate trial level court.

§ 6.4 Other special proceedings.

Various State statutes permit a limited number of other proceedings to be commenced in this court. Litigants should refer specifically to those provisions for more information and to section 670.l8 of the Rules (Eminent Domain Procedure Law § 207; Public Service Law §§ l28, 170; Labor Law § 220; Public Officers Law § 36).

§ 6.5 Filing fee.

CPLR 8022(b) requires that a fee of $315 be paid upon the filing of a notice of petition or order to show cause commencing a special proceeding in this court.

7. CPLR 5704.

CPLR 5704(a) gives this court authority to review ex parte orders of a Justice of the Supreme Court, a Judge of a Family Court or Court of Claims, or a Surrogate. If both parties appeared before or were heard by the Justice, Judge, or Surrogate, the order is not ex parte and CPLR 5704(a) review does not lie.

If the trial court granted relief ex parte (e.g., granted a temporary restraining order in an order to show cause), then one Justice of the Appellate Division may vacate or modify the order. A panel of Justices is needed to grant relief that the trial court declined to grant.

Section 670.5(e) of the Rules requires that the party seeking relief pursuant to CPLR 5704(a) give his or her adversary reasonable notice of the date, time and place that the

application will be made and of the relief being requested. The papers must include an affidavit describing the notice given and the position of the other party. If the party submitting the application is unwilling to give notice, he or she must state the reason for such unwillingness.

The Appellate Division will not review an ex parte order to show cause applied for at the Appellate Term of the Supreme Court.

8. Motion Practice.

If a party needs to seek relief from the court prior to or after the filing of records and 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 (Rules § 670.5[b]).

§ 8.1 Notice of motion.

If time is not of the essence and interim relief with a temporary restraining order (TRO) is not needed, the movant should proceed by notice of motion (a sample notice of motion is annexed to this pamphlet). Motions prosecuted by notice of motion may be made returnable at 9:30 A.M. on any Friday (Rules § 670.5[a]). 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 l3 days notice if they are served by mail. The moving papers should be filed with the court at least one week before the return date and opposition papers should be filed by 4:00 P.M. on the day before the return date (Rules § 670.5[b]).

The motion papers must contain a copy of the notice of appeal and the paper appealed from (Rules § 670.5[d]), 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 the adversary.

A cross motion must be made returnable the same day as the original motion and must be served and filed three days prior thereto (Rules § 670.5[a]).

§ 8.2 Order to show cause.

If time is of the essence or a TRO is needed, the moving party should proceed by order to show cause (a sample order to show cause is annexed to this pamphlet). The order to show cause must be signed by a Justice of this court. The TRO should be set forth in a separate paragraph. The granting of a TRO 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 paper appealed from, an affidavit setting forth the background of the case and why the relief requested should be granted, if a TRO 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 coming to this court to have it signed.

§ 8.3 Temporary restraining order.

As with an application pursuant to CPLR 5704 (see, Part 7 of this pamphlet), section 670.5(e) of the Rules requires that an applicant for a TRO give his or her adversary reasonable notice of the date, time, and place that the application for the order to show cause will be made, and the nature of the relief requested. The motion papers must include an affidavit describing the notice given and the position of the other party. If the movant is unwilling to give notice, he or she must set forth the reasons for such unwillingness. If an attorney or a party *pro se* is seeking a TRO, he or she must personally appear (Rules § 670.5[e]).

§ 8.4 Motions to reargue, resettle, amend.

Motions for reargument or to resettle or amend a decision and order of this court shall be made within 30 days after service of a copy of the decision and order with notice of its entry in the office of the clerk of this court. For good cause shown, the court may consider a motion made after that time (Rules § 670.6[a]).

§ 8.5 Rejection of motion papers.

Section 670.5(f) of the Rules authorizes the court to reject papers if they are not in proper form. Common reasons for such rejection are: (1) the failure to annex a copy of the notice of appeal or paper appealed from (Rules § 670.5[d][1], [2]); (2) the failure to annex a Request for Appellate Division Intervention (RADI), if an Appellate Division docket number has not yet been assigned; (3) the failure to sign or have notarized the supporting affidavit; and (4) the failure to include proof of service of the papers.

§ 8.6 Filing fee for motions.

CPLR 8022(b) provides that the fee for filing a motion or cross motion regarding a civil appeal or special proceeding is $45. However, no fee is payable for a motion which seeks poor person relief pursuant to CPLR 1101(a).

9. The Calendar.

§ 9.1 The general calendar.

When a matter is perfected it is placed on the court's general calendar to await the filing of answering and reply briefs, if any, before it can be placed on the day calendar for argument or submission to a panel of Justices. Unless a preference is granted, matters are generally heard in the order in which they are perfected (Rules § 670.7[a]).

§ 9.2 Preferences.

It will take several months after a matter is perfected before it will appear on a day calendar. A party who is entitled by law to a preference (to have the matter taken out of turn and heard on a date certain) may serve and file a demand for that relief at the time the matter is perfected, setting forth the provision of law relied upon and good cause for the preference (Rules § 670.7[b][1]). In all other cases, if a party desires an early calendar date, he or she must move for a preference on papers showing good cause why the case should be preferred over other matters (Rules § 670.7[b][2]).

§ 9.3 The day calendar; notice.

The court schedules cases for a hearing before a particular panel of Justices by publishing its day calendars in the *New York Law Journal* and on its web site at www.nycourts.gov/courts/ad2/calendar/. No other official notice is provided to litigants. Oral argument will not be rescheduled because of the failure of a litigant to obtain actual prior notice of the appearance of a cause on the day calendar.

A party who does not have access to the *New York Law Journal* or the Internet and who wishes informal, prior notification of the date his or her case will appear on the day calendar may periodically telephone the court's General Clerk's Office at 718 875-1300. Alternatively, he or she may submit a properly addressed, stamped postcard to the calendar clerk. However, the court assumes no responsibility for the accuracy, timeliness, or receipt of such informal notice, and parties are reminded that the only official notice of the calendar date is the publication in the *New York Law Journal* and on the court's web site.

The Courtroom

§ 9.4 The call of the day calendar and argument or submission.

Unless otherwise ordered, the court convenes at 10 o'clock in the morning in the courtroom in its courthouse located at 45 Monroe Place in Brooklyn, New York. Court sessions are held every Monday, Tuesday, Thursday, and Friday, excepting public holidays and during certain recess periods (Rules § 670.1[a]).

The first order of business is the call of the day calendar by the Justice Presiding. Parties who marked the cover of their brief with an argument request and who still wish to argue must answer the calendar call and state the amount of time required. Those who made an argument request on their brief but who no

longer wish to argue, may submit simply by not appearing in court at the call of the calendar. The court will then mark their appeal submitted without argument. Thereafter the cases will be heard in the order that they appear on the day calendar.

10. Frivolous Conduct — Costs & Sanctions; the Signing Requirement.

Parties and attorneys who prosecute frivolous appeals or proceedings or engage in frivolous motion practice in this court are subject to the imposition of an award to their opponent of costs in the form of reimbursement of actual expenses reasonably incurred and reasonable attorneys fees, and to a sanction of up to $10,000 for each single instance of such conduct (22 NYCRR Part 130; § 670.2[h]).

Pursuant to § 130-1.1-a of the Rules of the Chief Administrator of the Courts, papers filed with this court in a civil cause must be signed. The signature constitutes a certification by the signer that the presentation of the paper or the contentions therein are not frivolous (22 NYCRR § 130-1.1-a; § 670.2[i]), as well as a representation of the accuracy of the certificate of compliance (Rules § 670.10.3[f]).

The signing requirement applies to civil appeals, habeas corpus proceedings, original and transferred CPLR article 78 proceedings, most Family Court proceedings (e.g., support, custody, visitation, abuse and neglect), and all other actions or proceedings commenced in this court in the first instance. The requirement is not applicable to criminal cases, to Family Court cases arising under articles 3 (juvenile delinquency), 7 (PINS), and 8 (family offenses) of the Family Court Act, and to appeals in cases originating in a town or village court or a small claims part.

When a signature is required, any attorney with the firm can sign. Parties appearing *pro se* are also obligated to sign their papers. The signature must be an autograph in ink and must be on the original of the paper that is to be filed in the office of the clerk of this court. The signatory's name must be typed or printed below the signature.

Complete information concerning the signing requirement and its applicability in this court is provided in the court's instructional publication "Complying with the Signing Requirement of 22 NYCRR 130-1.1-a," which is attached to this guide.

11. Miscellaneous.

§ 11.1 Poor person relief; relief from printing requirement.

If a party wishes to be exempt from payment of the $315 filing fee to perfect a civil appeal or special proceeding, the $45 filing fee for motions and cross motions, and/or the requirement that a civil appeal or proceeding be perfected using a printed record or appendix, he or she must move for poor person relief (CPLR 1101, 1102). The papers must be served on the Corporation Counsel if the appeal arises from a court in New York City or the County Attorney if not in the city (CPLR 1101[c]). If a party is unable to afford the expense of printing a record

or appendix, but would not qualify for poor person relief, he or she may submit a motion for permission to prosecute the appeal on the original record.

§ 11.2 Filings.

All papers required to be filed at the court (e.g., records, briefs and motions) are deemed filed only as of the time they are actually received (Rules § 670.2[d]).

§ 11.3 Decisions.

The decisions of the court on motions and on appeals and special proceedings are published in the *New York Law Journal* and on the court's web site at www.nycourts.gov/courts/ad2/. If a party without access to the *New York Law Journal* or the Internet wishes to receive a copy of a judgment or order of this court determining a cause or motion, he or she must submit a self-addressed, stamped envelope which should include the docket number or numbers assigned by this court (Rules § 670.2[f]). Such an order or judgment is deemed entered on the date upon which it was issued (Rules § 670.21).

§ 11.4 Web Site

Further information about the court, including directions to the courthouse, the answers to frequently asked questions, a description of the process by which a case is decided, biographies of the Justices of the court, its rules of procedure, calendars, decisions, and copies of its forms and public notices are posted on the court's web site at www.nycourts.gov/courts/ad2/.

Bibliography

There are numerous publications dealing with appellate practice in New York. Attorneys and *pro se* litigants may wish to consult the following works for further information on specific topics of appellate practice relevant to their specific circumstances.

Davies, Mark, Marianne Stecich, and Risa I. Gold. *New York Civil Appellate Practice.* (St. Paul: West Publishing Co., 1996).

Griffith, Lonnie G. Jr., et al., eds. "Appeals in General," chap. 70 in vol. 10, *Carmody-Wait 2d: Cyclopedia of New York Practice with Forms* (Rochester: Lawyers Cooperative Publishing, 1990).

Karger, Arthur. *The Powers of the New York Court of Appeals*, 3rd ed. (Rochester: Lawyers Cooperative Publishing, 1997).

Naffky, Jeanne M., et al., eds. "Appeals to the Appellate Division," chap. 72 in vol. 11, *Carmody-Wait 2d: New York Practice with Forms* (Rochester: Lawyers Cooperative Publishing, 1996).

New York State Bar Association. *New York Appellate Practice.* (Albany: New York State Bar Association, 2007).

Newman, Thomas R., et al. *New York Appellate Practice,* rev. ed. (New York: Matthew Bender & Co., 1997).

Siegel, David D. *New York Practice,* 3rd ed. (St. Paul: West Group, 1999).

List of Forms and Practice Aids

I. Notice of Appeal

II. Form A – Request For Appellate Division Intervention – Civil

III. Form B – Additional Appeal Information

IV. Form C – Additional Party and Attorney Information

V. Order to Show Cause

VI. Notice of Motion

VII. Affidavit

VIII. Affidavit of Service

IX. Signing Requirement Certification Pursuant to 22 NYCRR § 130-1.1-a(a)

X. Cover – Record on Appeal

XI. Cover – Appellant's Brief

XII. Statement Pursuant to CPLR 5531

XIII. Certification Pursuant to CPLR 2105

XIV. Certificate of Compliance Pursuant to 22 NYCRR § 670.10.3(f)

XV. Glossary of Terms for Formatting Computer-Generated Briefs

XVI. Complying with the Signing Requirement of 22 NYCRR 130-1.1-a

_____ Court of the State of New York

County of _____

NOTICE OF APPEAL

Index No.:

_____

PLEASE TAKE NOTICE that *(insert your name)* _____ hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a *(insert judgment, order, decree, etc.)* _____ of the _____ Court, _____ County, dated _____.

Dated: _____, New York
_____ ___, 200___

Yours, etc.,

_____

Signature

(Print Name)

(Address)

(Telephone Number)

To: *(Insert below the name and address of the clerk of the trial court and the names and addresses of all opponents)*

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type		Filing Type	
❑ Civil Action	❑ CPLR article 78 Proceeding	❑ Appeal	❑ Transferred Proceeding
❑ CPLR article 75 Arbitration	❑ Special Proceeding Other	❑ Original Proceeding	❑ CPLR 5704 Review
	❑ Habeas Corpus Proceeding		

Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.

A. Administrative Review

- ❑ 1 Freedom of Information Law
- ❑ 2 Human Rights
- ❑ 3 Licenses
- ❑ 4 Public Employment
- ❑ 5 Social Services
- ❑ 6 Other

B. Business & Other Relationships

- ❑ 1 Partnership/Joint Venture
- ❑ 2 Business
- ❑ 3 Religious
- ❑ 4 Not-for-Profit
- ❑ 5 Other

C. Contracts

- ❑ 1 Brokerage
- ❑ 2 Commercial Paper
- ❑ 3 Construction
- ❑ 4 Employment
- ❑ 5 Insurance
- ❑ 6 Real Property
- ❑ 7 Sales
- ❑ 8 Secured
- ❑ 9 Other

D. Domestic Relations

- ❑ 1 Adoption
- ❑ 2 Attorney's Fees
- ❑ 3 Children - Support
- ❑ 4 Children - Custody/Visitation
- ❑ 5 Children - Terminate Parental Rights
- ❑ 6 Children - Abuse/Neglect
- ❑ 7 Children - JD/PINS
- ❑ 8 Equitable Distribution
- ❑ 9 Exclusive Occupancy of Residence
- ❑ 10 Expert's Fees
- ❑ 11 Maintenance/Alimony
- ❑ 12 Marital Status
- ❑ 13 Paternity
- ❑ 14 Spousal Support
- ❑ 15 Other

E. Miscellaneous

- ❑ 1 Constructive Trust
- ❑ 2 Debtor & Creditor
- ❑ 3 Declaratory Judgment
- ❑ 4 Election Law
- ❑ 5 Notice of Claim
- ❑ 6 Other

F. Prisoners

- ❑ 1 Discipline
- ❑ 2 Jail Time Calculation
- ❑ 3 Parole
- ❑ 4 Other

G. Real Property

- ❑ 1 Condemnation
- ❑ 2 Determine Title
- ❑ 3 Easements
- ❑ 4 Environmental
- ❑ 5 Liens
- ❑ 6 Mortgages
- ❑ 7 Partition
- ❑ 8 Rent
- ❑ 9 Taxation
- ❑ 10 Zoning
- ❑ 11 Other

H. Statutory

- ❑ 1 City of Mount Vernon Charter §§ 120, 127-f, or 129
- ❑ 2 Eminent Domain Procedure Law § 207
- ❑ 3 General Municipal Law § 712
- ❑ 4 Labor Law § 220
- ❑ 5 Public Service Law §§ 128 or 170
- ❑ 6 Other

I. Torts

- ❑ 1 Assault, Battery, False Imprisonment
- ❑ 2 Conversion
- ❑ 3 Defamation
- ❑ 4 Fraud
- ❑ 5 Intentional Infliction of Emotional Distress
- ❑ 6 Interference with Contract
- ❑ 7 Malicious Prosecution/ Abuse of Process
- ❑ 8 Malpractice
- ❑ 9 Negligence
- ❑ 10 Nuisance
- ❑ 11 Products Liability
- ❑ 12 Strict Liability
- ❑ 13 Trespass and/or Waste
- ❑ 14 Other

J. Wills & Estates

- ❑ 1 Accounting
- ❑ 2 Discovery
- ❑ 3 Probate/Administration
- ❑ 4 Trusts
- ❑ 5 Other

V2.0.060293

Appeal

Paper Appealed From (check one only):

❑ Amended Decree	❑ Determination	❑ Order	❑ Resettled Order
❑ Amended Judgment	❑ Finding	❑ Order & Judgment	❑ Ruling
❑ Amended Order	❑ Interlocutory Decree	❑ Partial Decree	❑ Other (specify):
❑ Decision	❑ Interlocutory Judgment	❑ Resettled Decree	
❑ Decree	❑ Judgment	❑ Resettled Judgment	

Court:	County:
Dated:	Entered:
Judge (name in full):	Index No.:
Stage: ❑ Interlocutory ❑ Final ❑ Post-Final	Trial: ❑ Yes ❑ No If Yes: ❑ Jury ❑ Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ❑ Yes ❑ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ❑ Yes ❑ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: ❑ Order to Show Cause ❑ Notice of Petition ❑ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

Issues Continued:

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1			
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Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C):

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention [Form A, this document], (2) any required Additional Appeal Information Forms [Form B], (3) any required Additional Party and Attorney Information Forms [Form C], (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance, if any.

Supreme Court of the State of New York Appellate Division : Second Judicial Department

Form B - Additional Appeal Information

Use this Form For Each Additional Paper Covered by the Notice of Appeal to be filed with Form A

Paper Appealed From (check one only):

❑ Amended Decree	❑ Determination	❑ Order	❑ Resettled Order
❑ Amended Judgment	❑ Finding	❑ Order & Judgment	❑ Ruling
❑ Amended Order	❑ Interlocutory Decree	❑ Partial Decree	❑ Other (specify):
❑ Decision	❑ Interlocutory Judgment	❑ Resettled Decree	
❑ Decree	❑ Judgment	❑ Resettled Judgment	

Court:	County:
Dated:	Entered:
Judge (name in full):	Index No.:
Stage: ❑ Interlocutory ❑ Final ❑ Post-Final	Trial: ❑ Yes ❑ No If Yes: ❑ Jury ❑ Non-Jury

Description of Appeal

Description: Briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied.

Amount: If the appeal is from a money judgment, specify the amount awarded.
Issues: Specify the issues proposed to be raised on the appeal.

V2.0.060293

Form C - Additional Party and Attorney Information

Additional Party Information

No.	Party Name	Original Status	Appellate Division Status
21			
22			
23			
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29			
30			
31			
32			

Additional Attorney Information

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form A):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form A):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form A):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ❑ Retained ❑ Assigned ❑ Government ❑ Pro Se ❑ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form A):

V2.0.060293

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

ORDER TO SHOW CAUSE

Appellate Division Docket No.:

_____

_____

Upon the annexed affidavit of _____, dated _____ ____, 200__, and the papers annexed thereto,

LET _____ **SHOW CAUSE BEFORE THIS COURT,** at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the ____ day of _____, 200__, at 9:30 o'clock in the forenoon of that date, why an order should not be made and entered:

1.

2.

3. Granting such other and further relief as to the court may seem just and equitable.

SUFFICIENT CAUSE THEREFOR APPEARING, it is

ORDERED that pending the hearing and determination of this motion _____ _____ _____ __ _____ are stayed; and it is further,

ORDERED that service of a copy of this order to show cause and the papers upon which it was made upon _____ by

- ❑ personal delivery pursuant to CPLR 2103(b)(1)
- ❑ office delivery pursuant to CPLR 2103(b)(3)
- ❑ overnight delivery service pursuant to CPLR 2103(b)(6)

on or before _____ ____, 200__, shall be deemed sufficient service thereof.

Dated: Brooklyn, New York
_____ _____, 200__

_____
Associate Justice
Appellate Division: 2nd Department

NOTE: On the return date all motions and proceedings are deemed submitted. Oral argument is not permitted (22 NYCRR 670.5[h]).

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

NOTICE OF MOTION

Appellate Division Docket No.:

_____ _____

Please take notice that upon the annexed affidavit of _____, dated _____ ____, 200__, and the papers annexed thereto, the undersigned will move this court, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the ____ day of _____, 200__, at 9:30 o'clock in the forenoon of that date, for an order granting the following relief:

1.

2.

3.

4.

5. Such other and further relief as to the court may seem just and equitable.

Dated: _____, New York
_____ _____, 200__

Yours, etc.:

_____

Signature

Print name: _____

Address: _____

_____

_____

To: _____

_____

_____

_____

_____

_____

NOTE: On the return date all motions are deemed submitted. Oral argument is not permitted (22 NYCRR 670.5[b]).

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

AFFIDAVIT

Appellate Division Docket No.:

_____

_____

State of New York)
County of _____) ss.:

I, _____, being duly sworn, depose and say that:

1.

2.

3.

4.

5.

WHEREFORE, I request that the court grant me the following relief:

Dated: _____ ____, 200__

_____

Sworn to before me this _____
day of _____, 200__

_____
Notary Public

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

AFFIDAVIT OF SERVICE

Appellate Division Docket No.:

_____

_____

State of New York)
County of _____) ss.:

_____, being duly sworn, deposes and says that:

1. The deponent is not a party to the action, is 18 years of age or older, and resides at:

2. On the _____ day of _____, 200___, the deponent served the following described paper upon the person or persons listed in paragraph 5 hereof:

3. The number of copies served on each of said persons was _____.

4. The method of service on each of said persons was:

   - ❑ By delivering the paper to the person personally pursuant to CPLR 2103(b)(1).
   - ❑ By mailing the paper to the person at the address designated by him or her for that purpose by depositing the same in a first class, postpaid, properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State of New York pursuant to CPLR2103(b)(2).
   - ❑ Where the person served is an attorney, by leaving the paper with the person in charge of the office of that attorney, pursuant to CPLR 2103(b)(3).
   - ❑ Where the person served is an attorney whose office was not open for business at the time of service, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box pursuant to CPLR 2103(b)(3).
   - ❑ By leaving the paper at the person's residence within the State of New York with a person of suitable age and discretion, pursuant to CPLR 2103(b)(4) where service at the person's office could not be made pursuant to CPLR 2103(b)(3).
   - ❑ By transmitting the paper by facsimile transmission to the telephone number or other station designated by the person for that purpose, pursuant to CPLR 2103(b)(5). A signal was obtained from equipment of the person served indicating that the transmission was received and a copy of the paper was mailed to the person.

- ❑ By dispatching the paper to the person by overnight delivery service at the address designated by the person for that purpose, pursuant to CPLR 2103(b)(6).

5. The name of the person or names of the persons served and the address or addresses at which service was made are as follows:

Dated: _____, New York
_____ ___, 200__

_____

Sworn to before me this _____
day of _____, 200___

_____
Notary Public

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

SIGNING REQUIREMENT CERTIFICATION

Pursuant to 22 NYCRR § 130-1.1-a

Appellate Division Docket No.: _____

I hereby certify pursuant to 22 NYCRR § 130-1.1-a that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers listed below or the contentions therein are not frivolous as defined in 22 NYCRR § 130-1.1(e):

Dated: _____, New York
_____ ___, 200___

_____ _____
Signature

Print Name

Print Address

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

John Doe,

Plaintiff-Appellant,

Appellate Division Docket No.:

-against-

ABC Corporation,

Defendant-Respondent.

(Do not change the order of the parties in the title from that on the summons or petition.)

RECORD ON APPEAL

John Doe
Appellant *pro se*
15 Lois Lane
Metropolis, New York 10000
212 123-4567

Ricardo & Mertz, P.C.
Attorneys for Respondent
One Main Street
Metropolis, New York 10000
212 987-6543

Supreme Court, Kings County, Index No. 9876/98
(trial court information)

To be argued by: John Doe
10 Minutes
(Or: To be submitted.)

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

John Doe,

Plaintiff-Appellant,

-against-

Appellate Division Docket No.:

ABC Corporation,

Defendant-Respondent.

(Do not change the order of the parties in the title from that on the summons or petition.)

APPELLANT'S BRIEF

John Doe
Appellant *pro se*
15 Lois Lane
Metropolis, New York 10000
212 123-4567

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

John Doe,

Plaintiff-Appellant,

-against-

Appellate Division Docket No.:

ABC Corporation,

Defendant-Respondent.

(Do not change the order of the parties in the title from that on the summons or petition.)

STATEMENT PURSUANT TO CPLR 5531

1. The Index Number in the trial court was 9876/98

2. The full names of the parties are set forth above. There have been no changes.

3. The action was commenced in the Supreme Court, Kings County.

4. The summons and complaint were served on January 8, 1998. The answer was served on February 2, 1998.

5. The object of the action is to recover damages for personal injuries arising out of an automobile accident.

6. The appeal is from an order of the Supreme Court, Kings County dated March 2, 1998, and entered March 3, 1998, made by Justice Smith.

7. The appeal is being perfected on the full record method.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

CERTIFICATION
Pursuant to CPLR 2105

Appellate Division Docket No.:

_____

_____

I, _____, an attorney at law admitted to practice before the courts of the State of New York, hereby certify pursuant to CPLR 2105 that the papers contained in the annexed _____ have been personally compared by me with the originals on file in the office of:

- ☐ the clerk of the _____ Court, _____ County, or.
- ☐ the clerk of the County of _____,

and that I found them to be true and complete copies of those originals.

Dated: _____, New York
_____, 200___

_____

Signature

Print Name

Attorney for:

Address

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Completing a Certificate of Compliance

Section 670.10.3(f) of the rules of the court (effective January 1, 2004), requires that all briefs, except those that are handwritten, have at the end thereof a certificate of compliance attesting that the formatting of the brief complies with the court's rules. The certificate may be single spaced and need not be signed. The following examples, when properly completed with the requisite information, will satisfy the rule. *Do not attach this document to a brief! The text of the appropriate certificate should be included as a part of the brief at its end.*

Typewritten Brief

The foregoing brief was prepared on a typewriter. The size of the type is pica and the pitch of the type is 10 characters per inch.

Computer-generated Brief – Proportionally Spaced Typeface

The foregoing brief was prepared on a computer (on a word processor). A proportionally spaced typeface was used, as follows:

Name of typeface: _____
Point size: _____
Line spacing: _____

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is _____.

Computer-generated Brief – Monospaced Typeface

The foregoing brief was prepared on a computer (on a word processor). A monospaced typeface was used, as follows:

Name of typeface: _____
Point size: _____
Line spacing: _____

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is _____.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

A GLOSSARY OF TERMS FOR
FORMATTING COMPUTER-GENERATED BRIEFS, WITH EXAMPLES

The rules concerning the formatting of briefs are contained in CPLR 5529 and in §§ 670.10.1 and 670.10.3 of the rules of this court. Those rules cover technical matters and therefore use certain technical terms which may be unfamiliar to attorneys and litigants. The following glossary is offered as an aid to the understanding of the rules.

Typeface: A typeface is a complete set of characters of a particular and consistent design for the composition of text, and is also called a font. Typefaces often come in sets which usually include a **bold** and an *italic* version in addition to the basic design.

Proportionally Spaced Typeface: Proportionally spaced type is designed so that the amount of horizontal space each letter occupies on a line of text is proportional to the design of each letter, the letter i, for example, being narrower than the letter w. More text of the same type size fits on a horizontal line of proportionally spaced type than a horizontal line of the same length of monospaced type. This sentence is set in Times New Roman, which is a proportionally spaced typeface.

Monospaced Typeface: In a monospaced typeface, each letter occupies the same amount of space on a horizontal line of text. `This sentence is set in Courier, which is a monospaced typeface.`

Point Size: A point is a unit of measurement used by printers equal to approximately 1/72 of an inch. The vertical height of type is measured in points. The measurement is somewhat complicated and requires a special ruler. The process of measurement is well explained in *The Chicago Manual of Style* (14th ed.) § 19.43. Suffice it to say that an attorney or litigant may rely on the type size setting of the word processing program used to create the brief. A brief utilizing a proportionally spaced typeface must use 14-point type for the body of the text, but 12-point type may be used for footnotes. A brief utilizing a monospaced typeface must use 12-point type for the body of the text, but 10-point type may be used for footnotes.

Double Spacing: Double spaced text has a blank line between successive lines of type. The space between lines is called leading and is measured in points from the bottom of one line of text to the bottom of the next. Double spaced text should have leading of at least the height of the type. Thus double spaced 14-point type must have at least 14 points of leading, for a total line spacing of 28 points. An attorney or litigant may rely on the line spacing setting of the word processing program used to create the brief.

Serif: A serif is not an angel (a seraph), but rather is a fine cross-stroke at the end of the principal stroke of a letter. Serifs enable the eye to move easily from letter to letter of a line of text and hence improve the readability of a document set in a serifed typeface. Sans serif typefaces lack serifs. Times Roman is a serifed typeface and Arial is a sans serif typeface. In the following examples, the serifs are the fine lines at the ends of the s, r, i, and f in the word serif, which is set in Times New Roman, and which are missing from the same letters in the words sans serif, which are set in Arial:

Serif Sans Serif

The rules require the use of a serifed typeface to enhance the readability of the brief (22 NYCRR 670.10.3[a]). The use of sans serif fonts is prohibited.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

COMPLYING WITH THE SIGNING REQUIREMENT OF 22 NYCRR 130-1.1-a

Papers filed with this court in most civil causes must be signed. The signature constitutes a certification by the signer that the presentation of the paper or the contentions therein are not frivolous (22 NYCRR 130-1.1-a).

The requirement applies to civil appeals, habeas corpus proceedings, original and transferred CPLR article 78 proceedings, most Family Court proceedings (e.g., support, custody, visitation, abuse and neglect), and all other actions or proceedings commenced in this court in the first instance.

The requirement is not applicable to criminal cases, to Family Court cases arising under articles 3 (juvenile delinquency), 7 (PINS), and 8 (family offenses) of the Family Court Act, and to appeals in cases originating in a town or village court or a small claims part (see, 22 NYCRR 130-1.1[a]).

When a signature is required, any attorney with the firm can sign. The signature must be an autograph in ink and must be on the original of the paper that is to be filed in the office of the clerk of this court. The attorney's name must be typed or printed below the signature.

Parties appearing *pro se* are also obligated to sign their papers.

Requests for Appellate Division Intervention

Because notices of appeal must be signed, the Request for Appellate Division Intervention (RADI) that must be annexed thereto pursuant to the rules of this court (22 NYCRR 670.3[a]) need not be signed. However, those RADIs that are required to be filed in the office of the clerk of this court in connection with transferred proceedings and actions or proceedings commenced in this court (22 NYCRR 670.3[c], [d], [e]) must be signed on a space provided for that purpose on a litigation back enclosing the RADI or on a separate form annexed thereto. A form for this purpose is available in the office of the clerk.

Records & Appendices

Records and appendices on appeals and on proceedings transferred to this court need not be signed, the papers contained therein having been subject to the application of the signature rule in the court of original instance.

Briefs

The "original" of the brief to be filed with the court must bear an ink autograph signature. All copies must be conformed to the original (*see*, 22 NYCRR 670.2[i]).

In the event joint briefs are submitted, if separate firms appear for different parties, a signature is needed for each firm. If separate firms appear for the same party, one signature will suffice.

Motions

Motions in General

There are four preferred methods of signing: (1) by signing the actual paper, such as an affidavit, (2) by signing a cover paper, such as a notice of motion, (3) by signing a space provided for that purpose on a litigation back that encloses the motion papers to be filed, or (4) by signing a separate form that lists the accompanying papers. A form for this purpose is available in the office of the clerk. Some of these methods are better adapted than others for use in different types of motion practice.

Motions Prosecuted by Notice of Motion.

The preferred method for complying with the signing requirement on a motion prosecuted by notice of motion is a signature on the notice of motion itself. Alternatively, signing a litigation back or a separate form is appropriate. The notice of motion, litigation back, or separate form must recite the papers that accompany the notice of motion.

If the only affidavit or affirmation in support of the motion is that of the attorney or party *pro se*, the original signature on that paper is sufficient compliance with the rule and a separate signature is not required.

Motions Prosecuted by Order to Show Cause

An order to show cause is not signed by the party or attorney on whose behalf it is submitted for signature. Accordingly, compliance with the signing requirement is necessary in one of the following ways: (1) if the only supporting paper is an affidavit or affirmation of an attorney or a party *pro se*, by signature on that paper, (2) by signature on a litigation back enclosing the motion papers, or (3) by signature on a separate form. If the second or third of these methods is used, the litigation back or form must recite the papers covered by the signature. If the only paper submitted in support of a motion prosecuted by order to show cause is the affidavit or affirmation of a party who is represented by counsel, or the affidavit or affirmation of a nonparty, compliance with the signing requirement by an attorney is required. The signature may be made either on a litigation back or on a separate form, each of which must recite the papers covered by the signature.

Opposition & Reply Papers

If the only paper submitted in opposition to the motion or in reply to opposition papers is an affidavit or affirmation of an attorney or a party *pro se*, the signature on that paper will be sufficient. If, however, the only paper submitted in opposition or reply is the affidavit or affirmation of a party who is represented by counsel, or the affidavit or affirmation of a nonparty, or if more than one affidavit or affirmation is submitted, the signature of an attorney is necessary. That signature may be made either on a litigation back or on a separate form, each of which must recite the papers covered by the signature.

RULES OF PROCEDURE

by

APRILANNE AGOSTINO, Esq.

Clerk of the Court
Appellate Division
Second Judicial Department
Brooklyn

22 NYCRR Part 670
Effective May 1, 1990

Amendment History:

§ 670.21(a) amended June 18, 1990, effective May 25, 1990;

§ 670.12(e) enacted September 26, 1990, effective immediately;

§ 670.21(b)(6) amended February 11, 1991, effective immediately;

§§ 670.7(c)(1), 670.9, and 670.10(d)(1)(i) amended August 27, 1991, effective immediately;

§ 670.8(g) amended May 6, 1992, effective immediately;

§ 670.9(d)(vi) amended and (viii) enacted September 24, 1992, effective immediately;

Table of Contents amended; § 670.2(e) and (g) repealed and new § 670.2(a)(5), (e), and (g) enacted; § 670.3 repealed and new § 670.3 enacted; § 670.4 repealed and new § 670.4 enacted; § 670.7(c) repealed and new § 670.7(c) enacted; § 670.8(e) repealed and new § 670.8(e) enacted; § 670.8(g) amended; § 670.10 amended; 670.12 amended; § 670.18 amended; § 670.23 amended; Forms A, B, C, E, and F repealed and revised Forms A, B, C, and E adopted; June 23, 1993, effective September 1, 1993;

§ 670.12(f) enacted October 20, 1994, effective immediately;

§§ 670.1(a), and 670.6(b)(2) amended; § 670.2(g) repealed and new § 670.2(g) enacted; § 670.12(g) and (h) enacted; December 29, 1994, effective January 1, 1995;

§ 670.8(d)(2), and (f) amended; § 670.8(g) renumbered 670.8(h); new § 670.8(g) enacted; February 27, 1995, effective immediately;

§ 670.21(b)(5) amended March 13, 1996, effective immediately;

§ 670.21(a) amended August 16, 1996, effective immediately;

Table of Contents amended; § 670.2(a)(6) enacted; § 670.2(e) and (g) amended; § 670.3(c) amended; § 670.4(b) amended; captions of §§ 670.5, 670.8, and 670.18 amended; §§ 670.19, 670.20, 670.21, 670.22, and 670.23 renumbered to be §§ 670.20, 670.21, 670.22, 670.23 and 670.24, respectively; § 670.5(a) and (b) amended; § 670.6(a) amended; § 670.7(c)(1) amended; § 670.8(c) and (e) repealed and new § 670.8(c) and (e) enacted; § 670.8(d) and § 670.8(d)(1) and (2) amended; § 670.10(a)(5) renumbered § 670.10(a)(6) and new § 670.10(a)(5) enacted; § 670.10(d)(1), (d)(2)(i), (vi), and (viii)(A) amended; § 670.12(h) amended; § 670.14 amended; § 670.18(a) amended; new § 670.19 enacted; renumbered § 670.20(c) and (e) amended; text of renumbered § 670.21 denominated subdivision (b) and new renumbered § 670.21(a) enacted; January 14, 1998, effective February 2, 1998;

§ 670.2(h) and (i) enacted, February 11, 1998, effective March 1, 1998;

Table of Contents amended; captions of §§ 670.6 and 670.18 amended; § 670.2(j) enacted; § 670.6(e) enacted; § 670.8(h) amended; § 670.10(d)(4) and (d)(4)(ii) amended; § 670.18(a) amended; § 670.20(c) amended; November 17, 1999, effective immediately;

§ 670.12(g)(2) and (h) amended, December 12, 2001, effective immediately;

Table of Contents amended; new § 670.4(a) enacted, and former subdivisions (a) and (b) redesignated § 670.4(b)(1) and (2), respectively; § 670.8(d) repealed and new § 670.8(d) enacted; and § 670.9(d)(1)(vii) and (viii) amended and new § 670.9(d)(1)(ix) enacted; December 24, 2002, effective January 1, 2003;

§ 670.8(e), (f), and (g) amended, February 27, 2003, effective immediately;

§ 670.18(a) and § 670.22(a) amended, and § 670.22(b)(7) repealed, June 20, 2003, effective July 14, 2003;

Table of Contents amended; § 670.9(a), (b)(4), and (c) amended; § 670.10 repealed and new §§ 670.10.1, 670.10.2, and 670.10.3 enacted; § 670.11(b), § 670.12(c), § 670.19(a)(1) and (b), and § 670.20(f) amended, October 22, 2003, effective January 1, 2004; and,

§ 670.22(b)(2) and (3) amended, December 8, 2004, effective immediately.

22 NYCRR PART 670
PROCEDURE IN THE APPELLATE DIVISION
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§ 670.1 Court Sessions.

(a) Unless otherwise ordered, the court will convene at l0 o'clock in the forenoon on Monday, Tuesday, Thursday, and Friday.

(b) Special sessions of the court may be held at such times and for such purposes as the court from time to time may direct.

(c) When a cause is argued or submitted with four Justices present, it shall, whenever necessary, be deemed submitted also to any other duly qualified Justice unless objection is noted at the time of argument or submission.

§ 670.2 General Provisions and Definitions.

(a) Unless the context requires otherwise, as used in this part:

(l) The word cause includes an appeal, a special proceeding transferred to this court pursuant to CPLR 7804(g), a special proceeding initiated in this court, and an action submitted to this court pursuant to CPLR 3222 on a case containing the agreed statement of facts upon which the controversy depends.

(2) Any reference to the court means this court; any reference to a Justice means a Justice of this court; any reference to the clerk means the clerk of this court.

(3) Wherever reference is made to a judgment, order, or determination it shall also be deemed to include a sentence.

(4) The word perfection refers to the requirements for placing a cause on the court's calendar, e.g. the filing of a record and brief.

(5) The word consolidation refers to combining two or more causes arising out of the same action or proceeding in one record and one brief.

(6) The word concurrent, when used to describe appeals, is intended to refer to those appeals which have been taken separately from the same order or judgment by parties whose interests are not adverse to one another. The term cross appeal refers to an appeal taken by a party whose interests are adverse to a party who previously appealed from the same order or judgment.

(b) Unless the context requires otherwise, if a period of time prescribed by this Part for the performance of an act ends on a Saturday, Sunday, or holiday, the act will be deemed timely if performed before 5:00 P.M. on the next business day.

(c) If a period of time prescribed by this Part is measured from the service of a record, brief, or other paper and service is by mail, five days shall be added to the prescribed period. If service is by overnight delivery, one day shall be added to the prescribed period.

(d) All records on appeal, briefs, appendices, motions, affirmations, and other papers will be deemed filed in this court only as of the time they are actually received by the clerk and they shall be accompanied by proof of service upon all necessary parties pursuant to CPLR 2l03.

(e) An appellate division docket number will be assigned to every cause. All papers and correspondence thereafter filed shall prominently display the docket number or numbers in the

upper right hand corner of the first page opposite the title of the action or proceeding. In the event of concurrent and/or cross appeals from a judgment or order, all parties shall use the docket number first assigned to the appeal from that judgment or order.

(f) In any civil cause, and in any criminal cause where the defendant appears by retained counsel, the clerk will send to the party a copy of the decision on an appeal or a motion, if the party provides the clerk with a self-addressed, stamped envelope.

(g) If a cause or the underlying action or proceeding is wholly or partially settled or if any issues are wholly or partially rendered moot, or if any cause should not be calendared because of bankruptcy or death of a party, inability of counsel to appear, an order of rehabilitation, or for some other reason, the parties or their counsel shall immediately notify the court. Any attorney or party who, without good cause shown, fails to comply with the requirements of this subdivision shall be subject to the imposition of such costs and/or sanctions as the court may direct.

(h) Any attorney or party to a civil cause who, in the prosecution or defense thereof, engages in frivolous conduct as that term is defined in section 130-1.1(c) of this Title, shall be subject to the imposition of such costs and/or sanctions authorized by subpart 130-1 of this Title as the court may direct.

(i) The original of every paper submitted for filing in the office of the clerk of this court shall be signed in ink in accordance with the provisions of section 130-1.1-a(a) of this Title. Copies of the signed original shall be served upon all opposing parties and shall be filed in the office of the clerk whenever multiple copies of a paper are required to be served and filed by this Part.

(j) Pursuant to CPLR 5525(a), in all causes the petitioner or appellant may request that the court reporter or stenographer prepare only one copy of the transcript of the stenographic record of the proceedings. When the appendix method or original record method of prosecuting an appeal is being used, the copy prepared by the court reporter, or one of equal quality, shall be filed in the office of the clerk of the court in which the action or proceeding was commenced, prior to the issuance of a subpoena for the original papers as required by section 670.9(b)(1) or (d)(2) of this Part.

§ 670.3 Filing of Notice of Appeal, Request for Appellate Division Intervention, Order of Transfer.

(a) Where an appeal is taken in a civil action or proceeding, the notice of appeal, or the order of the court of original instance granting permission to appeal, shall be filed by the appellant in the office in which the judgment or order of the court of original instance is filed. Two additional copies of the notice of appeal or order granting permission to appeal shall be filed by the appellant, to each of which shall be affixed a completed Request for Appellate Division Intervention - Civil (Form A), a copy of the order or judgment appealed from, and a copy of the opinion or decision, if any. In the event that the notice of appeal covers two or more judgments or orders, the appellant shall also complete and affix to each Form A an Additional Appeal Information form (Form B) describing the additional judgments or orders appealed from, and affix copies of the judgments or orders and the opinions or decisions upon which they were based, if any. Thereupon, the clerk of the court of original instance shall endorse the filing date upon such instruments and transmit the two additional copies to the clerk of this court.

(b) Where an appeal is taken in a criminal action, the notice of appeal shall be filed by the appellant in duplicate in the office in which the judgment or order of the court of original instance is filed. Thereupon the clerk of the court of original instance shall endorse the filing date upon such instruments, shall execute a Request for Appellate Division Intervention - Criminal (Form D) and shall transmit it together with the duplicate notice of appeal to the clerk of this court.

(c) In any case in which an order is made transferring a proceeding to this court, the petitioner shall file forthwith in the office of the clerk of this court two copies of such order, to each of which shall be affixed a copy of a Request for Appellate Division Intervention - Civil (Form A) and a copy of any opinion or decision by the transferring court.

(d) A Request for Appellate Division Intervention - Attorney Matters (Form E) shall be filed in connection with attorney disciplinary proceedings instituted in this court and applications made to this court pursuant to sections 690.17 and 690.19 of the rules of this court.

(e) In all other actions or proceedings instituted in this court, and applications pursuant to CPLR 5704, a Request for Appellate Division Intervention - Civil (Form A) shall be filed.

§ 670.4 Management of Causes.

(a) *Active Management.*

(1) The court may, in the exercise of discretion, direct that the prosecution of any cause or class of causes be actively managed.

(2) The clerk shall issue a scheduling order or orders directing the parties to a cause assigned to the active management program to take specified action to expedite the prosecution thereof, including but not limited to the ordering of the transcript of the proceedings and the filing of proof of payment therefor, the making of motions, the perfection of the cause, and the filing of briefs. Notwithstanding any of the time limitations set forth in this part, a scheduling order shall set forth the date or dates on or before which such specified action shall be taken.

(3) If any party shall establish good cause why there cannot be compliance with the provisions of a scheduling order, the clerk may amend the same consistent with the objective of insuring expedited prosecution of the cause. An application to amend a scheduling order shall be made by letter, addressed to the clerk, with a copy to the other parties to the cause. The determination of the clerk in amending or declining to amend a scheduling order shall be reviewable by motion to the court on notice pursuant to section 670.5 of this Part.

(4) No filing directed by a scheduling order shall be permitted after the time to do so has expired unless the order is amended in accordance with paragraph (3) of subdivision (a) of this section.

(5) Upon the default of any party in complying with the provisions of a scheduling order, the clerk shall issue an order to show cause, on seven days notice, why the cause should not be dismissed or such other sanction be imposed as the court may deem appropriate.

(b) *Civil Appeals Management Program.*

(1) The court, in those cases in which it deems it appropriate, will issue a notice directing the attorneys for the parties and/or the parties themselves to attend a pre-argument conference before a designated Justice of this court or such other person as it may designate, to consider the possibility of settlement, the limitation of the issues, and any other matters which the designated Justice or other person determines may aid in the disposition of the appeal or proceeding.

(2) Any attorney or party who, without good cause shown, fails to appear for a regularly scheduled pre-argument conference, or who fails to comply with the terms of a stipulation or order entered following a pre-argument conference, shall be subject to the imposition of such costs and/or sanctions as the court may direct.

§ 670.5 Motions and Proceedings Initiated in this Court – Generally.

(a) Unless otherwise required by statute, rule, or order of the court or any Justice, every motion and every proceeding initiated in this court shall be made returnable at 9:30 A.M. on any Friday. Cross motions shall be made returnable on the same day as the original motion and shall be served and filed at least three days before the return date. Motions shall be on notice prescribed by CPLR 22l4 and CPLR article 78 proceedings shall be on notice prescribed by CPLR 7804(c).

(b) All motions and proceedings initiated by notice of motion or notice of petition, shall be filed with the clerk at least one week before the return date. All papers in opposition shall be filed with the clerk before 4 P.M. of the business day preceding the return date. All papers in opposition to any motion or proceeding initiated in this court by an order to show cause shall be filed with the clerk on or before 9:30 A.M. of the return date, and shall be served by a method calculated to place the movant and other parties to the motion in receipt thereof on or before that time. The originals of all such papers shall be filed. On the return date the motion or proceeding will be deemed submitted to the court without oral argument. Counsel will not be required to attend and a note of issue need not be filed.

(c) Every notice, petition, or order to show cause instituting a motion or proceeding must state, *inter alia*:

(l) the nature of the motion or proceeding;

(2) the specific relief sought;

(3) the return date; and

(4) the names, addresses, and telephone numbers of the attorneys and counsel for all parties in support of and in opposition to the motion or proceeding.

(d) The papers in support of every motion or proceeding must contain a copy of:

(l) the order, judgment, or determination sought to be reviewed and the decision, if any; and

(2) the notice of appeal or other paper which first invoked the jurisdiction of this court.

(e) Except as hereinafter provided, when an order to show cause presented for signature makes provision for a temporary stay or other interim relief pending determination of the motion, or when an application is presented pursuant to CPLR 5704, the party seeking such relief must give reasonable notice to his or her adversary of the day and time when, and the location where, the order to show cause or CPLR 5704 application will be presented and the relief being requested. If notice has been given, the order to show cause or the application pursuant to CPLR 5704 must be accompanied by an affidavit or affirmation stating the time, place, by whom given, the manner of such notification, and to the extent known, the position taken by the opposing party. If notice has not been given, the affidavit or affirmation shall state whether the applicant has made an attempt to give notice and the reasons for the lack of success. If the applicant is unwilling to give notice, the affidavit or affirmation shall state the reasons for such unwillingness. An order to show cause providing for a temporary stay or other interim relief or an application pursuant to CPLR 5704 must be personally presented for signature by the party's attorney or by the party if such party is proceeding *pro se*.

(f) The clerk may reject papers or deem a motion or proceeding to be withdrawn or abandoned for the failure to comply with any of these rules.

§ 670.6 Motions - Reargue; Resettle; Amend; Leave to Appeal; Admission Pro Hac Vice.

(a) Motions to Reargue, Resettle, or Amend. Motions to reargue a cause or motion, or to resettle or amend a decision and order shall be made within 30 days after service of a copy of the decision and order determining the cause or motion, with notice of its entry, except that for good cause shown, the court may consider any such motion when made at a later date. The papers in support of every such motion shall concisely state the points claimed to have been overlooked or misapprehended by the court, with appropriate references to the particular portions of the record or briefs and with citation of the authorities relied upon. A copy of the order shall be attached.

(b) Motions for Leave to Appeal to Appellate Division

(l) Motions for leave to appeal to the Appellate Division pursuant to CPLR 570l (c) and Family Court Act §1112 shall be addressed to the court and shall contain a copy of the order or judgment and the decision of the lower court.

(2) Motions for leave to appeal from an order of the Appellate Term shall contain a copy of the opinions, decisions, judgments, and orders of the lower courts, including: A copy of the Appellate Term order denying leave to appeal; a copy of the record in the Appellate Term if such record shall have been printed or otherwise reproduced; and a concise statement of the grounds of alleged error. If the application is to review an Appellate Term order which either granted a new trial or affirmed the trial court's order granting a new trial, the papers must also contain the applicant's stipulation consenting to the entry of judgment absolute against him or her in the event that this court should affirm the order appealed from.

(c) Motions for leave to appeal to the Court of Appeals shall set forth the questions of law to be reviewed by the Court of Appeals and, where appropriate, the proposed questions of law decisive of the correctness of this court's determination or of any separable portion within it. A copy of this court's order shall be attached.

(d) Motions for leave to appeal to the Court of Appeals pursuant to CPL 460.20 shall be made to any Justice who was a member of the panel which decided the matter. A copy of this court's order shall be attached.

(e) Motions for Admission Pro Hac Vice. An attorney and counselor-at-law or the equivalent may move for permission to appear pro hac vice with respect to a cause pending before this court pursuant to section 520.11(a)(1) of this Title. An affidavit in support of the motion shall state that the attorney and counselor-at-law is a member in good standing in all the jurisdictions in which he or she is admitted to practice and is associated with a member in good standing of the New York Bar, which member shall appear with him or her on the appeal or proceeding and shall be the person upon whom all papers in connection with the cause shall be served. Attached to the affidavit shall be a certificate of good standing from the bar of the state in which the attorney and counselor-at-law maintains his or her principal office for the practice of law.

§ 670.7 Calendar; Preferences; Consolidation.

(a) There shall be a general calendar for appeals. Appeals will be placed on the general calendar in the order perfected and, subject to the discretion of the court, will be heard in order.

(b) Preferences

(l) Any party to an appeal entitled by law to a preference in the hearing of the appeal may serve and file a demand for a preference which shall set forth the provision of law relied upon for such preference and good cause for such preference. If the demand is sustained by the court, the appeal shall be preferred.

(2) A preference under CPLR 552l may be obtained upon good cause shown by a motion directed to the court on notice to the other parties to the appeal.

(c) Consolidation

(1) A party may consolidate appeals from civil orders and/or judgments arising out of the same action or proceeding provided that each appeal is perfected timely pursuant to section 670.8(e)(1) of this Part; and

(2) Appeals from orders or judgments in separate actions or proceedings cannot be consolidated but may, upon written request of a party, be scheduled by the court to be heard together on the same day.

§ 670.8 Placing Civil or Criminal Causes on Calendar; Time Limits for Filing.

(a) Placing Cause on General Calendar. An appeal may be placed on the general calendar by filing with the clerk the record on appeal pursuant to one of the methods set forth in section 670.9 of this Part and by filing nine copies of a brief, with proof of service of two copies upon each of the other parties. Unless the court shall otherwise direct, when an appeal is prosecuted upon the original record, only one copy of the brief need be served. An extra copy of the statement required by CPLR 5531 shall be filed together with the record or appendix. If an appeal is taken on the original record, the extra copy of the statement shall be filed with the appellant's brief.

(b) Answering and Reply Briefs. Not more than 30 days after service of the appellant's brief, each respondent or opposing party shall file nine copies of the answering brief with proof of service of two copies upon each of the other parties. Not more than 10 days after service of respondent's brief, the appellant may file nine copies of a reply brief with proof of service of two copies upon each of the other parties. If one copy of the appellant's brief was served, only one copy of answering and reply briefs need be served.

(c) Concurrent and Cross Appeals

(1) Unless otherwise ordered by the court, all parties appealing from the same order or judgment shall consult and thereafter file a joint record or joint appendix which shall include copies of all notices of appeal. The cost of the joint record or the joint appendix, and the transcript, if any, shall be borne equally by the appealing parties.

(2) The joint record or joint appendix and the briefs of concurrent appellants shall be served and filed together. The time to do so in accordance with subdivision (e) of this rule shall be measured from the latest date on the several concurrent notices of appeal.

(3) The answering brief on a cross appeal shall be served and filed not more than 30 days after service of the appellant's brief or briefs and the joint record or joint appendix, and it shall include the points of argument on the cross appeal. An appellant's reply brief may be served and filed not more than 30 days after service of the answering brief. A cross appellant's reply brief may be served and filed not more than 10 days after service of the appellant's reply brief.

(d) *Enlargements of Time.* Except where a scheduling order has been issued pursuant to section 670.4(a)(2) of this Part or where the court has directed that a cause be perfected or that a brief be served and filed by a date certain, an enlargement of time to perfect or to serve and file a brief may be obtained as follows:

(l) *By Stipulation.* The parties may stipulate to enlarge the time to perfect a cause by up to 60 days, to file an answering brief by up to 30 days, and to file a reply brief by up to 10 days. Not more than one such stipulation per perfection or filing shall be permitted. Such a stipulation shall not be effective unless so ordered by the clerk.

(2) *For Cause.* Where a party shall establish a reasonable ground why there cannot or could not be compliance with the time limits prescribed by this section, or such time limits as extended by stipulation pursuant to paragraph (1) of this subdivision, the clerk or a Justice may grant reasonable enlargements of time to comply. An application pursuant to this paragraph shall be made by letter, addressed to the clerk, with a copy to the other parties to the cause. Orders made pursuant to this paragraph shall be reviewable by motion to the court on notice pursuant to section 670.5 of this Part.

(e) Notwithstanding any of the provisions of this Part, a civil appeal, action, or proceeding shall be deemed abandoned unless perfected

(1) within six months after the date of the notice of appeal, order granting leave to appeal, or order transferring the proceeding to this court, or,

(2) within six months of the filing of the submission with the county clerk in an action on submitted facts pursuant to CPLR 3222,

unless the time to perfect shall have been extended pursuant to subdivision (d) of this section. The clerk shall not accept any record or brief for filing after the expiration of such six-month period or such period as extended.

(f) Nothwithstanding any of the provisions of this Part, an unperfected criminal appeal by a defendant shall be deemed abandoned in all cases where no application has been made by the defendant for the assignment of counsel to prosecute the appeal within nine months of the date of the notice of appeal unless the time to perfect shall have been extended pursuant to subdivision (d) of this section.

(g) Notwithstanding any of the provisions of this Part, an appeal by the People pursuant to CPL 450.20(1), (1-a) or (8) shall be deemed abandoned unless perfected within three months after the date of the notice of appeal unless the time to perfect shall have been extended pursuant to subdivision (d) of this section. All other appeals by the People shall be deemed abandoned unless perfected within six months after the date of the notice of appeal unless the time to perfect shall have been extended pursuant to subdivision (d) of this section.

(h) The clerk shall periodically prepare a calendar of all civil causes which have been ordered to be perfected by a date certain and which have not been perfected and a calendar of all civil causes which have been assigned an appellate division docket number and have not been perfected within the time limitations set forth in subdivision (e) of this section. Such calendars shall be published in the New York Law Journal for five consecutive days. Upon the failure of the appellant to make an application to enlarge time to perfect within l0 days following the last day of publication, an order shall be entered dismissing the cause.

§ 670.9 Alternate Methods of Prosecuting Appeals.

An appellant may elect to prosecute an appeal upon a reproduced full record (CPLR 5528[a][5]); by the appendix method (CPLR 5528[a][5]); upon an agreed statement in lieu of record (CPLR 5527); or, where authorized by statute or this Part or order of the court, upon a record consisting of the original papers.

(a) Reproduced Full Record. If the appellant elects to proceed on a reproduced full record on appeal as authorized by CPLR 5528(a)(5), the record shall be printed or otherwise reproduced as provided in sections 670.10.1 and 670.10.2 of this Part. Nine copies of the record, one of which shall be marked "original", duly certified as provided in section 670.10.2(f), shall be filed with proof of service of two copies upon each of the other parties.

(b) Appendix Method.

(l) If the appellant elects to proceed by the appendix method, the appellant shall subpoena from the clerk of the court from which the appeal is taken all the papers constituting the record on appeal and cause them to be filed with the clerk of this court prior to the filing of the appendix.

(2) The clerk from whom the papers are subpoenaed shall compile the original papers constituting the record on appeal and transmit them to the clerk of this court, together with a certificate listing the papers constituting the record on appeal and stating whether all such papers are included in the papers transmitted.

(3) If a settled transcript of the stenographic minutes, or an approved statement in lieu of such transcript, or any relevant exhibit is not included in the papers so filed with the clerk of this court, the appellant shall cause such transcript, statement, or exhibit to be filed together with the brief.

(4) The appendix shall be printed or otherwise reproduced as provided in sections 670.10.1 and 670.10.2 and may be bound with the brief or separately. Nine copies of the appendix, one of which shall be marked "original", duly certified as provided in section 670.10.2(f) shall be filed with proof of service of two copies upon each of the other parties.

(c) Agreed Statement in Lieu of Record Method. If the appellant elects to proceed by the agreed statement method in lieu of record (CPLR 5527), the statement shall be reproduced as provided in sections 670.10.1 and 670.10.2 as a joint appendix. The statement required by CPLR 553l shall be appended. Nine copies of the statement shall be filed with proof of service of two copies upon each of the other parties.

(d) Original Record

(l) The following appeals may be prosecuted upon the original record, including a properly settled transcript of the trial or hearing, if any:

(i) appeals from the Appellate Term;

(ii) appeals from the Family Court;

(iii) appeals under the Election Law;

(iv) appeals under the Human Rights Law (Executive Law § 298);

(v) appeals where the sole issue is compensation of a judicial appointee;

(vi) other appeals where an original record is authorized by statute;

(vii) appeals where permission to proceed upon the original record has been authorized by order of this court;

(viii) appeals in criminal causes; and

(ix) appeals under Correction Law §§ 168-d(3) and 168-n(3).

(2) When an appeal is prosecuted upon the original record the appellant shall subpoena from the clerk of the court from which the appeal is taken all the papers constituting the record on appeal and cause them to be filed with the clerk of this court prior to the filing of the briefs.

§ 670.10.1 Form and Content of Records, Appendices, and Briefs—Generally.

(a) *Compliance with Civil Practice Law and Rules.* Briefs, appendices and to the extent practicable, reproduced full records, shall comply with the requirements of CPLR 5528 and 5529 and reproduced full records shall, in addition, comply with the requirements of CPLR 5526.

(b) *Method of Reproduction.* Briefs, records, and appendices shall be reproduced by any method that produces a permanent, legible, black image on white paper. To the extent practicable, reproduction on both sides of the paper is encouraged.

(c) *Paper Quality, Size, and Binding.* Paper shall be of a quality approved by the chief administrator of the courts and shall be opaque, unglazed, white in color, and measure 11 inches along the bound edge by 8½ inches. Records, appendices, and briefs shall be bound on the left side in a manner that shall keep all the pages securely together; however, binding by use of any metal fastener or similar hard material that protrudes or presents a bulky surface or sharp edge is prohibited. Records and appendices shall be divided into volumes not to exceed two inches in thickness.

(d) *Designation of Parties.* The parties to all appeals shall be designated in the record and briefs by adding the word "Appellant," "Respondent," etc., as the case may be, following the party's name, e.g., "Plaintiff-Respondent," "Defendant-Appellant," "Petitioner-Appellant," "Respondent-Respondent," etc. Parties who have not appealed and against whom the appeal has not been taken, shall be listed separately and designated as they were in the trial court, e.g., "Plaintiff," "Defendant," "Petitioner," "Respondent." In appeals from the Surrogate's Court or from judgments on trust accountings, the caption shall contain the title used in the trial court including the name of the decedent or grantor, followed by a listing of all parties to the appeal, properly designated. In proceedings and actions originating in this court, the parties shall be designated "Petitioner" and "Respondent" or "Plaintiff" and "Defendant."

(e) *Docket Number.* The cover of all records, briefs, and appendices shall display the appellate division docket number assigned to the cause in the upper right-hand portion opposite the title.

(f) *Rejection of Papers.* The clerk may refuse to accept for filing any paper that does not comply with these rules, is not legible, or is otherwise unsuitable.

§ 670.10.2 Form and Content of Records and Appendices.

(a) *Format*. Records and appendices shall contain accurate reproductions of the papers submitted to the court of original instance, formatted in accordance with the practice in that court, except as otherwise provided in subdivision (d) of this section. Reproductions may be slightly reduced in size to fit the page and to accommodate the page headings required by CPLR 5529(c), provided, however, that such reduction does not significantly impair readability.

(b) *Reproduced Full Record.* The reproduced full record shall be bound separately from the brief, shall contain the items set forth in CPLR 5526, and shall contain in the following order so much of the following items as shall be applicable to the particular cause:

(l) A cover which shall contain the title of the action or proceeding on the upper portion and, on the lower portion, the names, addresses, and telephone numbers of the attorneys, the county clerk's index or file number, and the indictment number;

(2) The statement required by CPLR 553l;

(3) A table of contents which shall list and briefly describe each paper included in the record. The part of the table relating to the transcript of testimony shall separately list each witness and the page at which direct, cross, redirect and recross examinations begin. The part of the table relating to exhibits shall concisely indicate the nature or contents of each exhibit and the page in the record where it is reproduced and where it is admitted into evidence. The table shall also contain references to pages where a motion to dismiss

the complaint or to direct or set aside a verdict or where an oral decision of the court appears;

(4) The notice of appeal or order of transfer, judgment or order appealed from, judgment roll, corrected transcript or statement in lieu thereof, relevant exhibits and any opinion or decision in the cause;

(5) An affirmation, stipulation or order, settling the transcript pursuant to CPLR 5525;

(6) A stipulation or order dispensing with reproducing exhibits.

(i) Exhibits which are relevant to a cause may be omitted upon a stipulation of the parties which shall contain a list of the exhibits omitted and a brief description of each exhibit or, if a party unreasonably refuses to so stipulate, upon motion directed to the court. Exhibits thus omitted, unless of a bulky or dangerous nature, shall be filed with the clerk at the same time that the appellant's brief is filed. Exhibits of a bulky or dangerous nature (cartons, file drawers, ledgers, machinery, narcotics, weapons, etc.) thus omitted need not be filed but shall be kept in readiness and delivered to the court on telephone notice. A letter, indicating that a copy has been sent to the adversary, listing such exhibits and stating that they will be available on telephone notice, shall be filed with the clerk at the same time that the appellant's brief is filed.

(ii) Exhibits which are not relevant to a cause may be omitted upon stipulation of the parties which shall contain a list of the exhibits omitted, a brief description of each exhibit, and a statement that the exhibits will not be relied upon or cited in the briefs of the parties. If a party unreasonably refuses to so stipulate, a motion to omit the exhibits may be directed to the court. Such exhibits need not be filed; and

(7) The appropriate certification or stipulation pursuant to subdivision (f) of this section.

(c) *Appendix.*

(l) The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent including, where applicable, at least the following:

(i) notice of appeal or order of transfer;

(ii) judgment, decree, or order appealed from;

(iii) decision and opinion of the court or agency, and report of a referee, if any;

(iv) pleadings, if their sufficiency, content or form is in issue or material; in a criminal case, the indictment, or superior court information;

(v) material excerpts from transcripts of testimony or from papers in connection with a motion. Such excerpts must contain all the testimony or averments upon which the appellant relies and upon which it may be

reasonably assumed the respondent will rely. Such excerpts must not be misleading or unintelligible by reason of incompleteness or lack of surrounding context;

(vi) copies of critical exhibits, including photographs, to the extent practicable; and

(vii) The appropriate certification or stipulation pursuant to subdivision (f) of this section.

(2) If bound separately from the brief, the appendix shall have a cover complying with subdivision (b)(l) of this section and shall contain the statement required by CPLR 553l and a table of contents.

(d) *Condensed Format of Transcripts Prohibited.* No record or appendix may contain a transcript of testimony given at a trial, hearing, or deposition that is reproduced in condensed format such that two or more pages of transcript in standard format appear on one page.

(e) *Settlement of Transcript or Statement.* Regardless of the method used to prosecute any civil cause, if the record contains a transcript of the stenographic minutes of the proceedings or a statement in lieu of such transcript, such transcript or statement must first be either stipulated as correct by the parties or their attorneys or settled pursuant to CPLR 5525.

(f) *Certification of Record.* A reproduced full record or appendix shall be certified either by: (l) a certificate of the appellant's attorney pursuant to CPLR 2l05; (2) a certificate of the proper clerk; or (3) a stipulation in lieu of certification pursuant to CPLR 5532. The reproduced copy containing the signed certification or stipulation shall be marked "Original."

§ 670.10.3 Form and Content of Briefs.

(a) *Computer-generated briefs.* Briefs prepared on a computer shall be printed in either a serifed, proportionally spaced typeface such as Times Roman, or a serifed, monospaced typeface such as Courier. Narrow or condensed typefaces and/or condensed font spacing may not be used. Except in headings, words may not be in bold type or type consisting of all capital letters.

(1) *Briefs set in a proportionally spaced typeface*. The body of a brief utilizing a proportionally spaced typeface shall be printed in 14-point type, but footnotes may be printed in type of no less than 12 points.

(2) *Briefs set in a monospaced typeface*. The body of a brief utilizing a monospaced typeface shall be printed in 12-point type containing no more than 10½ characters per inch, but footnotes may be printed in type of no less than 10 points.

(3) *Length.* Computer-generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc.

(b) *Typewritten briefs.* Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch. The ribbon typescript of the brief shall be signed and filed as one of the number of copies required by section 670.8 of

this Part. Typewritten appellants' and respondents' briefs shall not exceed 70 pages and reply briefs and amicus curiae briefs shall not exceed 35 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc.

(c) *Margins, line spacing, and page numbering of computer-generated and typewritten briefs.* Computer-generated and typewritten briefs shall have margins of one inch on all sides of the page. Text shall be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Pages shall be numbered consecutively in the center of the bottom margin of each page.

(d) *Handwritten briefs.* Pro se litigants may serve and file handwritten briefs. Such briefs shall be neatly prepared in cursive script or hand printing in black ink. Pages shall be numbered consecutively in the center of the bottom margin of each page. The submission of handwritten briefs is not encouraged. If illegible or unreasonably long, handwritten briefs may be rejected for filing by the clerk.

(e) *Application for permission to file oversized brief*. An application for permission to file an oversized brief shall be made to the clerk by letter stating the number of words or pages by which the brief exceeds the limits set forth in this section and the reasons why submission of an oversize brief is necessary. The letter shall be accompanied by a copy of the proposed brief, including a certificate if required by subdivision (f) hereof to the effect that the brief is in all other respects compliant with this section. The determination of the clerk may be reviewed by motion to the court on notice in accordance with section 670.5 of this Part.

(f) *Certification of compliance*. Every brief, except those that are handwritten, shall have at the end thereof a certificate of compliance with this rule, stating that the brief was prepared either on a typewriter, a computer, or by some other specified means. If the brief was typewritten, the certificate shall further specify the size and pitch of the type and the line spacing used. If the brief was prepared on a computer, the certificate shall further specify the name of the typeface, point size, line spacing, and word count. A party preparing the certificate may rely on the word count of the processing system used to prepare the brief. The signing of the brief in accordance with section 130-1.1-a(a) of this Title shall also be deemed the signer's representation of the accuracy of the certificate of compliance.

(g) *Content of Briefs.*

(l) *Cover*. The cover shall set forth the title of the action or proceeding. The upper right hand section shall contain a notation stating: whether the cause is to be argued or submitted; if it is to be argued, the time actually required for the argument; and the name of the attorney who will argue (see § 670.20). The lower right hand section shall contain the name, address, and telephone number of the attorney filing the brief and shall indicate whom the attorney represents.

(2) *Appellant's Brief.* The appellant's brief shall contain, in the following order:

(i) the statement required by CPLR 553l;

(ii) a table of contents including the titles of the points urged in the brief;

(iii) a concise statement of the questions involved without names, dates, amounts, or particulars. Each question shall be numbered, set forth

separately, and followed immediately by the answer, if any, of the court from which the appeal is taken;

(iv) a concise statement of the nature of the action or proceeding and of the facts which should be known to determine the questions involved, with supporting references to pages in the record or the appendix, including, if such be the case, a statement that proceedings on the judgment or order appealed from have been stayed pending a determination of the appeal;

(v) the appellant's argument, which shall be divided into points by appropriate headings distinctively printed;

(vi) if a civil cause is perfected on the original papers, the brief shall include either a copy of the order or judgment appealed from, the decision, if any, and the notice of appeal, or a copy of any order transferring the proceeding to this court;

(vii) if the appeal is from an order involving pendente lite relief in a matrimonial action, the brief shall state whether issue has been joined and, if so, the date of joinder of issue, and whether the case has been noticed for trial;

(viii) in criminal causes, the appellant's brief at the beginning shall also set forth

(A) whether an order issued pursuant to CPL 460.50 is outstanding, the date of such order, the name of the judge who issued it and whether the defendant is free on bail or on his or her own recognizance, and

(B) whether there were co-defendants in the trial court, the disposition with respect to such co-defendants, and the status of any appeals by such co-defendants; and

(ix) a certificate of compliance, if required by subdivision (f) of this section.

(3) *Respondent's Brief.* The respondent's brief shall contain, in the following order:

(i) a table of contents including the titles of points urged in the brief;

(ii) a counterstatement of the questions involved or of the nature and facts of the action or proceeding, if the respondent disagrees with the statement of the appellant;

(iii) the argument for the respondent, which shall be divided into points by appropriate headings distinctively printed; and

(iv) a certificate of compliance, if required by subdivision (f) of this section.

(4) *Appellant's Reply Brief.* The appellant's reply brief, unless otherwise ordered by the court, shall not contain an appendix, but shall contain, in the following order:

(i) a table of contents;

(ii) the reply for the appellant to the points raised by the respondent, without repetition of the arguments contained in the main brief, which shall be divided into points by appropriate headings distinctively printed; and

(iii) a certificate of compliance, if required by subdivision (f) of this section.

(h) *Addenda to Briefs.*

(1) Briefs may contain an addendum composed of decisions, statutes, ordinances, rules, regulations, local laws, or other similar matter, cited therein that were not published or that are not otherwise readily available.

(2) Unless otherwise authorized by order of the court, briefs may not contain maps, photographs, or other addenda.

(i) *Constitutionality of State Statute.* Where the constitutionality of a statute of the State is involved in an appeal in which the State is not a party, the party raising the issue shall serve a copy of the brief upon the Attorney General of the State of New York who will be permitted to intervene in the appeal.

§ 670.11 *Amicus Curiae* Briefs.

(a) Permission to file an *amicus curiae* brief shall be obtained by persons who are not parties to the action or proceeding by motion on notice to each of the parties.

(b) Unless otherwise ordered by the court, oral argument is not permitted.

§ 670.12 Appeals in Criminal Actions

(a) Except as otherwise provided herein, an appeal in a criminal action shall be prosecuted in the same manner as a civil appeal.

(b) Application for Certificate Granting Leave to Appeal

(l) An application pursuant to CPL 450.l5 and CPL 460.l5 for leave to appeal to this court from an order shall be made in writing within 30 days after service of the order upon the applicant, on 15 days notice to the district attorney, or other prosecutor, as the case may be.

(2) The application shall be addressed to the court for assignment to a Justice and shall include:

(i) the name and address of the applicant and the name and address of the district attorney or other prosecutor, as the case may be;

(ii) the indictment, or superior court information number;

(iii) the questions of law or fact which it is claimed ought to be reviewed;

(iv) any other information, data, or matter which the applicant may deem pertinent in support of the application;

(v) a statement that no prior application for such certificate has been made; and

(vi) a copy of the order sought to be reviewed and a copy of the decision of the court of original instance or a statement that there was no decision.

(3) Within l5 days after service of a copy of the application the district attorney or other prosecutor shall file answering papers or a statement that there is no opposition to the application. Such answering papers shall include a discussion of the merits of the application or shall state, if such be the case, that the application does not contain any allegations other than those alleged in the papers submitted by the applicant in the trial court and that the prosecutor relies on the record; the answering papers in the trial court; and the decision of such court, if any.

(4) Unless the Justice designated to determine the application shall otherwise direct, the matter shall be submitted and determined upon the foregoing papers and without oral argument.

(c) Appeal from Sentence. Where the only issue to be raised on appeal concerns the legality, propriety, or excessiveness of sentence, the appeal may be prosecuted by submitting a concise statement setting forth the reasons urged in support of the reversal or modification of sentence. Such statement shall contain the information required by CPLR 553l and by section 670.10.3(g)(2)(viii) of this Part and shall contain a statement by counsel for the appellant that no other issues are asserted.

(l) Such appeals may be brought on as though they were motions made in accordance with the provisions of section 670.5 of this Part and shall be placed upon a special calendar for appeals submitted in accordance with this subdivision. The respondent shall serve and file papers in opposition within l4 days after service of the motion papers.

(2) The appellant shall submit the transcripts of sentence and the transcripts of the underlying plea or trial. The parties shall file an original and four copies of their respective papers, including the necessary transcripts.

(d) When an appeal in a criminal action is prosecuted on the original record or by the appendix method, the appellant shall serve a copy of the transcript of the proceedings upon the respondent together with the brief and appendix.

(e) Appeals by the People pursuant to CPL 450.20 (1-a) shall be granted a preference upon the request of either the appellant or the respondent. The appellant's brief shall include an appendix containing a copy of the indictment, the order appealed from and the decision. The respondent's brief may also include an appendix, if necessary. The appellant shall file, separate from the record, one copy of the grand jury minutes (see Rules of the Chief Administrator of the Courts, Part 105).

(f) Appeals to the Court of Appeals. Service of a copy of an order on an appellant as required by CPL 460.10(5)(a) shall be made pursuant to CPLR 2103.

(g) In the event the defendant is represented by counsel the following shall be filed together with the brief filed on behalf of the defendant:

(1) Proof of mailing of a copy of the brief to the defendant at his or her last known address; and

(2) Where a brief pursuant to *Anders v California* (386 US 738) has been filed, a copy of a letter to the defendant advising that he or she may file a *pro se* supplemental brief and, if he or she wishes to file such a brief, that he or she must notify this court no later than 30 days after the date of mailing of counsel’s letter of the intention to do so.

(h) A defendant represented by counsel who has not submitted a brief pursuant to *Anders v California* (386 US 738) who wishes to file a *pro se* supplemental brief, must make an application for permission to do so not later than 30 days after the date of mailing to the defendant of a copy of the brief prepared by counsel. The affidavit in support of the motion shall briefly set forth the points that the appellant intends to raise in the supplemental brief.

§ 670.13 Appeals from the Appellate Term.

(a) Appeals from the Appellate Term of the Supreme Court to this court may be prosecuted upon the record as presented to the Appellate Term; its order; its opinion or decision; and the order granting leave to appeal.

(b) When this court has made an order granting leave to appeal, the appellant shall file with the clerk of the Appellate Term a copy of the order. Within 20 days after an order granting leave to appeal shall have been filed with the clerk of the Appellate Term, such clerk or the appellant shall cause the record to be filed with the clerk of this court. Thereafter the appeal may be brought on for argument by the filing of briefs in the same manner as any other cause.

§ 670.14 Appeals from Orders Concerning Grand Jury Reports.

The mode, time, and manner for perfecting an appeal from an order accepting a report of a grand jury pursuant to CPL l90.85(l)(a) or from an order sealing a report of a grand jury pursuant to CPL l90.85(5) shall be in accordance with the provisions of this Part governing appeals in criminal cases. Appeals from such orders shall be preferred causes and may be added to the calendar by stipulation approved by the court or upon motion directed to the court. The record, briefs, and other papers on such an appeal shall be sealed and not available for public inspection except as permitted by CPL l90.85(3).

§ 670.15 Appeals where the Sole Issue is Compensation of a Judicial Appointee.

If the sole issue sought to be reviewed on appeal is the amount of compensation awarded to a judicial appointee (i.e., referee, arbitrator, guardian, guardian ad litem, conservator, committee of the person or a committee of the property of an incompetent or patient, receiver, person designated to perform services for a receiver, such as but not limited to an agent, accountant, attorney, auctioneer, appraiser, or person designated to accept service), the appeal may be prosecuted in accordance with any of the methods specified in section 670.9 of this Part; or the appeal may be prosecuted by motion in accordance with the procedure applicable to special proceedings as set forth in section 670.5 of this Part. In such event, the review may be had on the original record and briefs may be filed at the option of any party.

§ 670.16 Transferred CPLR Article 78 Proceedings.

CPLR article 78 proceedings transferred to this court pursuant to CPLR 7804(g) may be prosecuted in accordance with any of the methods specified in section 670.9 of this Part. Where applicable, every such proceeding shall be governed by this Part as if it were an appeal.

§ 670.17 Transferred Proceedings under the Human Rights Law (Executive Law § 298).

(a) A proceeding under the Human Rights Law which is transferred to this court for disposition shall be prosecuted upon the original record which shall contain:

(l) copies of all papers filed in the Supreme Court;

(2) the decision of the Supreme Court, or a statement that no decision was rendered;

(3) the order of transfer; and

(4) the original record before the State Division of Human Rights, including a copy of the transcript of the public hearing.

(b) In all other respects every proceeding so transferred shall be governed by this Part as if it were an appeal.

(c) In the event that the original record which was before the State Division of Human Rights was not previously submitted to the Supreme Court, the Division shall file the original record with this court within 45 days after entry of, or service upon it of, a copy of the order of transfer.

§ 670.l8 Special Proceedings pursuant to Eminent Domain Procedure Law § 207; Public Service Law §§ 128, 170; Labor Law § 220; Public Officers Law § 36; or Real Property Tax Law § 1218.

(a) Special proceedings initiated in this court pursuant to Eminent Domain Procedure Law § 207, Public Service Law §§ l28, or 170, Labor Law § 220, Public Officers Law § 36, or Real Property Tax Law § 1218 shall be commenced by the filing of a petition in the office of the clerk of this court pursuant to CPLR 304. Service of the petition with a notice of petition or order to show cause shall be made in accordance with CPLR 306-b on at least 20 days notice to the respondent. In proceedings pursuant to sections 207, l28, or 170 such notice shall be accompanied by a demand upon the respondent to file a copy of the transcript of the hearing before it and a copy of its determinations and findings.

(b) The respondent shall file an answer to the petition and, in proceedings pursuant to sections 207, 128, or 170, the transcript of the hearing and the determination and findings.

(c) Within three months after service of the answer, the petitioner shall file nine copies of a brief, with proof of service of one copy upon the respondent. Not more than 30 days after service of petitioner's brief, the respondent shall file nine copies of an answering brief, with proof of service of one copy upon the petitioner. Not more than 10 days after service of the respondent's brief the petitioner may file a reply brief.

(d) The proceeding will be heard upon the original record which shall contain:

(l) the notice of petition and petition;

(2) if applicable, the demand for the transcript, determination, and findings;

(3) the original record before the respondent including a copy of the transcript of the hearing, if any; and

(4) the determination and findings of the respondent.

(e) In all other respects such a proceeding shall be governed by this Part as if it were an appeal.

§ 670.19 Action on Submitted Facts.

(a) An action submitted to this court pursuant to CPLR 3222 shall be prosecuted on a printed submission which shall be bound separately from the brief and shall contain in the following order:

(1) a cover complying with subdivision (b)(1) of section 670.10.2 of this Part;

(2) the statement required by CPLR 5531;

(3) the case required by CPLR 3222(a), duly executed and acknowledged by all the parties in the form required to entitle a deed to be recorded, containing:

(i) the agreed statement of facts upon which the controversy depends;

(ii) a statement that the controversy is real and is made in good faith for the purpose of determining the rights of the parties;

(iii) a provision designating the particular county clerk of one of the counties within the Second Judicial Department with whom the papers are to be filed; and,

(iv) a provision in conformity with CPLR 3222(b)(3) stipulating that the action be heard and determined by this court; and,

(4) proof of filing of the papers comprising the submission with the designated county clerk.

(b) Where applicable, every such action shall be governed by this Part as if it were an appeal. The submission and the briefs of the respective parties shall be served and filed in accordance with section 670.8 of this Part and the form of the briefs shall be governed by section 670.10.3 of this Part.

§ 670.20 Oral Argument.

(a) Not more than 30 minutes shall be allowed for argument to each attorney who has filed a brief on:

(l) appeals from judgments, orders, or decrees made after a trial or hearing;

(2) appeals from orders of the Appellate Term; and

(3) special proceedings transferred to or instituted in this court to review administrative determinations made after a hearing.

(b) Not more than l5 minutes shall be allowed for argument to each attorney who has filed a brief on all other causes except as set forth in subdivision (c).

(c) Argument is not permitted on issues involving maintenance; spousal support; child support; counsel fees; the legality, propriety or excessiveness of sentences; determinations made pursuant to the sex offender registration act; grand jury reports; and calendar and practice matters

including but not limited to preferences, bills of particulars, correction of pleadings, examinations before trial, physical examinations, discovery of records, interrogatories, change of venue, and transfers of actions to and from the Supreme Court. Applications for permission to argue such issues shall be made at the call of the calendar on the day the cause appears on the calendar. Notice of intention to make such an application shall be given to the court and the other parties at least seven days before the cause appears on the calendar.

(d) The court, in its discretion, may deny oral argument of any cause.

(e) Where the total time requested for argument by the attorneys on each side exceeds 30 minutes on appeals under subdivision (a) of this section or l5 minutes on appeals under subdivision (b) of this section, the court may, in its discretion, reduce the argument time requested. Not more than one attorney will be heard for each brief unless, upon application made before the beginning of the argument, the court shall have granted permission to allow more than one attorney to argue. A party who has not filed a brief may not argue.

(f) In the event that any party's main brief shall fail to set forth the appropriate notations indicating that the cause is to be argued and the time required for argument (see 670.10.3[g][1]) the cause will be deemed to have been submitted without oral argument by that party.

(g) If any party shall have filed the main brief late and such late brief be accepted, the court or any Justice may deem that the party has waived oral argument and has submitted the cause without argument.

(h) A party who originally elected to argue may notify the clerk of the intention to submit the cause without argument and need not appear on the calendar call.

(i) No briefs, letters, or other communications in connection with a cause will be accepted after the argument or submission of a cause unless permission is granted by the court.

§ 670.21 Decisions and Orders; Costs.

(a) An order or judgment of this court determining a cause or an order of this court determining a motion shall be drafted by the court and shall be entered in the office of the clerk of this court. Such an order or judgment shall be deemed entered on the date upon which it was issued.

(b) Costs and disbursements upon any cause or motion shall be allowed only as directed by the court. In the absence of a contrary direction, the award by this court of costs upon any cause shall be deemed to include disbursements.

§ 670.22 Fees of the Clerk of the Court.

(a) Pursuant to CPLR 8022, the clerk is directed to charge and is entitled to receive on behalf of the State:

(1) A fee of $315, payable upon the filing of a record on a civil appeal or statement in lieu of record on a civil appeal and upon the filing of a notice of petition or order to show cause commencing a special proceeding.

(2) A fee of $45, payable upon the filing of each motion or cross motion with respect to a civil appeal or special proceeding, except that no fee shall be imposed for a motion or cross motion which seeks leave to appeal as a poor person pursuant to CPLR 1101(a).

(b) Pursuant to Judiciary Law § 265, the clerk is directed to charge and is entitled to receive in advance the following fees on behalf of the State:

(l) For making a photocopy of an order, decision, opinion, or other filed paper or record, $l for the first page and 50 cents for each additional page.

(2) For comparing the copy of a prepared order, decision, opinion, or other paper or record with the original on file, $1 for the first page and 50 cents for each additional page, with a minimum fee of $2.

(3) For certifying the copy of an order, decision, record, or other paper on file or for affixing the seal of the court, $l; and for authenticating the same, an additional $5.

(4) For certifying in any form that a search of any records in his custody has been made and giving the result of such search, $l.

(5) For an engraved parchment diploma attesting to admission as an attorney and counselor at law, $25.

(6) For a printed certificate attesting to admission or to good standing as an attorney and counselor at law, $5.

(c) The clerk shall not, however, charge or receive any fees set forth in subdivision (b) of this section from the following parties who shall be exempt from the payment of such fees in this court.

(1) The United States or any state, city or county, or any political subdivision or agency or department of any of them;

(2) any judge, court, official character committee or board of examiners, or any recognized agency serving the court or such committee or board;

(3) any duly recognized bar association;

(4) any party specifically exempt by law from the payment of fees; and

(5) any party to the cause for furnishing a copy of an opinion or order.

§ 670.23 Court's Waiver of Compliance.

In any civil or criminal cause, the court, either upon its own or upon any party's motion and either with or without notice to the adverse parties, may waive compliance by any party with any provision of this Part or may vary the application of any such provision.

§ 670.24 Forms.

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A - Request for Appellate Division Intervention - Civil

B - Additional Appeal Information

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CIVIL AND CRIMINAL APPEALS IN THE APPELLATE TERM, SECOND DEPARTMENT

by

HON. PAUL KENNY

Chief Clerk, New York Supreme Court,
Appellate Term for the Second Department
Brooklyn

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)

October 25, 2013

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 2nd, 11th and 13th Judicial Districts (Kings, Queens and Richmond Counties), and the other the 9th and 10th 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 9th & 10th Judicial Districts, and from the District Courts in Nassau and Suffolk Counties. The Appellate Term for the 9th & 10th 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 when 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 aupon 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. [1]

(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.

[1] 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 9th & 10th 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).[2]

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.

[2] 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.*** [3]

[3] 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, 9th & 10th 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 2nd, 11th & 13th Judicial Districts at 141 Livingston Street, 15th 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 9th & 10th 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 2nd, 11th & 13th Judicial Districts) and at 9:30 AM (in the Appellate Term for the 9th & 10th 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 l3 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 <u>not a party</u> 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. <u>The signing of an order to show cause is discretionary</u>, 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 2nd, 11th & 13th Judicial Districts) or find an available Justice to entertain their application (in the 9th & 10th 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 in 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
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APPELLATE TERM COORDINATOR

CONTACT LIST

9th Judicial District:

Westchester County-

James Garfein, Esq.
Westchester County Courthouse
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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
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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

10th Judicial District:

Nassau County-

Mary Gallagher
Paul Paoli
Nassau County Supreme Court Building
100 Supreme Court Drive
Court Information Center (2nd Floor)
Mineola, New York 11501
Phone: (516) 493-3200
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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, 1st Floor
Riverhead, New York 11901
Phone: (631) 852-2420
(631) 852-2494

2nd Judicial District:

Kings County

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

11th 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

13th Judicial District:

Richmond County-

Mary Shine
Resource Center
Richmond County Civil Court
927 Castleton Avenue
Staten Island, New York 10310
Phone: (718) 675-8443
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TAKING APPEALS IN THE APPELLATE DIVISION,

THIRD DEPARTMENT

by

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I. TAKING AN APPEAL TO THE APPELLATE DIVISION

A. Jurisdiction of the Appellate Division

1. Orders appealable as of right

CPLR 5701(a) provides that the following types of orders are appealable *as of right*:

a. Any final or interlocutory judgment which disposes of all of the issues in the action,

b. Any other order that:

(i) grants, refuses, continues, or modifies a provisional remedy;
(ii) settles, grants, or refuses an application to resettle a transcript or statement on appeal;
(iii) grants or refuses a new trial….
(iv) involves some part of the merits;
(v) effects a substantial right;
(vi) in effect determines the action and prevents a judgment from which an appeal may be taken;
(vii) determines a statutory provision of the state to be unconstitutional….;
(viii) *grants* a motion for leave to reargue or determines a motion for leave to renew.

2. Orders not appealable as of right

CPLR 5701(b) lists the following as the only orders that are *not* appealable as of right:

a. Orders made in a proceeding against a body or officer pursuant to Article 78;

b. Orders that require or refuse to require a more definite statement in a pleading;
c. Orders that order, or refuse to order, that scandalous or prejudicial matter by stricken from a pleading.

In addition to those statutorily-defined limitations, additional matters which are not appealable as of right include:

a. Denials of motions to reargue
b. A default Order/Judgment
c. Consent Orders and stipulations
d. *Most* interlocutory orders/pretrial evidentiary rulings

> "An Order which merely limits the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor of permission….However, an Order that limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable. *Vaughan v. St. Francis Hosp.*, 29 AD3d 1133 (3d Dept 2006).

3. Appeals by permission

Appeals may still be taken to the appellate division from those non-appealable orders by permission of the judge who made that order or by a judge of the appellate division in the department to which the appeal could be taken.

4. What is appealable?

CPLR §5512, entitled "Appealable paper", provider that "An initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is sought to be reviewed."

Note that per §5517, an appeal shall not be affected by certain subsequent orders, such as an Amended Order of Judgment that merely clarifies the original Decision. So long as no additional substantive relief is granted or denied, no new Notice of Appeal need be filed, and the original appeal is not mooted. CPLR §5517(b)

Note that oral rulings made in Chambers or "off the record" are not appealable unless they are transcribed. 22 NYCRR 202.12 provides that a preliminary conference may be recorded by a reporter, and that that transcript "shall have the full force and effect of an Order of the Court."

5. Who may appeal?

CPLR §5511 defines *who* may take an appeal:

"An **aggrieved party**, or a person substituted for him, may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent."

The Court of Appeals notes in *Parochial Bus Systems v. Bd of Educ of City of New York*, 60 NY2d 539 (1983), "Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal….The major exception to this general rule, however, is that the successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief. This exception would include those situations in which the successful party received an award less favorable than he sought….or a judgment which denied him some substantive claim or substantial right….But where the successful party has obtained the full relief sought, he has no grounds for appeal or cross-appeal…. This is so even where that party disagrees with the particular findings, rationale, or the opinion supporting the judgment or order below in his favor…or where he failed to prevail on all the issues that had been raised."

6. Scope of review

CPLR §5501 provides that an appeal from a final judgment brings up for review:

(1) any non-final judgment or order which necessarily affects the final judgment,
(2) any order denying a new trial or hearing which has not previously been reviewed by the court;
(3) any ruling to which the appellant **objected** or had no opportunity to object, and any charge to the jury or failure to refusal to charge as requested by the appellant, to which he objected
(4) any remark made by the judge to which the appellant objected; and
(5) a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate….

B. Notice of Entry Requirements

Pursuant to CPLR 2220, the Order and all original papers determining a motion shall be filed in the County Clerk's Office where action is pending. It is generally the responsibility of the prevailing party to file Order and motion papers. If a party fails to file any papers required to be filed, the order may be vacated.

Service of the Order with notice of entry triggers the timeframe for filing the Notice of Appeal. Note that pursuant to CPLR 5513, in order to be effective, the Notice of Entry must provide information on the date and place of filing.

Simply mailing a copy of the Decision to an adversary and enclosing the time-stamped copy of the Decision, without more, is *insufficient* to satisfy 5513 and will not trigger the deadline to appeal. *Reynolds v. Dustman*, 1 NY3d 559 (2003). ("Compliance with 5513(a) requires a notice of entry that refers to the appealable paper, and the date and place of its entry.")

C. The Notice of Appeal

Pursuant to CPLR 5515(1), an appeal is taken simply by filing a Notice of Appeal in the office where the Order or Judgment appealed from was filed, paying the filing fee, and serving it on each party.

1. Requirements

The Notice of Appeal must designate (1) the party taking the appeal, (2) the order or judgment appealed from, and (3) the court from which the appeal is taken. The Notice of Appeal should also identify the specific portions of the Order or Judgment appealed from.

In some circumstances where multiple requests for relief were raised below, an appeal may be taken only from a limited portion of the Decision ("that portion of the Decision that granted defendant's motion to preclude"). Note that when taking an appeal only from a limited portion of the Decision, an appeal from only a *part* of an Order constitutes a waiver of the right to appeal from other parts of the Order. See: *Royal v. Brooklyn Union Gas Co.*, 122 AD2d 132 (2d Dept 1986). When in doubt, it is best practice to simply appeal from the entire Judgment or Order.

Note that once the time to file a Notice of Appeal has expired, it cannot be amended to add other parties or requests for relief.

2. Timing

Pursuant to §5513, the Notice of Appeal must be filed and served within **30 days** from after service of the Judgment or Order with Notice of Entry.

That deadline is extended by five days if the Order and Notice of Entry was served by regular mail, and by one additional day if served by overnight mail. CPLR §§5513(d), 2103(b)

An "adverse party" that seeks to cross-appeal has ten days from service of the Notice of Appeal to file their own Notice of Appeal. CPLR 5513(c)

3. Curing errors

§ 5520 permits the Court to cure errors made in the course of taking an appeal. If a party timely files or serves it, but neglects, through mistake or excusable neglect, to do another required act within the time limited; or if the Notice of Appeal was premature or contained an inaccurate description; the court has discretion to overlook the defect in the interests of justice and treat the appeal as valid.

4. Extensions of time to take an appeal

§5514 provides limited grounds for taking an appeal or moving for permission to appeal:

a. If an appeal is dismissed by the improper method, the appellant may move to appeal within 30 days;
b. If the appellant's attorney dies, is suspended, or becomes physically or mentally incapacitated or otherwise disabled;
c. Substitution of parties – CPLR §1022
d. §5520 – "If an appellant either serves or files a timely notice of appeal or notice of motion for permission to appeal, but neglects through mistake or excusable neglect to do another act within the time limited, the court from or to which the appeal is taken, or the court of original jurisdiction, may grant an extension of time for curing the omission."

Note that §5514 specifically provides that no extension of time shall be granted for taking an appeal or moving for an appeal except upon those grounds.

D. Cross-Appeals

In situations where both parties seek to appeal from the same Judgment or Order, the plaintiff is deemed the appellant and shall serve and file the Brief and Record/Appendix first. The parties should work together to create a Joint Record on Appeal. Answering briefs shall be filed within thirty days, including any new points on the cross-appeal. The plaintiff shall file a Reply Brief within 10 days of the Respondent's Brief. The Reply Brief to the Cross-Appeal shall be filed within 10 days of the appellant's reply. CPLR 5513, 22 NYRCC 800.9(e)

Note that in a case involving cross-appeals, the Third Department deems the plaintiff the appellant with the responsibility for preparing the Record on Appeal, and in assuming the costs of same.

In the recent matter of *Derr v. Fleming*, 108 AD3d 854 (3d Dept 2013), the defendants appealed, the plaintiff subsequently cross-appealed, and the defendants took the initiative of preparing the Record on their own. When plaintiff refused to contribute toward the printing costs, the defendant moved to compel them to do so. The Third Department ultimately denied that application, noting that although the plaintiff would otherwise have been obligated to file and serve the record, because the defendants unilaterally undertook the task of preparing the Record, the plaintiff would not be compelled to share in such costs. The Court further noted that Supreme Court lacked jurisdiction to direct plaintiff to reimburse defendant for its printing expenses, as costs and disbursements are awarded in the appellate context only in the decision on appeal.

E. Consolidating Appeals

When there are multiple appeals in the same action, but arising out of different Orders of Judgments, they are traditionally automatically consolidated without the necessity of a motion or stipulation. Note that this process may differ in other departments. For example, the Fourth Department requires a motion to be made to consolidate separate appeals together.

F. The Pre-Calendar Statement

Note that the Third Department also requires a Pre-Calendar Statement to be filed with the Notice of Appeal in virtually every civil case in which a notice of appeal is filed. The original form shall be filed in the lower court and served on all parties. The specific format for the Pre-Calendar Statement may be found at §800.24-a. The Statement should contain the title of the underlying action; the full name of the parties; the name, address, phone number, etc. of counsel for each party; the county, court, and judge from which the appeal is taken; the RJI number; the specific nature of the underlying action ("automobile accident", "breach of contract", etc.); whether there is another appeal or related action

pending; and "a clear and concise statement of the issues to be raised on appeal and the grounds for reversal or modification to be advanced."

A copy of the Decision or Judgment appealed from, as well as the Notice of Appeal, should be attached to the Pre-Calendar Statement. Note that the absence of a Pre-Calendar Statement does not appear to be a jurisdictional defect, and will not serve as the basis to dismiss an appeal as untimely or incomplete. However, should you fail to serve the Pre-Calendar Statement, the Appellate Division Clerks Office will likely advise you of this deficiency and request that it be corrected.

Note that this statement is required only in the 3rd and 1st Departments. A separate Request for Appellate Division Intervention form is required in the 2nd Department. 22 NYCRR 670.3(a)

G. Civil Appeals Settlement Program

The CASP program is established by 22 NYCRR 800.24-b. If your case is selected for this program, you will receive a notice of a conference directing the attorneys, and the parties themselves (including representatives of the defendant's insurance carrier), to attend a settlement conference. Clients and carriers are expected to attend the conference unless they are excused from the CASP program. Note that the court expects that the attorney attending the conference shall be fully familiar with the action and have authority (or be accompanied by someone with authority) to enter into binding settlement stipulations. Any party who fails to appear, or who appears without such familiarity and authority, may be subject to sanctions.

If your case is not selected for inclusion in the CASP program, but you believe that a conference would be worthwhile, you may contact the CASP office and request that a conference be held. Typically, the CASP office will honor such requests.

If your case is selected for the program, you should prepare a brief statement of the pertinent facts and issues of your case and your position as to why you expect to prevail on appeal.

II. MOTIONS TO DISMISS AN APPEAL

A. Motions to Dismiss for Failure to Timely Perfect an Appeal

In the Third Department, two different potential deadlines to perfect an appeal are running. 22 NYCRR §800.9 provides that an Appellant shall file a Brief and Record on Appeal within *60 days* of service of the Notice of Appeal. However, §800.12 provides that the appeal shall be deemed abandoned if not fully perfected within *9 months* of the Notice of Appeal.

Although 9 months should be viewed as the outside deadline to perfect the appeal, there may be compelling reasons to expect the Appellant to perfect the appeal earlier. Under those circumstances, §800.9(d) provides that upon the Appellant's failure to perfect the appeal within sixty days, the Respondent can move to dismiss for lack of prosecution. In practice, you may expect that the motion will be granted if no opposition is filed; in contrast, if opposition to the motion is served, the court will likely grant an extension of time to perfect the appeal. In determining whether to make such a motion, consideration should be given to its merits, whether the appellant will demonstrate a reasonable excuse, the timeframe for a Decision on the motion, and strategic issues – is it best to compel an earlier or appeal, or simply allow the appeal to be abandoned?

In contrast, pursuant to §800.12, the appeal will be deemed *abandoned* if it is not perfected within 9 months of the filing of the Notice of Appeal. The non-appealing party need not make any formal application for that relief. Absent an extension, any attempts to file the appeal beyond that 9-month period will be automatically rejected by the Clerk's Office.

In order for an appeal to be accepted beyond that nine-month period, the appellant must move for leave to file a late appeal, and must demonstrate both a reasonable excuse for the delay and facts showing *merit* to the appeal. *Poneti v. Regan*, 99 AD2d 642 (3d Dept 1984). In contrast to the motion to dismiss under §800.9(d), the court will consider excuse and merit, so it is imperative to raise such objections in opposition to the motion.

Note that motions in the Appellate Division are returnable on Mondays and are generally without oral argument.

III. SCHEDULING OF APPEAL

No formal separate request for oral argument is required. When filing the Brief, the appellant may request oral argument simply by noting, on the cover page of the Brief, that oral argument is requested, and identifying the person who will be arguing the appeal and the time sought for appeal. Should the Appellant decline to request oral argument, the Respondent may do so in the same manner. Under most circumstances, requests for oral argument will be granted. (Note that oral argument will not be allowed in appeals from WC Board, Unemployment Insurance Board, judgments of conviction where only the sentence is at issue, and Article 78 proceedings where the only issue is whether there was substantial evidence to support the challenged determination – See: 800.10(a)(1 – 4)

Once the appeal is perfected and Briefs filed by both Appellant and Respondent the court will issue a Scheduling Memorandum advising of the term in which the appeal will be heard. The Court will also issue a Notice advising of the dates during the term when the argument may be heard. Any potential conflicts with those dates should immediately be brought to the court's attention. Approximately six weeks before oral argument, the court will issue the Day Calendar, establishing the specific date for argument, along with a form requesting that you acknowledge your receipt of the calendar. Once the final Day Calendar assignment is made, if any conflicts have developed, you must immediately advise the court and request that it be rescheduled. Argument will not be rescheduled within fourteen days of the commencement of the term.

Within one week of the oral argument date, you may check the calendar available online to determine the amount of time allotted for oral argument, as well as the panel of judges assigned to your case.

Decisions are typically issued approximately sixty days from oral argument. Decisions are issued on Thursdays and are traditionally available on the court's website after 12:00 noon.

Decisions will be entered by the court on the date that it is issued and will specifically state the date that it has been entered by the Court. That Decision should then be served on the adversary to trigger their time to appeal, or file a motion for leave to appeal, to the Court of Appeals.

PERFECTING THE APPEAL – PART I

THE RECORD ON APPEAL AND APPENDICES

by

GEORGE J. HOFFMAN, JR., ESQ.

Allen & Desnoyers, LLP
Albany

PERFECTING THE APPEAL – PART I
The Record On Appeal And Appendices

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An appeal may be prosecuted upon a full reproduced record (CPLR 5526); an appendix method (CPLR 5528(a)(5)); or an agreed statement in lieu of record (CPLR 5527). For the majority of appeals, particularly those arising from motion practice, a full reproduced record containing all of the items considered by the Court below can be used. Alternatively, where the appeal only involves a narrow issue, and substantial portions of the motion papers are irrelevant to the appeal, the appellant may choose to proceed via the Appendix method. Even when perfecting an appeal under this method, the appellant is still required to prepare and file a single copy of the record on appeal. Finally, although very rarely utilized, the CPLR authorizes an appeal to be prosecuted upon an agreed statement in lieu of a record in which the parties jointly prepare a statement setting forth the facts necessary to determine the issue(s) on appeal.

RECORD ON APPEAL

Contents Of The Record On Appeal

The appellant is responsible for compiling the Record on Appeal. Oftentimes, the judgment, order or decree being appealed will specify the papers upon which it was made. It is then the appellantôs responsibility to obtain accurate copies of these papers and compile them in the Record on Appeal.

The contents of the Record on Appeal are prescribed by the CPLR and the Rules of the various Appellate Divisions. For example, CPLR 5526 generally requires that:

> The record on appeal from a final judgment shall consist of the notice of appeal, the judgment-roll, the corrected transcript of the proceedings * * * if a trial or hearing was held, any relevant exhibits, or copies of them, in the court of original instance, any other reviewable order, and any opinions in the case. The record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other exhibits upon which the judgment or order was founded and any opinions in the case.

In addition to these general requirements regarding the content of the Record on Appeal, the

CPLR also requires that the subject matter of each page of the record be included at the top of the page. (*See* CPLR 5526). If the particular page consists of testimony from an underlying proceeding, the statute requires that the page include a header setting forth the name of the witness and whether the testimony is part of direct, cross, redirect or re-cross examination. (Id.)

The Appellate Division rules supplement these general requirements. For example, the Appellate Division - Third Department[1] requires that the Record on Appeal contain:

- A soft cover containing the title and names, addresses and telephone numbers of attorneys (§ 800.5(a)(1));
- A table of contents which shall list and briefly describe each paper included in the record, each witnessô testimony and each exhibit (§ 800.5(a)(2));
- A statement pursuant to CPLR 5531 (§ 800.5(a)(3));
- The notice of appeal or order of transfer, judgment or order appealed from, judgment roll, corrected transcript or statement in lieu thereof, any affidavits and relevant exhibits or copies of them, and any opinion or decision in the case (§ 800.5 (a)(4));
- A stipulation or order settling the transcript pursuant to CPLR 5525(c) (§ 800.5(a)(5));
- A stipulation dispensing with reproducing any exhibits (§ 800.5(a)(6));
- The appropriate certification or stipulation as required by section 800.7 of the Courtôs rules (§ 800.5(a)(7)).

In addition to setting forth the required content to be included in the Record on Appeal, the Third Departmentôs rules also specify the size and quality of paper to be used, the size of the record volumes (not to exceed 1 ½ inches thick), and the type of binding to be utilized. (§ 800.5(a)).

While the CPLR and Appellate Division rules dictate the materials which are required to be included in the Record on Appeal, caselaw demonstrates that certain materials are not to be included in the Record on Appeal. More specifically, the appellate court will typically refuse to consider materials which were not presented to or considered by the court below (ñmatters dehors the Recordò). *See, e.g.*, Cives Corp. v. Hunt Constr. Group, Inc., 91 A.D.3d 1178, 1179 n.2 (3rd Dept. 2012) (refusing to consider papers which were not part of record on appeal); Smith v. Bombard, 294 A.D.2d 673, 675 n.2 (3rd Dept. 2002) (refusing to consider information which is ñdehors the recordò); Lattuca v. Natale-Lattuca, 293 A.D.2d 805, 805 n.2 (3rd Dept. 2002) (same); Cipitelli v. County of Schenectady, 284 A.D.2d 823, 825 n.2 (3rd Dept.) (noting that the Court previously granted motion striking those documents which were dehors the record), *app.*

[1] The Rules of Practice for the Appellate Division ï Third Department can be found at 22 N.Y.C.R.R. Part 800. These Rules will be referenced herein by their particular section number.

denied, 97 N.Y.2d 606 (2001). Despite this general proscription, ñan incontrovertible official document, even though it is dehors the record, may be considered on appeal for the purpose of sustaining a judgment.ò Interrante v. Rozzi, 26 A.D.3d 704, 705 (3rd Dept. 2006).

One document which poses particular problems when compiling the Record on Appeal is a memorandum of law which was submitted to and considered by the court below. Generally, since a memorandum of law contains ñunsworn allegations of fact é [that] are without probative value,ò it is not to be included in the Record on Appeal. *See* Byrd v. Roneker, 90 A.D.3d 1648, 1649 (4th Dept. 2011). An exception to this general rule exists when the inclusion of the memorandum of law is necessary to determine whether a particular issue has been properly preserved for review. Id.; *See also* Town of Claverack v. Brew, 277 A.D.2d 807, 808 n.1 (3rd Dept. 2000).

Settlement of Transcripts

As indicated above, if the Record on Appeal contains transcripts from proceedings in the Court below, the Record must also contain a stipulation or order settling the transcripts. (*See* § 800.5(a)(5)). The procedure for settling the transcript is contained in CPLR 5525 (c), which requires that the appellant, within 15 days of receiving the transcript, serve the transcript upon the opposing parties with any proposed corrections and amendments, as well as a notice that the transcripts will be deemed accepted if there is no response within 15 days.

If the parties agree to the accuracy or proposed corrections / amendments, the parties can execute a stipulation reflecting their agreement. Alternatively, if the opposing party does not object to the proposed corrections / amendments within 15 days, the transcript with the proposed changes will be deemed correct. In such an instance, the appellant shall include in the Record on Appeal an affirmation certifying compliance with the statutory procedure and the absence of any objections. Finally, if the parties are unable to agree on the proposed changes, either party may submit the transcript and the proposed corrections / amendments to the judge who oversaw the proceedings for certification of their accuracy.

Certification of the Record on Appeal

As indicated above, the Third Departmentôs rules require that the Record on Appeal contain an appropriate certification or stipulation. (*See* § 800.5(a)(7)). More specifically, § 800.7(a) of the Third Departmentôs rules requires that the record be certified by either:

(1) A certificate of appellantôs or petitionerôs attorney pursuant to CPLR 2105;

(2) A certificate of the proper clerk; or

(3) A stipulation in lieu of certification pursuant to CPLR 5532.

APPENDIX

Contents Of An Appendix

Where an appeal involves only a narrow issue, and large portions of the Record on Appeal are not relevant to the determination of that particular issue, the appellant may choose to pursue the appeal via the Appendix method. In such case, the Appendix should contain only those portions of the Record on Appeal which are necessary to consider the questions / issues raised in the appeal. *See* CPLR 5528(a)(5).

Although, like the Record on Appeal, the CPLR contains general requirements for an Appendix (*see* CPLR 5528(a)(5) and 5529), the specific contents required to be included in the Appendix are set forth in the Appellate Divisionôs rules. For example, the Appellate Division - Third Department requires that the Appendix contain:

- Notice of appeal (§ 800.8(b)(1));
- Judgment, decree or order appealed from (§ 800.8(b)(2));
- Decision and opinion of the court or agency, and report of a referee, if any (§ 800.8(b)(3));
- Pleadings, if their sufficiency, content or form is in issue or material (§ 800.8(b)(4));
- Relevant excerpts from transcripts or testimony or averments in motion papers upon which appellant relies or has reason to believe respondent will rely (§ 800.8(b)(5));
- Charge to the jury (if applicable) (§ 800.8(b)(6)); and
- Copies of critical exhibits, including photographs[2], to the extent practicable (§ 800.8(b)(7)).

Both the CPLR and the Appellate Division rules contemplate that the Appendix should contain materials that the appellant reasonably assumes will be relied upon by the respondent. (*See* CPLR 5528(a)(5); § 800.8(b)(5)). In fact, in the event that a party fails to comply with this requirement, the Third Departmentôs rules authorize a party to move to compel the filing of a further appendix. (See § 800.8(c)). Alternatively, both the CPLR and the Appellate Division rules permit the respondent to submit their own appendix along with their respondentôs brief. (*See* CPLR 5528(b); § 800.8(c)).

Even if the appellant chooses to proceed with their appeal via the Appendix method, they

[2] If the motion papers or exhibits in the proceedings below contained color photographs, the photographs included in the Record / Appendix should be identical color photographs.

must still file a single copy of the Record on Appeal. (*See* § 800.7(b)). This single copy must comply with the content and certification requirements addressed above. (*See* Id.).

FILING REQUIREMENTS

The Appellate Divisionôs rules also dictate the necessary filing requirements. For example, in the Appellate Division ï Third Department, the appellant must file an original and nine copies of the Record on Appeal when proceeding via the reproduced full record method. (*See* § 800.4(a)). In addition, the appellant must also serve one copy of the Record on Appeal upon each adverse party. (Id.).

Conversely, when proceeding via the Appendix method, appellant need only file a single copy of the Record on Appeal and serve one copy upon each adverse party. (*See* § 800.4(b)). Alternatively, in lieu of serving a copy of the Record on Appeal upon each adverse party, appellant may elect to serve notice upon each adverse party that the single copy Record on Appeal has been filed in the Appellate Division Clerkôs Office. (Id.). Yet another option authorizes appellant to serve the Single Copy of the Record directly upon the respondent, who is then required to file the single copy of the Record on Appeal in the Appellate Division Clerkôs Office within 30 days of service. (Id.). In either of these instances, appellant must file ten copies of their Appendix, along with their brief, and serve two copies upon each respondent. (*See* § 800.9(a)).

PERFECTING THE APPEAL -PART I

THE RECORD ON APPEAL AND APPENDICES FORMS

by

GEORGE J. HOFFMAN, JR., ESQ.

Allen & Desnoyers, LLP
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PERFECTING THE APPEAL – PART I
The Record On Appeal And Appendices

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FORMS

1. Record on Appeal Cover Page.
2. Sample Statement Pursuant to CPLR § 5531.
3. Sample Table of Contents for Record on Appeal (Non-Trial).
4. Sample Table of Contents for Record on Appeal (Appeal from Trial).
5. Sample CPLR 2105 Certification.
6. Sample Stipulation Pursuant to CPLR 5532.
7. Sample Form of Stipulation As To Exhibits.
8. Stipulation As To Correctness of Transcripts.
9. Appellant's Appendix Cover Page.
10. Sample Appendix Index.

503500

Albany County Clerk
Index No. 2247-06

STATE OF NEW YORK **SUPREME COURT**
APPELLATE DIVISION **THIRD DEPARTMENT**

JOHN SMITH,

Plaintiff-Respondent,

-against-

MARY DOE,

Defendant,

and

FRANK JONES,

Defendant-Appellant.

****

RECORD ON APPEAL

****

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(518) 555-1212

Counselor & Counselor, P.C.
(Mary J. Counselor, Esq., of Counsel)
Attorneys for Respondent John Smith
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SAMPLE STATEMENT PURSUANT TO CPLR § 5531

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION – THIRD DEPARTMENT

In The Matter Of The Application Of The
STATE OF NEW YORK,

Respondent, **Appeal No.: 511720**

-against-

JOHN SMITH,

Appellant.

---

1. The Index Number in the trial court was _____.

2. The original parties in this matter were the State of New York and John Smith[1].

3. The action was commenced in Supreme Court, _____ County. Subsequently, the action was removed to Supreme Court, _____ County, pursuant to Mental Hygiene Law § 10.06 (b).

4. This action was commenced by the filing of a Petition For Civil Management Pursuant to Mental Hygiene Law Article 10, via Order to Show Cause, on June 19, 2009.

5. The object of the action was to civilly confine appellant pursuant to the provisions of Article 10 of the Mental Hygiene Law.

6. This appeal is from each and every part of an Order of _____ County Supreme Court (_____, J.), dated December 23, 2010 and entered on December 29, 2010, directing that appellant be confined pursuant to Law.

7. This appeal is prosecuted by the Appendix method.

---

[1] Pursuant to this Court's Decision and Order on Motion, dated March ____, 2011, appellant was granted permission to proceed anonymously.

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(If the exhibit was NOT Admitted into Evidence - it should not be reproduced in record)

STIPULATION DISPENSING WITH REPRODUCTION OF EXHIBITS .....
STIPULATION AS TO TRIAL TRANSCRIPT .....
CERTIFICATION AS TO CORRECTNESS OF RECORD .....

Sample CPLR 2105
CERTIFICATION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION THIRD DEPARTMENT

JOHN SMITH,

Plaintiff-Respondent,

v

CPLR 2105
CERTIFICATION

MARY DOE,

Defendant,

and

FRANK JONES,

Defendant-Appellant.

I, John P. Attorney, an attorney admitted to practice in the courts of the State of New York and attorney for appellant herein, hereby certify, pursuant to CPLR 2105, that I have compared the foregoing papers constituting the Record on Appeal with the originals now on file in the office of the Clerk of the County of Albany and have found them to be a true and complete copy thereof.

Dated: June 20, 2006

John P. Attorney, Esq.
Attorney for Appellant Frank Jones

Sample Stipulation Pursuant to CPLR 5532
(Re: Pleadings, Transcript & Exhibits)

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

JOHN SMITH,

Plaintiff-Respondent,

v

STIPULATION

MARY DOE,

Defendant,

and

FRANK JONES,

Defendant-Appellant.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the foregoing are correct and complete copies of all pertinent papers in this action; and that settlement of the transcript and certification of the record are hereby waived and that any exhibits received in evidence, omitted from the record, shall be filed in the Appellate Division by the parties upon the filing of their briefs.

Dated: June 20, 2006

John P. Attorney, Esq.
Attorney for Appellant Frank Jones

Dated: June 27, 2006

Mary J. Counselor, Esq.
Attorney for Respondent Jones Smith

SAMPLE FORM OF STIPULATION AS TO EXHIBITS WHEN OMITTED, BUT RELEVANT TO APPEAL

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION THIRD DEPARTMENT

[TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the reproduction, in the Record on Appeal, of all [or certain] of the exhibits be and the same is hereby dispensed with.

That any of the parties may refer to the exhibits in brief or argument as if they were fully included in the Record on Appeal.

The said exhibits are as follows:

Plaintiff's (number and describe in detail)

Defendant's (number and describe in detail)

AND IT IS FURTHER STIPULATED AND AGREED that such exhibits are to be filed contemporaneously with the filing of the Record on Appeal.

Dated:

_____
Attorney for Appellant

Dated:

_____
Attorney for Respondent

STIPULATION AS TO CORRECTNESS OF TRANSCRIPTS

Supreme Court Appellate Division
State of New York Third Judicial Department

TITLE

_____

IT IS HEREBY STIPULATED by and between the respective parties that the transcript contained in the record on appeal, as certified correct by the court reporter, together with the proposed amendments made by the parties, if any, are correct and complete.

DATED:

_____
Attorney for Appellant

DATED:

_____
Attorney for Respondent

USE WITH CPLR 2105 CERTIFICATION WHEN PERFECTING BY FULL REPRODUCED RECORD METHOD

Appeal #: 511720

NEW YORK STATE SUPREME COURT

APPELLATE DIVISION – THIRD DEPARTMENT

In The Matter of the STATE OF NEW YORK,

Respondent,

-against-

JOHN SMITH,

Appellant,

APPELLANT'S APPENDIX

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518.426.2288

SAMPLE APPENDIX INDEX

Matter of the Application of the State of New York v. John Smith
Appeal #: 511720

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GENERAL MOTION PRACTICE

by

JAMES S. RANOUS, ESQ.

Deputy Clerk of the Court
New York State Supreme Court
Appellate Division Third Department
Albany

GENERAL MOTION PRACTICE

1. Making a motion

    a. Be aware of $45 filing fee for making a motion or cross motion in the Appellate Division.

    b. Pursuant to 22 NYCRR 130-1.1-a, motion is to be signed by an attorney.

    c. § 800.2 of the Rules of Practice

CIVIL APPEALS

1. Orders to show cause

    a. When to use an order to show cause as opposed to a notice of motion

        1. To bring on a motion

        2. To commence a proceeding

        3. Use only when absolutely necessary

    b. Procedure for getting an order to show cause signed by a Justice

        1. When Court is sitting

        2. When Court is not sitting

        3. *Ex parte* or not?

    c. Preferred form of order to show cause in Third Department

1. Getting form of proposed order to show cause approved by a Motions Department attorney

d. Procedure following presentation of order to show cause to a Justice

1. Filing all papers (and filing fee) with the Clerk's office

2. No oral argument on the motion's return date

2. Motions for stays

a. First determine whether a statutory stay is available pursuant to CPLR 5519 (a).

b. Determine if you are asking for more than a stay of a proceeding to enforce the order on appeal. If so, you may need a preliminary injunction pending appeal pursuant to CPLR 5518.

c. Stays of Family Court orders are obtained pursuant to Family Court Act §1114.

3. Motions pursuant to § 800.12

a. Nine months from date of notice of appeal, not date of filing of notice of appeal

4. Motions to dismiss on grounds other than failure of prosecution

a. Failure to timely file and serve notice of appeal

1. CPLR 5520

b. Mootness

c. Not an appealable order

1. Denial of reargument or resettlement

d. An appeal will not be dismissed on a motion on the ground that the appeal is frivolous.

5. Motions to vacate defaults

a. Generally, these types arise when there is a motion to dismiss an appeal and the appellant defaults.

b. In the motion to vacate, you should address the reason or excuse for the default and then go on to discuss the issues raised on the motion to dismiss.

6. Motion to strike record and brief

a. Record on appeal should only contain materials that were before the Court when the order or judgment on appeal was issued.

b. Materials outside the record on appeal should not be attached to the brief unless you are requesting the Court to take judicial notice of them.

c. Motion should be made expeditiously.

d. If it appears to be an unintentional error in the record, it is suggested you speak to appellant's attorney before making the motion.

e. A copy of the record and brief should not accompany the motion papers.

7. Motions for leave to appeal

a. To the Appellate Division

1. Most orders are appealable as of right (CPLR 5501).

2. Some orders are not appealable by right or permission.

3. Cases originating in local courts, such as small claims courts

4. Orders as opposed to judgments in Article 78 proceedings

5. CPLR 5701 (c) -- one-judge motions

6. Grounds for the motion

b. To the Court of Appeals

1. What should accompany the motion

2. Full court motion

3. Making the motion in Appellate Division or Court of Appeals

a. Final orders -- 2 bites of the apple

b. Non-final orders

4. Grounds for the motion

a. Different showing for appeals from final order and non-final orders

8. Consolidation

a. Question is really whether appeals should be heard together.

9. Permission to file a brief *amicus curiae*

a. Time motion should be made

b. § 500.11 (e) of the Court of Appeals Rules sets forth the general grounds for obtaining such relief.

10. Withdrawing an appeal

11. How to obtain a preference

12. How to obtain an adjournment

CRIMINAL APPEALS

1. Brief note on taking an appeal to Appellate Division from a judgment of conviction

   a. Obligations of an attorney upon sentencing in a criminal case (*see* 22 NYCRR 821.2)

SAMPLE ORDER TO SHOW CAUSE CONTAINING TEMPORARY RELIEF AND BRINGING ON MOTION ONLY

by

JAMES S. RANOUS, ESQ.

Deputy Clerk of the Court
New York State Supreme Court
Appellate Division Third Department
Albany

SAMPLE ORDER TO SHOW CAUSE CONTAINING TEMPORARY RELIEF AND BRINGING ON MOTION ONLY

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

JOE PLAINTIFF,
Appellant (or Respondent),

v

MARY DEFENDANT,
Respondent (or Appellant).

ORDER TO SHOW CAUSE

Upon the affidavit of Joe Plaintiff (or Mary Defendant), the plaintiff (or defendant) in the above matter, and upon the exhibits annexed thereto,

LET the defendant (or the plaintiff) in this matter show cause before this Court on the _____ day of _____, 201_ at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be granted staying the order of _____ Court, _____ County, entered _____ __, 201_, pending determination of the appeal that has been taken from such order, and for such other and further relief as this Court may deem just and appropriate. Sufficient reason appearing therefore, it is

ORDERED that the above-referenced order of _____ Court is hereby stayed pending determination of the motion brought on by this order to show cause, and it is further

ORDERED that personal or overnight mail service of a copy of this order to show cause and the papers upon which it is granted upon the attorney for defendant (or plaintiff) on or before the _____ day of _____, 201_ shall be deemed good and sufficient service thereof, and it is further

ORDERED that the motion brought on by this order to show cause shall not be orally argued unless counsel are notified to the contrary by the Clerk of the Court.

DATED:_____, New York
_____ __, 201_

_____
HONORABLE XXXXXXXXXXX
Associate (or Presiding) Justice
Appellate Division,
Third Judicial Department

SAMPLE ORDER TO SHOW CAUSE CONTAINING TEMPORARY RELIEF, COMMENCING ARTICLE 78 PROCEEDING AND BRINGING ON MOTION

by

JAMES S. RANOUS, ESQ.

Deputy Clerk of the Court
New York State Supreme Court
Appellate Division Third Department
Albany

SAMPLE ORDER TO SHOW CAUSE CONTAINING TEMPORARY RELIEF, COMMENCING ARTICLE 78 PROCEEDING AND BRINGING ON MOTION

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of JOE PETITIONER,
Petitioner,

v

MARY RESPONDENT, as Commissioner of XXXXXXXXXXXX,
Respondent.

ORDER TO SHOW CAUSE

Upon the petition of Joe Petitioner, the petitioner in the above matter, verified on the ____ day of _____, 2000_, and the affidavit of said petitioner (and/or affirmation of his attorney) duly sworn to (or dated) the ____ day of _____, 200_, and upon the exhibits annexed thereto,

LET Mary Respondent, the respondent in this matter, show cause before this Court on the _____ day of _____, 200_ at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why a judgment should not be granted pursuant to CPLR article 78 annulling the _____ (*Describe administrative determination sought to be reviewed.*) and why an order should not be granted staying the _____ (*Describe administrative determination.*) pending determination of this proceeding, and for such other and further relief as this Court may deem just and appropriate. Sufficient reason appearing therefore, it is

ORDERED that the above-referenced _____ (*Describe administrative determination.*) is hereby stayed pending determination of the motion brought on by this order to show cause, and it is further

ORDERED that personal or overnight mail service of a copy of this order to show cause and the papers upon which it is granted upon respondent and upon the office of the Attorney General (or the attorney for respondent) on or before the _____ day of _____, 200_ shall be deemed good and sufficient service thereof, and it is further

ORDERED that the motion brought on by this order to show cause shall not be orally argued unless counsel are notified to the contrary by the Clerk of the Court.

DATED:_____, New York
_____ __, 200_

_____
HONORABLE XXXXXXXXXXX
Associate (or Presiding) Justice
Appellate Division,
Third Judicial Department

NOTICE OF INTENTION WITH RESPECT TO APPEAL

by

JAMES S. RANOUS, ESQ.

Deputy Clerk of the Court
New York State Supreme Court
Appellate Division Third Department
Albany

THE PEOPLE OF THE STATE OF NEW YORK
v

NOTICE OF INTENTION WITH RESPECT TO APPEAL

TO: COUNTY COURT, ...COUNTY:

My counsel, ..., has advised me of my right to appeal from the judgment rendered ....., convicting me of the crime of ..... and sentencing me to .....

He has also advised me that my appeal must be taken within thirty (30) days from the judgment, explained the manner of instituting an appeal, indicated that he will file a notice of appeal on my behalf if so requested and explained my right to request the appellate court to assign counsel to prosecute my appeal.

I do / do not wish to appeal.
(circle applicable word or words)

Dated: .....

.....
Defendant

In presence of :

.....
Attorney for defendant

NOTICE TO DEFENDANT

Pursuant to § 821.2 of the Appellate Division, Third Department Rules of Practice, it is the duty of counsel, immediately upon sentencing, to advise the defendant in writing of his right to appeal, to ascertain whether defendant wishes to appeal and, if so, to serve and file the necessary notice of appeal.

APPEALS TO THE APPELLATE DIVISION,

FOURTH DEPARTMENT

by

HON. FRANCES E. CAFARELL

Clerk of the Court, New York State Supreme Court
Appellate Division Fourth Department
Rochester

APPEALS TO THE APPELLATE DIVISION, FOURTH DEPARTMENT

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APPEALS TO THE APPELLATE DIVISION, FOURTH DEPARTMENT

I. TAKING AN APPEAL

A. Notice of Appeal. Taking an appeal consists of filing and serving the notice of appeal. The taking of an appeal is a prerequisite to appellate jurisdiction, and the procedures are statutory. The Court's rules, therefore, do not address the procedures for taking an appeal.

B. Filing of Notice of Appeal. Notices of appeal are not filed with the Appellate Division. They should be filed with the Clerk of the Court in which the action was commenced. The County Clerk is the Clerk of the County and Supreme Courts.

C. Transmittal of Notice of Appeal. In some instances, such as under the Family Court Act or the CPL, a notice of appeal will be forwarded to the Appellate Division. However, the taking of an appeal will not result in any action on the part of the Appellate Division; the burden of pursuing the appeal falls upon the parties.

D. Time to Take Appeal. The time to take an appeal, generally 30 days, begins to run upon service of the underlying order with notice of entry. The time to take an appeal operates as a statute of limitations and cannot be extended without statutory authorization.

II. PERFECTING AN APPEAL

A. HOW TO PERFECT AN APPEAL

1. General Rule. Unless otherwise provided by statute, rule or Court order, an appeal is perfected by filing the original stipulated or settled record and 10 copies thereof; 10 copies of a brief; all exhibits; proof of service of two copies of the record and brief; and payment of the filing fee of $315 (22 NYCRR 1000.3 [b]). No filing fee is required in a criminal matter or in an appeal when the Court has granted poor person relief.

2. Poor Person Appeal - Civil. When poor person relief has been granted in a civil matter, an appeal is perfected by filing the original stipulated or settled record, 10 copies of a brief, exhibits and proof of service of one copy of the record and brief (22 NYCRR 1000.3 [c] [2]).

   a. Exhibits in Family Court appeals. Confidential exhibits in Family Court appeals may be delivered directly to the Appellate Division, either at the request of the parties or the Court, as appropriate.

3. Poor Person Appeal - Criminal. When poor person relief has been granted in a criminal matter, an appeal is perfected by the filing of 10 copies of a brief, one copy of the criminal appendix, exhibits, the certified transcript of the trial or hearing, the presentencing investigation report and proof of service of one copy of the brief and appendix.

4. Prior Orders - Copies of any prior order affecting the appeal should be filed with the record.

5. Date of Filing. A filing is accomplished by the actual delivery of papers to the courthouse in Rochester.

B. TIME LIMITS

1. 60-Day Rule. 22 NYCRR 1000.2 (b) provides that an appeal must be perfected within 60 days after the notice of appeal is served on the respondent.

   a. Sanction for failure to comply is not automatic dismissal of appeal; the appeal is subject to dismissal on motion for failure to timely perfect (*see* 22 NYCRR 1000.2 [b];1000.12 [a]; 1000.13 [e]).

   b. 22 NYCRR 1000.13 (e) provides that, if the motion is not answered, the appeal is dismissed by default. If an answer is filed, a conditional order of dismissal is entered, which establishes a deadline (generally 30 to 60 days).

2. Nine-Month (Abandonment) Rule. 22 NYCRR 1000.12 (b) provides that a civil appeal must be perfected within nine months from the date of service of the notice of appeal or the appeal is deemed abandoned and dismissed. The rule is self-executing. Records are examined for

compliance and, if the record has been submitted more than nine months following service of the notice of appeal, the record is rejected and the party or attorney is advised that the appeal has been deemed abandoned and dismissed and that a motion may be made to vacate the dismissal (*see* 22 NYCRR 1000.13 [g]).

3. Family Court Appeals. 22 NYCRR 1000.2 (c) (1) provides that appeals from Family Court orders in which the Appellate Division has assigned counsel must be perfected within 60 days of receipt of the transcript pursuant to Family Court Act § 1121 (7).

4. Criminal Appeals. 22 NYCRR 1000.2 (c) (2) provides that criminal appeals in which the Appellate Division has assigned counsel must be perfected within 120 days following receipt of the transcript (*see also* 22 NYCRR 1021.1 [a] [3]).

5. Briefs. The time to file and serve responsive and reply briefs is measured from the time of service of the prior brief, not from receipt of a brief. Deadlines are extended five days if the service was by mail.

   a. Respondent's briefs are due 30 days after service of the appellant's brief.

   b. Reply briefs are due 10 days after service of the respondent's brief.

   c. Surreply briefs are due 10 days after service of the reply brief. The contents of a surreply brief are limited to matters raised on a cross appeal, and, absent a cross appeal, a surreply brief is not permitted.

6. Multiple Appeals. In a matter involving multiple appeals, by the same or different parties, the deadlines for perfecting the appeals run separately. When a matter involves multiple appellants, the deadlines to file respondent's briefs run separately. When a matter involves multiple respondents, the deadlines for filing reply briefs run separately.

C. RECORD ON APPEAL (22 NYCRR 1000.4)

1. Complete Record. The first step in perfecting an appeal is to prepare the complete record. The complete record does not mean the original papers filed in the Clerk's Office, but instead means the volume(s) containing

copies of necessary papers, as stipulated to by the attorneys or settled by the court from which the appeal is taken (*see* 22 NYCRR 1000.4 [a]) and the original stipulation to the record or the original order settling the record or a certified copy thereof.

2. Contents of Record. 22 NYCRR 1000.4 (a) (2) outlines the contents of the complete record on appeal.

   a. Whether the appeal is taken from an order or a judgment, the record should include a table of contents and a statement pursuant to CPLR 5531. Additionally, the record should include the following documents in the following order:

      i. the notice of appeal with proof of service and filing;

      ii. the order or judgment from which the appeal is taken;

      iii. the decision, if any;

      iv. the judgment roll, if any;

      v. the pleadings;

      vi. the corrected transcript, if any;

      vii. all necessary and relevant motion papers; and

      viii. all necessary and relevant exhibits, to the extent practicable.

   b. If the appeal is taken from a judgment, the record should also include any reviewable order.

   c. Memoranda of law and oral argument on motions constitute legal argument and generally are not included in the record on appeal. They may be included in the record on appeal in some circumstances, however, such as where preservation for review is at issue (*see e.g. Matter of Lloyd v Town of Greece Zoning Bd. of Appeals* [appeal No. 1], 292 AD2d 818, lv dismissed in part and denied in part 98 NY2d 691, rearg denied 98 NY2d 765).

d. If a party is uncertain as to what papers should be included in the record on appeal, reference should be made to the order or judgment. The appealable document should recite all of the papers that should be included in the record. Accordingly, when preparing an order or judgment for signature, be certain that it accurately recites the papers that were before the court.

e. If the parties are unable to agree regarding the contents of the record, it is the appellant's obligation to move before the trial court for an order settling the record. The order settling the record should state exactly what papers constitute the record on appeal.

f. The best procedure to follow is to prepare a proposed record and a proposed stipulation and send it to opposing counsel for review. The record should be reproduced only after the stipulation is signed.

i. Do not wait until the "eleventh" hour to send a record to your opponent for stipulation.

ii. There is no obligation on a respondent to sign a stipulation to the record. An appellant should therefore allow sufficient time to move for an order of settlement.

g. In a criminal matter, the Court is not bound by the parties' stipulation and may consider such material as it considers necessary and appropriate.

3. Form of the record.

a. The record should be bound on the left side. Avoid metal fasteners with sharp points or edges (*see* 22 NYCRR 1000.4 [a] [3] [i]).

b. Use white, opaque, unglazed paper, 8½ by 11 inches. Print must be at least 11-point size (*see* 22 NYCRR 1000.4 [a] [3] [ii]). Do not use the traveling transcript form or any other method that reproduces multiple transcript pages on a single 8½ by 11-inch page.

c. The cover of the record shall be white and shall contain the following information:

i. title;

ii. names and addresses of attorneys;

iii. index number, claim number or indictment number; and

iv. Appellate Division docket number, if one has been assigned (*see* 22 NYCRR 1000.4 [a] [3] [iii]).

d. Include a table of contents listing, and briefly describing, all papers in the complete record and listing all exhibits, indicating on which page of the record each exhibit was introduced and the page of the record where the exhibit is reproduced (*see* 22 NYCRR 1000.4 [a] [3] [iv]).

e. The record shall be consecutively paginated. The subject matter of each page of the record shall be stated at the top of the page (*see* CPLR 5526; 22 NYCRR 1000.4 [a] [3] [v]).

4. Companion Filings. In addition to the records and briefs, the parties may submit companion filings on interactive compact disk, read-only memory (CD-ROM) (*see* 22 NYCRR 1000.3 [h]).

5. Incomplete or Untimely Filings. A record that is not completely or timely will be rejected by the Clerk, as will any filing that does not comply with the rules, is illegible, or is otherwise unsuitable (*see* NYCRR 1000.3 [a]; 1000.4 [h]).

D. APPENDIX METHOD IN CIVIL APPEALS CPLR 5528 [a] [5]; 22 NYCRR 1000.3 [d]; 1000.4 [d])

1. One alternative to reproducing the entire record is to employ the appendix method. However, caution is recommended when using this method.

2. A party proceeding by the appendix method must file one complete stipulated or settled record, plus 10 copies of the brief and appendix, and must serve one copy of the complete record and two copies of the brief and appendix on opposing counsel.

3. The appendix must include all papers necessary for the Court to decide the arguments raised. It must include all portions of the transcript upon which appellant relies and can reasonably expect that the respondent will rely (*see* CPLR 5528 [a] [5]; 22 NYCRR 1000.4 [d] [2]). Portions of transcript should not be misleading because of surrounding context. Briefs should contain references to the appendix and not to the original record. If it is necessary to refer to the original record, the appendix is incomplete.

4. The best example of an appropriate use of the appendix method is in a personal injury case in which liability but not damages, or damages but not liability, is in issue. The appendix would contain only those portions of the transcript relating to the arguments raised.

5. The appendix method may <u>not</u> be used in the following situations:

   a. If the issue raised is whether the verdict is against the weight of the evidence. The Court must search the entire record to determine this issue.

   b. To bring to the Court's attention papers that were not included in the stipulated record. Such an appendix is subject to a motion to strike by opposing counsel.

6. The parties may stipulate to a joint appendix (*see* 22 NYCRR 1000.4 [d] [2] [iv]).

7. There are several sanctions that may be imposed if an appendix is found to be inadequate:

   a. The Clerk may, and often will, reject it.

   b. The Court may simply dismiss the appeal.

   c. A respondent may print a separate appendix and seek costs (*see* CPLR 5528 [e]).

   d. The Court may order the appellant to print the entire record.

E. APPENDICES IN CRIMINAL APPEALS (22 NYCRR 1000.3 [c] [i]; 1000.4 [e] [1])

1. Appendices are required in criminal cases in which counsel has been assigned and should consist of the following documents in the following order:

   a. a statement pursuant to CPLR 5531;

   b. a copy of the notice of appeal with proof of service and filing;

   c. a copy of the certificate of conviction and the judgment from which the appeal is taken;

   d. a copy of the indictment, superior court information or other accusatory instrument;

   e. all motion papers and affidavits;

   f. exhibits (written and photographic) that are relevant and necessary to the determination of the appeal; and

   g. the original stipulation to the record or the original order settling the record or a certified copy thereof.

2. Copies of prior orders affecting the appeal should be filed with the appendix (*see* 22 NYCRR 1000.3 [c] [1]; 1000.4 [e] [1]).

F. BRIEFS (22 NYCRR 1000.4 [f])

1. The brief should be bound on the left side (*see* 22 NYCRR 1000.4 [f] [1]).

2. The printing in the brief must be <u>at least</u> 11-point size, double-spaced with one-inch margins (*see* 22 NYCRR 1000.4 [f] [2]).

3. Footnotes are <u>not</u> permitted (*see* 22 NYCRR 1000.4 [f] [2], [6]).

4. Citation to New York decisions shall be to the Official Reports. If no official citation is available for a decision, the citation used should be to the most available source (*see* 22 NYCRR 1000.4 [f] [7]).

5. The page limits are 70 pages for principal briefs and 35 pages for reply or surreply briefs (*see* 22 NYCRR 1000.4 [f] [3]).

6. Pursuant to 22 NYCRR 1000.4 (f) (4), the cover of a brief shall include the following information:

   a. the name, address and telephone number of the person submitting the brief;

   b. the lower court docket number, index number, motion number, indictment number or information number;

   c. the Appellate Division docket number, if one has been assigned; and

   d. in the upper right-hand corner, the name of the person requesting oral argument or submitting the brief and the time requested.

7. Pursuant to 22 NYCRR 1000.4 (f) (5), the cover of the brief shall be:

   a. blue for an appellant's or petitioner's brief;

   b. red for a respondent's brief;

   c. gray for a reply brief;

   d. yellow for a surreply brief;

   e. green for an amicus curiae brief; and

   f. in an appeal involving a party granted poor person relief, either white or the previously designated color.

8. Pursuant to 22 NYCRR 1000.4 (f) (6), a brief shall include, in the following order:

   a. a table of contents;

b. a table of citations;

c. a concise statement of questions involved, followed by answers given by lower court;

d. a concise statement of the nature of the matter and the facts necessary and relevant to the questions involved, with supporting page references; and

e. argument of the issues, divided into points by appropriate headings, distinctively printed.

9. Material may be appended to a brief only if it is contained in the record or it consists of reprinted case law, statutes or regulations.

10. The briefs must be signed (*see* 22 NYCRR 1000.16 [b]).

G. EXHIBITS (22 NYCRR 1000.4 [g])

1. Parties may stipulate that particular exhibits are not relevant or necessary to the determination of the appeal. Otherwise, all original exhibits must be filed (*see* 22 NYCRR 1000.4 [g] [1]).

2. Exhibits should be printed in the record, to the extent practicable (s*ee* 22 NYCRR 1000.4 [g] [2]).

3. It is the appellant's responsibility to file all exhibits at the time records and briefs are filed or, if some or all exhibits are in the control of a third party, to file a five-day written demand for the exhibits (*see* 22 NYCRR 1000.4 [g] [3]).

4. In a criminal appeal, in lieu of filing original physical exhibits, the appellant may file an original stipulation identifying the exhibits and their location and providing that they are available upon request by the Court.

5. When confidential or sealed material is involved, it may be separately delivered to the Court.

III. TRANSFERRED AND ORIGINAL PROCEEDINGS

A. PROCEEDINGS TRANSFERRED TO THE APPELLATE DIVISION (22 NYCRR 1000.8)

1. Upon an order of Supreme Court transferring a matter to the Appellate Division, the County Clerk will transfer its file, including the order of transfer, petition, answer, motion papers and transcript, if any. It is not necessary for the petitioner to prepare a record on review (*see* 22 NYCRR 1000.8 [a]).

2. The Clerk's Office will issue a scheduling order fixing a filing date for briefs. The failure of petitioner to file and serve briefs will result in the dismissal of the proceeding (*see* 22 NYCRR 1000.8 [b]).

3. Oral argument is not permitted on matters transferred pursuant to CPLR article 78 (*see* 22 NYCRR 1000.11 [c] [2]).

B. ORIGINAL PROCEEDINGS (22 NYCRR 1000.9)

1. Most typically, these involve Article 78 proceedings in the nature of prohibition or mandamus against Supreme Court justices. These are not treated like motions, but rather, are treated like appeals, which means that briefs may be filed and the proceedings are placed on the calendar for argument and submission.

2. Although not a motion, an original proceeding must have a return date, for scheduling reasons. The return date is any Monday and must fall not less than 25 days after service of the notice of petition and petition (*see* 22 NYCRR 1000.9 [a]).

3. File the original notice of petition and petition, 10 copies thereof and the filing fee (*see* 22 NYCRR 1000.9 [b]).

4. Proof of service of two copies of the notice of petition and petition shall be filed not later than 15 days after the expiration of the applicable statute of limitations (*see* 22 NYCRR 1000.9 [b] [2]).

5. The Clerk will issue a scheduling order for the filing and service of briefs, if any (*see* 22 NYCRR 1000.9 [c]). Although no briefs are required, a

party is not entitled to oral argument unless a brief is filed (*see* 22 NYCRR 1000.11 [a]).

IV. CALENDARING APPEALS AND PROCEEDINGS

A. COURT TERMS.

The Court is in session nine terms per year. The June term is reserved for submitted appeals, motions, bar admissions and disciplinary proceedings. The August term consists of Election Law appeals only. The Court sits in panels of 4 or 5 to hear oral argument. The identity of the members of the panel for a particular day is not released until the morning of that day.

B. CALENDAR.

1. Scheduling Orders. Once an appellant has perfected an appeal or a proceeding has been commenced or transferred to the Appellate Division, the Clerk's Office will issue a scheduling order, directing that an appeal or proceeding be placed on a calendar for the next available term and fixing a date for the filing of respondent's briefs (*see* 22 NYCRR 1000.10 [a], [b]).

    a. The date for respondent's briefs will be 30 days from the date of service of appellant's record and briefs (*see* 22 NYCRR 1000.2 [d]; 1000.10 [b]). The date in the scheduling order for a respondent's brief is confirmatory of the date compelled by service of an appellant's brief. Respondent may move for an extension of time to file a brief prior to the expiration of the deadline in the scheduling order (*see* 22 NYCRR 1000.10 [b]; 1000.13 [h]).

    b. A party unavailable for oral argument on a specific date, or dates, during the term, should notify the Clerk in writing, within 15 days of the date that the scheduling order was mailed (*see* 22 NYCRR 1000.10 [c]). The Clerk will attempt to accommodate any scheduling requests.

c. A motion to expedite an appeal or a proceeding may be made within 15 days of the date of mailing of the scheduling order. The motion must contain an affidavit setting forth compelling circumstances that require the appeal to be expedited (*see* 22 NYCRR 1000.10 [d]; 1000.13 [m]). A motion to expedite should not be made until the appeal is perfected or the proceeding has been filed with or transferred to the Appellate Division.

d. The Clerk prepares the calendars for each day of the Court term and notifies the parties or their attorneys of the date at least 20 days prior to the commencement of the term (*see* 22 NYCRR 1000.10 [e]).

2. Calendar Notice. Once the calendar is prepared, notices are mailed advising counsel of the scheduled date of argument. Once an appeal is placed on the calendar, adjournment is unlikely. Attorneys requesting alternate dates are usually advised either to submit the case or to ask another attorney to present the oral argument. Attorneys are advised to notify the Clerk's Office in writing prior to the respondents' filing deadline if they will be unavailable on a particular date.

C. ORAL ARGUMENT

1. Check In. Attorneys scheduled for oral argument must check in with the Clerk's Office prior to 10:00 a.m. on the day of oral argument. No more than one person shall be heard on behalf of any party. Argument is not permitted by a party who has not filed a brief, unless otherwise ordered by the Court (*see* 22 NYCRR 1000.11 [a]).

2. Argument Time. Requests for oral argument are made by indicating the amount of time requested on the cover of the brief. If no time is so indicated, the appeal will be deemed submitted (*see* 22 NYCRR 1000.11 [b]).

3. Rebuttal. The Court does not permit rebuttal argument (*see* 22 NYCRR 1000.11 [f]).

4. Post-Argument Submissions. Must be made within five business days of oral argument (*see* 22 NYCRR 1000.11 [g]). A form for such submissions is available on the Court's website (www.courts.state.ny.us/ad4).

5. Day Calendar. The Court's day calendar generally contains between 20 to 30 appeals. The Court convenes at 10:00 a.m. and immediately calls the first case. Thereafter, each case is argued or submitted in order until the calendar is concluded. If a case is called and the attorneys are not in the courtroom, the appeal is deemed submitted. The Court does not recess until the calendar is complete.

V. DECISIONS

A. **Release Dates.** Generally, decision-orders are released two weeks after the conclusion of the term, at 3:00 p.m. (s*ee* 22 NYCRR 1000.17 [e]).

B. **Transmittal by Court.** Decision-orders are prepared by the Clerk's Office and mailed to all parties to an appeal or proceeding (*see* 22 NYCRR 1000.17 [a]). The prevailing party must serve losing parties in order to commence the time within which to move for leave to appeal (*see* 22 NYCRR 1000.17 [b]). It is important to note that the mailing of orders by the Clerk's Office constitutes notification, not service.

C. **Availability of Decisions.** The Court's decision list is available on the Court's website at www.courts.state.ny.us/ad4.

VI. WITHDRAWAL OR SETTLEMENT (22 NYCRR 1000.18)

A. **Withdrawal.** To withdraw an appeal or proceeding, the parties must submit a written stipulation of discontinuance. An appeal or proceeding may be withdrawn and discontinued at any time prior to its determination. The Court shall be given prompt notice when the parties have resolved to withdraw a matter (*see* 22 NYCRR 1000.18 [b]).

B. **Settlement.** When an appeal or proceeding, or any issue therein, has been resolved by settlement, the parties shall immediately notify the Court. A party who, without good cause shown, fails to notify immediately the Court of a

settlement may be subject to sanctions pursuant to 22 NYCRR 1000.16 (a) (*see* 22 NYCRR 1000.18 [c]).

C. **Incapacity.** In the event that an appeal cannot be placed on the Court's calendar due to the death or bankruptcy of a party, the Court shall be notified immediately, under penalty of possible sanctions (*see* 22 NYCRR 1000.18 [c]).

VII. SANCTIONS (22 NYCRR 1000.16)

A. Sanctions may be applied to attorneys or parties who fail to comply with a rule or order of this Court or who engage in frivolous conduct as defined in 22 NYCRR 130-1.1 (c).

B. The imposition of sanctions may be made upon motion or upon the Court's own initiative, after a reasonable opportunity to be heard.

C. The Court may impose sanctions upon a written decision setting forth the conduct and the reasons that sanctions are appropriate.

Prepared by: Frances E. Cafarell, Esq., Clerk of the Court

October 1, 2013

STAYS IN CIVIL APPEALS

by

HON. FRANCES E. CAFARELL

Clerk of the Court, New York State Supreme Court
Appellate Division Fourth Department
Rochester

STAYS IN CIVIL APPEALS

I. Stays of all proceedings in a case (CPLR 2201):

A. May be granted by "the court in which an action is pending";

B. This means the court of original instance (*see Schwartz v New York City Hous. Auth.,* 219 AD2d 47, 48 [1996]; *Rhodes v Mosher*, 115 AD2d 351 [1985]).

II. Stays of all proceedings to enforce the order or judgment appealed from (CPLR 5519):

A. Stays only "proceedings to enforce":

1. A trial is not a proceeding to enforce an order denying a summary judgment motion, even if the order also directs the parties to proceed to trial (*see Matter of White v City of Jamestown*, 242 AD2d 979, 980 [1997]; *Baker v Board of Educ. of W. Irondequoit School Dist.*, 152 AD2d 1014 [1989]), but an arbitration can be stayed on appeal from an order denying an application to stay the arbitration pursuant to CPLR 7503 (*see Matter of Albany Port Dist. Commn. v Edward B. Fitzpatrick Jr. Constr. Co.*, 115 AD2d 898 [1985]).

2. Obligation to file and serve an answer is not stayed on appeal from order denying a motion to dismiss (*see Rotondo v Reeves*, 192 AD2d 1086 [1993], *lv dismissed* 82 NY2d 706 [1993]; *Spillman v City of Rochester,* 132 AD2d 1008 [1987], *cf. Eastern Paralyzed Veterans Assn. v Metropolitan Transp. Auth.,* 79 AD2d 516 [1980] [First Department stayed obligation where order denying motion to dismiss also directed that answer be served within 15 days]).

3. Motion for class certification is not stayed on appeal from order denying motion to dismiss (*see Fassl v New York State Dept. of Taxation & Fin.*, 159 AD2d 1029 [1990]).

4. Obligation to serve and file notice of claim is not stayed when municipality appeals from order granting leave to file late notice (*see Dublanica v Rome Hosp./Murphy Mem. Hosp.*, 126 AD2d 977 [1987], *lv denied* 70 NY2d 605 [1987]), nor is obligation to serve summons and complaint (*see Ramunno v County of Westchester*, 224 AD2d 403, 403-404 [1996], *lv denied* 88 NY2d 803 [1996]).

5. Trial on damages is not stayed on appeal from judgment on liability (*see Young v State of New York*, 213 AD2d 1084 [1995]).

6. If order is "self-executing," i.e. no proceedings are necessary to enforce it, no stay is available under 5519 (*see Crumb v Rodgers,* 234 AD2d 1015 [1996]; *see also Matter of Pickerell v Town of Huntington*, 219 AD2d 24, 25 [1996]).

Similarly, some forms of injunctive relief can be stayed under 5519 while others cannot (*see Matter of M.S.B.A. Corp. v Markowitz*, 23 AD3d 390, 391 [2005]; *Karasek v Hallenbeck*, 185 AD2d 719 [1992]).

B. Automatic Stays (CPLR 5519 [a] and [b]):

1. Available to State or political subdivision under 5519 (a) (1).

2. Available to any party under 5519 (a) (2) - (7) upon compliance with conditions, generally the giving of an undertaking. Other requirements for undertaking are set forth in CPLR article 25.

3. If party is insured, it can get automatic stay up to policy limits if insurer gives undertaking pursuant to 5519 (b).

C. Discretionary stays (CPLR 5519 [c]):

1. Can be granted by either court of original instance or appellate court.

2. Can be made conditional, e.g. upon filing of a bond (*see Lancaster v Kindor*, 64 NY2d 1013 [1985]).

D. Vacating automatic stay: per CPLR 5519 (c), only appellate court can do so (*see McLaughlin v Hernandez*, 4 Misc 3d 964, 969 [2004]).

E. Continuation of stay (CPLR 5519 [e]):

1. If order affirmed or modified an appeal, stay continues for five days after service of order of affirmance/modification with notice of entry. If party takes further appeal or moves for leave to appeal within those fives days, stay continues until further appeal or motion is determined.

2. If party does neither within five days, can still obtain a new automatic stay (or move for a discretionary stay?) thereafter (*see Summerville v City of New York*, 97 NY2d 427 [2002]).

III. Inherent power to stay:

A. "Supreme Court has inherent power in a proper case to restrain the parties before it from taking action which threatens to defeat or impair its exercise of jurisdiction" (*Matter of Schneider v Aulisi*, 307 NY 376, 386 [1954]).

B. This power can be used if a stay is not otherwise available under the CPLR (*see Matter of Pokoik v Department of Health Servs. of County of Suffolk*, 220 AD2d 13, 15-16 [1996]; *Schwartz*, 219 AD2d at 48-49).

C. Examples:

1. Stay of criminal trial pending determination of motion to inspect grand jury minutes and dismiss indictment (*Schneider*, 307 NY at 384).

2. Stay of order declaring Civil Rights Law § 52 unconstitutional and allowing audiovisual coverage of criminal trial pending determination of original CPLR article 78 proceeding by the criminal defendant seeking writ of prohibition against enforcement of the order (*Matter of Santiago v Bristol*, 273 AD2d 813 [2000], *appeal dismissed* 95 NY2d 847 [2000], *lv denied* 95 NY2d 848 [2000]).

3. Stay of civil trial where insurer is receivership had been granted an injunction by court of coordinate jurisdiction against all proceedings involving its insureds (*Rapone v Waste Mgt. of N.Y.,* Docket No. CA 02-00755 [unpublished order entered Aug. 27, 2002]).

IV. Bankruptcy stay (11 USC § 362):

A. Stays all proceedings against that party (*see Warfield v Terry*, 238 AD2d 765 [1997]; *Gianniny v Gianniny*, 207 AD2d 1037 [1994]).

B. Only protects debtor and those other parties obligated to indemnify it, not necessarily other parties in multi-party appeal (*see Howell v New York Post Co.*, 81 NY2d 115, 118 n 1 [1993]; *Murnane Assoc. v Harrison Garage Parking Corp.*, 217 AD2d 1003 [1995]; *Central Buffalo Project Corp. v Edison Bros. Stores*, 205 AD2d 295, 297 [1994]).

FOURTH DEPARTMENT MOTION PRACTICE

BY

IVAN E. LEE, ESQ.

Principle Appellate Court Attorney (Civil Motions) Appellate Division, Fourth Department
Rochester

FOURTH DEPARTMENT MOTION PRACTICE

Submitted by Ivan E. Lee
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I. MOTION PAPERS (22 NYCRR 1000.13)

Persons seeking relief from this Court may do so either by submitting a formal motion on notice or by proceeding by an order to show cause (22 NYCRR 1000.13).

A. Notice of Motion (Rule 1000.13 [a])

1. Return Date: any Monday except a holiday (Rule 1000.13 [a] [1] [I]).

2. Sufficient Notice: 8 days, plus one for overnight mail, or plus 5 for regular mail (Rule 1000.13 [a] [2]).

3. Cross Motions: 4 days before return date, and shall be served either personally or by overnight delivery service (Rule 1000.13 [a] [3]).

4. Filing Papers: by 5:00 p.m. Friday preceding return date (Rule 1000.13 [a] [4]). Fax is acceptable when necessary to meet this deadline, if compliant papers are also sent by mail the same day (preferably by overnight delivery).

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 required.

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, an original and copy of the order must be filed with our Clerk's Office, along with filing fee.

5. Filing requirements the same as for motions on notice (1000.13 [a]), except where otherwise indicated in Rule 1000.13 (b) and the signed order to show cause.

II. SPECIFIC MOTIONS

A. Dismissal For Failure to Perfect Timely: if motion opposed, conditional dismissal extension granted, ordinarily up to 60 days (Rule 1000.13 [e]).

B. Extension of Time to Perfect: ordinarily up to 60 days (Rule 1000.13 [f]).

C. Vacate Dismissal of Appeal: same requirements as for extension, but must also demonstrate merit (Rule 1000.13 [g]).

D. Extension of time to file a Brief: ordinarily up to 30 days for petitioner's or respondent's brief, and 15 days for reply brief (Rule 1000.13 [h]).

E. Briefs Amicus Curiae: as soon as possible after appeal is perfected (Rule 1000.13 [k]).

***F. Admission Pro Hac Vice*:** need certificate of good standing and affidavit from New York attorney (Rule 1000.13 [l]).

G. Expedite Appeal: premature until appeal perfected (Rules 1000.10 [d] and 1000.13 [m]).

H. Consolidation: rules permit consolidation of appeals only from orders in the same action or proceeding ***(Rules 1000.13 [n] and 1000.4 [b] [2])***, either on motion or upon stipulation:

1. If two or more parties appeal from the same order or judgment, the parties can stipulate to consolidate the appeals;

2. If one party appeals from two or more orders or judgments, a motion to consolidate is required.

I. Reargument and Leave to Appeal to Court of Appeals (Rule 1000.13 [p]):

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.

3. In criminal matters, only one application is permitted; in civil matters, successive applications can be made to this Court and the Court of Appeals.

J. Other Motions:

1. Stays in Family Court Appeals:

a. Application for a stay of a Family Court order pursuant to Family Court Act § 1114 initially must be made by order to show cause (Rule 1000.13 [d] [1]), unless otherwise ordered by a Justice of the Court (Family Ct Act § 1114).

b. Extension of stay must be requested by formal motion on notice (Rule 1000.13 [d] [2]).

2. Stays in Other Civil Appeals:

a. Can be by motion **or** order to show cause.

b. CPLR 5519 allows stays of "proceedings to enforce an order":

I. A trial is not a proceeding to enforce an order (*Matter of White v City of Jamestown*, 242 AD2d 979).

ii. 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): note that "automatic" stay may be available under CPLR 5519 (a) upon giving an undertaking.

e. Injunctions (CPLR 5518): same standard as CPLR art. 63.

***3. Stays in Criminal Appeals (CPL 460.50; 22 NYCRR 1000.13* [c] [1]):**

a. A stay of execution of judgment of conviction will allow an appellant to remain at liberty while his or her appeal is pending.

The motion papers must demonstrate:

I. an intention to perfect the appeal within a reasonable time; and

ii. that the appeal has merit.

b. If the appeal has not been perfected within 120 days from the date that the order granting the stay is issued, the stay automatically expires (CPL 460.50 [4]), unless the stay was granted pending determination of the appeal or some other designated future date or occurrence (CPL 530.45 [5]).

c. Extension of a criminal stay must be sought by formal motion with affidavit stating that the necessary transcript of proceedings has been filed or ordered and, if not yet filed, the reason for the delay.

4. Order of recognizance or bail after conviction and before sentence (CPL 530.45): may be made to a Justice of this Court if the criminal action was pending in Supreme or County Court.

5. Motions for Permission to Appeal:

a. Civil appeals:

I. CPLR 5704 (a): appealing from *ex parte* order. No appeal lies, but order (or refusal to sign order) can be reviewed on

motion.

ii. 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.

iii. CPLR 5513 and CPLR 5701 (c): appealing from order that is not appealable as of right under CPLR 5701.

b. Criminal appeals (Rule 100.13 [l]): an order denying a CPL 440 motion is not appealable as of right; defendant may seek permission to appeal by formal motion (CPL 460.15), within 30 days from the service of entry of the order (CPL 460.10 [4] [a]).

c. Family Court appeals: a non-dispositional order, other than an intermediate or final order in an abuse or neglect proceeding, may be appealed only by permission of this Court (Family Ct Act §1112 [a]).

6. Extension of time to serve or file notice of appeal:

a. Civil appeals (CPLR 5520 [a]): party seeking to appeal must have done one of the two required acts before the Court can authorize the other. If not, defect is jurisdictional.

b. Criminal appeals (CPL 460.10 [6], 460.30): defendant may seek permission to serve late notice of appeal **if** the notice of appeal was filed timely (Rule 1000.13 [l]).

7. Poor Person Relief (Rule 1000.14): must show indigency and merit (CPLR 1101[a]) and proof of service on County Attorney (CPLR 1101 [c]).

8. Lesser Number of Records (Rule 1000.15).

9. Strike Record/Brief (For noncompliance with Rules 1000.2 - 1000.4).

10. Withdrawal of counsel (Rule 1000.13 [q]): counsel assigned by the Court may move to be relieved of assignment (*People v Crawford*, 71 AD2d 38; *Matter of Jordan S.*, 179 AD2d 1091).

11. Other applications for relief (Rule 1000.13 [r]): may be considered by the Court if the motion papers comply with the Rules.

THE NEW YORK COURT OF APPEALS

CIVIL JURISDICTION AND PRACTICE OUTLINE

BY

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The New York Court of Appeals
Civil Jurisdiction and Practice Outline

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THE NEW YORK COURT OF APPEALS
CIVIL JURISDICTION AND PRACTICE OUTLINE

Prepared by the Clerk's Office, New York Court of Appeals
February 2011

I. APPEALS AS OF RIGHT

A. Individual Jurisdictional Predicates

An appeal as of right must meet one of the following statutory jurisdictional predicates (CPLR 5601) or it is subject to dismissal upon motion or by the Court sua sponte (see, 22 NYCRR 500.10).

1. Double Dissent at the Appellate Division -- CPLR 5601(a)

   a. The dissent must be on a question of law (compare, Scheer v Koubek, mot to dismiss appeal denied 69 NY2d 983 [1987] [difference between majority and dissent centered on conflicting interpretations of Insurance Law and consequent conclusion as to whether plaintiff made out a prima facie case: legal question] and Matter of Gardstein v Kemp & Beatley, Inc., mot to dismiss appeal denied 61 NY2d 900 [1984] [dispute between majority and dissent focuses on sufficiency (not weight) of the evidence to support finding of corporate oppression of shareholder: legal question] with Merrill v Albany Med. Center Hosp., appeal dismissed 71 NY2d 990 [1988] [dissent predicated on unpreserved issues] and Matter of Cindy M.G. v Michael A., appeal dismissed 71 NY2d 948 [1988] [difference between majority and dissent based on differing view of underlying facts, not applicable legal standard]; see, generally, Karger, Powers of the New York Court of Appeals § 6:15, at 203-207 [rev 3d ed]).

   b. The dissent must be in appellant's favor (Matter of Barron & Vesel, P.C. v Gammerman, cross appeal dismissed 63 NY2d 671 [1984]; Christovao v Unisul-Uniao de Coop. Transf., 41 NY2d 338 [1977]).

   c. The Appellate Division order must be final.

2. Constitutional Question -- CPLR 5601(b)(1) -- Appeal from Final Appellate Division Order

The constitutional question must be both directly involved in the Appellate Division order and substantial. The appellant has the burden of establishing the direct involvement of the constitutional question (see, Karger, supra § 39, at 245).

a. Direct Involvement (see, Karger, supra, § 7:8; 7:9-7:10, at 231-243).

i. The constitutional question must have been properly raised in the courts below. Thus, the issue must be preserved before the court of original instance (Matter of Schulz v State of New York, 81 NY2d 336, 344 [1983]; Matter of Shannon B., appeal dismissed 70 NY2d 458, 462 [1987]), and raised again at, or at least be passed upon by, the Appellate Division on an appeal to that court, if one was taken (see, Matter of Skenesborough Stone, Inc. v Village of Whitehall, appeal dismissed 95 NY2d 902 [2000]).

ii. The Appellate Division must have taken a view of the case that necessarily required it to pass upon the constitutional issue raised. Thus, an appeal will be dismissed where the Appellate Division's decision rests on an independent nonconstitutional ground (Marwanqa v Human Resources Admin., mot to dismiss appeal granted 69 NY2d 1037 [1987] [Statute of Limitations]; Matter of Fossella v Dinkins, appeal dismissed 66 NY2d 162,168 [1985] [statutory grounds]; Matter of Cioffi v Town of Guilderland, appeal dismissed 69 NY2d 984 [1987][mootness]; Burns v Egan, appeal dismissed 68 NY2d 806 [1986] [res judicata, laches, standing]).

b. Substantiality (see, Karger, supra, §7:5, at 226-228)

Whether a substantial constitutional question is presented is a determination that must be made on a case by case basis. The Court has examined the nature of the constitutional interest at stake, the novelty of the constitutional claim, whether the argument raised may have merit, and whether a basis has been established for distinguishing a state constitutional claim (if asserted) from a federal constitutional claim. The Court has stated that questions that have been "clearly resolved against an appellant's position * * * lack the degree of substantiality necessary to sustain an appeal as

of right under CPLR 5601(b)(1)" (Matter of David A.C., 43 NY2d 708, 709 [1977]). On the other hand, a constitutional argument need not prevail on the merits to support an appeal on constitutional grounds (see, Rose v Moody, 83 NY2d 65, 69 [1993]).

3. Constitutional Question -- CPLR 5601(b)(2) -- Direct Appeal from Court of Original Instance (When That Court Is Not the Appellate Division)

   a. The only question involved must be the constitutionality of a statutory provision; where issues are involved that must be resolved in addition to the constitutional question, the appeal is transferred to the Appellate Division (Jetro Cash and Carry Enters. v State of New York Dept. of Taxation and Fin., appeal transferred 81 NY2d 776 [1992] [discussion of plaintiff's possible failure to exhaust administrative remedies]; Town of Brookhaven v State of New York, appeal transferred 70 NY2d 999 [1998] [Court required to determine whether disputed material issues of fact existed prior to determining whether summary judgment could be granted on constitutional claims; threshold finality inquiry]; Matter of Morley v Town of Oswegatchie, appeal transferred 70 NY2d 925 [1987] [question of statutory interpretation that could be dispositive of constitutional question]; New York State Club Assn. v City of New York, appeal transferred 67 NY2d 717 [1986] [ripeness, standing, subject matter jurisdiction, issue whether declaratory judgment action is proper vehicle to test constitutionality of legislative enactment]; Kerrigan v Kenny, appeal transferred 64 NY2d 1109 [1985] [mootness]).

   b. The effectiveness of a stipulation to eliminate nonconstitutional issues will be strictly scrutinized by the Court. Presence of nonconstitutional issues is fatal to a direct appeal.

4. Stipulation for Judgment Absolute -- CPLR 5601(c) (see, Karger, supra, §§ 8:1-8:2, at 251-285; 12 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 5601.13, 5601.16)

   a. The Appellate Division must grant a new trial or hearing (as opposed to a first or initial hearing) (Matter of Knight-Ridder Broadcasting v Greenberg, mot to dismiss appeal denied 69 NY2d 875 [1987]; Matter of Town of Highlands v Weyant, appeal dismissed 30 NY2d 948 [1977]; see also, CPLR 5615).

b. The stipulation for judgment absolute must not be illusory. Such was the case where a judgment was originally entered in plaintiff's favor on liability but awarding plaintiff no damages and Appellate Division reversed and ordered a new trial on damages. Even if defendant lost on appeal, a new trial would still have to be held to determine the amount of the damages to which plaintiff was entitled. Thus, defendant gave up nothing by stipulating to judgment absolute (Goldberg v Elkom Co., appeal dismissed 36 NY2d 914 [1975]). Likewise, where a defendant stipulates to judgment absolute on the issue of liability in the event of an affirmance, no appeal lies pursuant to CPLR 5601(c). A stipulation for judgment absolute must effect a final determination of the action as to both liability and damages (Lusenskas v Axelrod, appeal dismissed 81 NY2d 300 [1993]). The stipulation, to be effective, must be for judgment absolute. Thus, a plaintiff-appellant who stipulates only to a reduction in the damages awarded at trial -- as opposed to dismissal of the complaint -- may not appeal pursuant to CPLR 5601(c) (Hedgepeth v Merz, appeal dismissed 70 NY2d 836 [1987]).

c. In this regard, it is worth noting that the Appellate Division does not have the power to grant leave to appeal on a certified question from an order granting a new trial or hearing (Fishman v Manhattan and Bronx Surface Tr. Op. Auth., mot to dismiss appeal granted 78 NY2d 878 [1991]). When a new trial or hearing is ordered, the Appellate Division cannot grant leave to appeal even if no appeal would lie as of right under CPLR 5601(c) (Maynard v Greenberg, appeal dismissed 82 NY2d 913 [1994]).

d. Even if the appellant would be otherwise aggrieved under normal agrievement rules, CPLR 5601(c) does not authorize an appeal to the Court of Appeals by a party in whose favor the Appellate Division has reversed a judgment and granted a new trial (Huerta v New York City Tr. Auth., 98 NY2d 643 [2002]).

e. Even in the rare cases where an appeal lies under CPLR 5601(c), appealing under this predicate involves certain dangers that can trap the unwary appellant. To prevail on an appeal on a stipulation for a judgment absolute, the appellant must show that the Appellate Division erred as a matter of law in granting a new trial or hearing. If, however, the Court of Appeals determines that the Appellate Division's order turned on a question of fact or an exercise of discretion, the Court has no alternative but to automatically affirm and render a judgment absolute (see, Clayton v Wilmont and Cassidy, Inc., 34 NY2d 992 [1974]). Thus, if the

Appellate Division reversal turned on an unpreserved issue, the determination below would be pursuant to the Appellate Division's discretionary interest of justice review powers, and the appellant would end up with an affirmance and a judgment absolute in the Court of Appeals.

5. Appeal Pursuant to CPLR 5601(d)

a. This jurisdictional predicate permits review of an Appellate Division order that satisfies all of the jurisdictional requirements for an appeal as of right pursuant to CPLR 5601(a) or (b)(1), except finality, on the basis of a subsequent order or judgment which finally determines the action or proceeding in which the earlier Appellate Division order was issued. Only the earlier nonfinal order is reviewed on such an appeal (CPLR 5501[b]; see, Matter of Greatsinger, 66 NY2d 680, 682-683 [1985]; Matter of Farber v U.S. Trucking Corp., 26 NY2d 44, 55 [1970]).

An appellant who wishes to challenge new matters decided by the trial court, instead of taking a CPLR 5601(d) appeal, must take a second appeal to the Appellate Division, which will review only the new matters. The appellant can thereafter take a CPLR 5601(d) appeal from the second Appellate Division order, obtaining Court of Appeals review only of the prior nonfinal Appellate Division order (see, Curiale v Ardra Ins. Co., appeal dismissed in part 86 NY2d 774 [1995]; Gilroy v American Broadcasting Co., 46 NY2d 580 [1979]). If jurisdictional predicate requirements for an appeal as of right are not met by the second order, the appellant must also move for leave to appeal in order to obtain review of the issues decided in the second Appellate Division order. If jurisdictional requirements for an appeal as of right are met by the second Appellate Division order, the appellant need not use CPLR 5601(d) to obtain Court of Appeals review. Rather, the appellant can appeal as of right from the second order, and obtain Court of Appeals review of the prior nonfinal order pursuant to CPLR 5501, assuming the nonfinal order “necessarily affects” the final order (see, Sections V-C-2 and VII of this outline).

Note that an opponent’s appeal from the final judgment to the Appellate Division does not extend a party's time to take a CPLR 5601(d) appeal. The failure to take an available CPLR 5601(d) appeal after entry of the final judgment may render the appeal untimely or otherwise waived (see, Goldman Copeland Assocs. , P.C. v Goodstein Bros. & Co., lv dismissed 96 NY2d 796 [2000]).

b. Besides the requirement that the earlier Appellate Division order satisfy all of the requirements for an appeal as of right pursuant to CPLR 5601(a) or (b)(1), except finality, two additional requirements must be met:

i. The order or judgment appealed from must finally determine the action or proceeding in which the Appellate Division issued its earlier nonfinal order (Park Slope Jewish Center v Stern, appeal dismissed 72 NY2d 873 [1988] [judgment restating contents of nonfinal Appellate Division order]; Bouchard v Abbott, appeal dismissed 67 NY2d 983 [judgment incorporated terms of Appellate Division order and did not resolve factual dispute left outstanding by the order]).

ii. The prior Appellate Division order must necessarily affect the final order or judgment appealed from (Javarone v Pallone, appeal dismissed 90 NY2d 884 [order denying motion to vacate stipulation of discontinuance does not necessarily affect final judgment disposing of remaining claims]; see, Karger, supra, § 9:5, at 297-314 [1997]). Accordingly, CPLR 5601(d) is not available to obtain review of an Appellate Division order entered in a prior action or proceeding (see, Matter of Concerned Citizens To Review Jefferson Val. Mall v Town Bd. of Town of Yorktown, 54 NY2d 957 [1981]; see also, Section VII of this outline for more on the "necessarily affects" doctrine).

B. Rule 500.10 Review -- Examination of Subject Matter Jurisdiction

1. What Is It?

As stated in Rule 500.10, the Court may determine, sua sponte, whether it has subject matter jurisdiction over an appeal taken as of right or by permission of the Appellate Division. This was formerly referred to as Sua Sponte Dismissal or SSD review, and is now called “jurisdictional review.”

2. When Is It Invoked?

Jurisdictional review is invoked when a question arises concerning the validity of a jurisdictional predicate for an appeal as of right or the validity of an Appellate Division leave grant in a civil case. Since the Court’s jurisdiction was significantly streamlined by legislation effective January 1, 1986 (L 1985, ch 300), jurisdictional review is invoked when a question is raised in four main areas: finality, constitutional questions, direct appeals

and double dissents. If the Court determines, after an inquiry made to the parties involved, that a jurisdictional predicate is lacking, it will dismiss the appeal sua sponte.

3. How Jurisdictional Review Works Within the Court

Under the authority of Rule 500.10, the Clerk of the Court screens all appeals taken as of right pursuant to CPLR 5601 or by permission of the Appellate Division pursuant to CPLR 5602 (b) to determine the validity of the jurisdictional predicate and timeliness of the appeal. If a jurisdictional question arises, a jurisdictional inquiry letter is sent to counsel inviting written comment. After comments are received or the period for counsels' comment expires, the Court determines whether to retain or dismiss the appeal.

II. MOTIONS FOR LEAVE TO APPEAL

A. Certiorari Jurisdiction

Effective January 1, 1986, CPLR 5601 was amended to eliminate some traditional grounds for appeals as of right to the Court of Appeals in favor of a greater certiorari jurisdiction. Now, all civil appeals are heard by permission of the Appellate Division or the Court of Appeals except where a constitutional question is directly involved (see, CPLR 5601[b]), where two Justices at the Appellate Division dissented on a question of law (CPLR 5601[a]) or in the limited circumstance prescribed for an appeal by stipulation for judgment absolute (CPLR 5601[c]). In 2009, 53 of the 146 (36%) civil appeals before the Court were there by its own leave.

B. What is a Motion for Leave?

More than a brief on the merits with a notice of motion, it is the opportunity for counsel to convince the Court that their case is worthy of the Court's time and scarce judicial resources. Motions for leave to appeal are randomly assigned to each of the Judges to report, in writing, to the Court as a body.

All motions for leave are conferenced and voted on by all the Judges of the Court. Leave to appeal will be granted upon the concurrence of two Judges (CPLR 5602[a]).

C. Statutory Requirements -- Jurisdictional Predicates

1. Motions for Leave To Appeal from Final Appellate Division Orders -- CPLR 5602(a)(1)(i)

CPLR 5602(a)(1)(i) allows a litigant to seek leave to appeal from a final Appellate Division order entered in an action originating in the Supreme Court, a County Court, a Surrogate's Court, the Family Court, the Court of Claims, an administrative agency, or an arbitration. This is by far the most common jurisdictional predicate for a motion for leave. Note that an appeal from a final Appellate Division order brings up for review prior nonfinal orders and judgments that necessarily affect the final order (see, CPLR 5501[a]; see also, Sections V-C and VII of this outline).

2. Motions for Leave To Appeal To Obtain Review of Prior Nonfinal Orders Only -- CPLR 5602(a)(1)(ii)

CPLR 5602(a)(1)(ii) allows a litigant to by-pass a second appeal to the Appellate Division when the movant only seeks review of the Appellate Division's prior nonfinal order and not the subsequent final order made by the nisi prius court after the Appellate Division's remittal. CPLR 5602(a)(1)(ii) is the parallel to CPLR 5601(d), which applies to appeals as of right. In order for a motion seeking leave to appeal pursuant to CPLR 5602(a)(1)(ii) to lie, the following requirements must be met:

a. The judgment sought to be appealed from must be a final judgment. The parties cannot simply enter a "nonfinal" judgment on the Appellate Division order (Burnside Coal & Oil v City of New York, lv dismissed 73 NY2d 852 [1988]). The Court has deemed a stipulation between the parties finally resolving all remaining claims a judgment to allow a motion for leave to appeal pursuant to CPLR 5602(a)(1)(ii) (Voorheesville Gun Club v E.W. Tompkins Co., 82 NY2d 564, 568 [1993]).

Where the "final" judgment or order on which the motion or appeal is predicated is based on a stipulation between the parties concerning damages, the Court will check the stipulation to make sure it is not illusory or conditional (see, Udell v New York News, lv dismissed 70 NY2d 745 [1987] [where stipulation expressly provided that it could not be construed as a concession by plaintiff that damages were limited to any amount, stipulation was deemed illusory and motion was dismissed for nonfinality]; Costanza Constr. Co. v City of Rochester, appeal dismissed 83 NY2d 950, 951 [1989] [dismissal of counterclaims only conditional]).

b. The prior nonfinal Appellate Division order must "necessarily affect" the final order or judgment. For a detailed discussion of the "necessarily affects" requirement, see Section VII, infra.

3. Motions for Leave To Appeal from Nonfinal Orders -- CPLR 5602(a)(2) -- Administrative Context

CPLR 5602(a)(2) allows a motion for leave to appeal from a nonfinal Appellate Division order in "a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal."

a. By its terms, this section only applies to motions for leave to appeal (compare, language of CPLR 5601 with CPLR 5602). Moreover, the section only applies to proceedings, not to actions (John T. Brady & Co. v City of New York, lv dismissed 56 NY2d 711 [1982]).

b. The remittal must be to the agency and not to (1) a lower court, or (2) a lower court and an agency (see, Matter of Golf v New York State Dept. of Social Servs., lv dismissed 88 NY2d 960 [1996]).

c. The public body must be participating in the litigation as an adjudicatory or administrative body. If the body participating is in the capacity of any other litigant, prosecuting or defending a claim before an adjudicatory tribunal, CPLR 5602(a)(2) will not apply (Matter of F.J. Zeronda, Inc. v Town of Halfmoon, 37 NY2d 198, 200-201 [1975]).

d. Any party to a proceeding which comes within the ambit of CPLR 5602(a)(2) may benefit from the section (Matter of F.J. Zeronda, Inc., supra, at 201 n *).

e. In Workers' Compensation Board cases, review by the Appellate Division is by appeal, so there is no proceeding "instituted by or against" a public body and, thus, a nonfinal Appellate Division order is not appealable by permission pursuant to CPLR 5602(a)(2) (Matter of Marcera v Delco Prods., lv dismissed 88 NY2d 804 [1995]). The same rule applies to unemployment insurance cases where review by the Appellate Division is by appeal under Labor Law § 624 (see, Matter of Caufield-Ori [Blumberg - Sweeney], 89 NY2d 982 [1997]).

4. Motions for Leave To Appeal by Permission of the Appellate Division -- CPLR 5602(b)

Note that in addition to the statutory predicates discussed above, the Appellate Division can also grant leave to appeal from certain final and nonfinal orders as to which the Court of Appeals lacks constitutional and statutory power to grant leave. Consult CPLR 5602(b). However, the Appellate Division's authority to grant leave from a nonfinal order, where it certifies a question for Court of Appeals review, has limitations (see, CPLR 5602[b][1]; Bryant v State of New York, 7 NY3d 732 [2006]).

D. How to Move for Leave to Appeal -- Rule 500.22 Requirements

1. What the document should look like

A motion is made on a copy of the record or appendix used in the court below and an original and six copies of the moving papers. Two copies of the moving papers must be served on the adverse party. The moving papers shall be a single document bound on the left (22 NYCRR 500.1; 500.22[b]).

2. What should be addressed

a. Notice of return date (any non-holiday Monday, or next non-holiday business day following a Monday holiday) within the meaning of CPLR 5516, 8 [if papers served personally], 9 [if served by overnight delivery] or 13 [if papers served by mail] days after service of notice, whether or not the Court is in session) and relief requested.

b. Questions presented.

Counsel should note the statement of the Court that "if a party in its application for leave to appeal specifically limits the issues it seeks to have reviewed, it is bound by such limitation and may not raise additional issues on the appeal" (Quain v Buzzetta Constr. Corp., 69 NY2d 376).

c. Procedural history and timeliness chain (22 NYCRR 500.22[b][2]).

d. Jurisdiction (CPLR 5602).

e. Argument as to why leave should be granted.

f. A disclosure statement, if required (22 NYCRR 500.1[f]; 500.22[b][5]).

g. One copy of all relevant orders, judgments, opinions or memoranda, one copy of the record or appendix below and one copy of each party's briefs below.

E. Common Errors in Motions for Leave

1. Failure to provide proof of service

Without proof of service, the Court is unable to determine whether the motion is timely and what the appropriate return date should be. Proof should indicate service of two copies (22 NYCRR 500.22[a]).

2. Failure to establish timeliness chain

Rule 500.22(b)(2) requires a demonstration of the timeliness of the motion (CPLR 5513), including the timeliness of any prior motion in the Appellate Division for leave to appeal to the Court of Appeals, which extends the time to move in the Court of Appeals (CPLR 5514[a]). A failure to comply with this requirement can result in the dismissal of the motion for such defects (see, Horowitz v Incorporated Vil. of Roslyn, lv dismissed 74 NY2d 835 [1989]).

a. The timeliness chain should be established in a short paragraph at the beginning of the motion papers which states: (a) each procedural step taken subsequent to the entry of the order from which leave to appeal is sought, (b) the dates all orders were entered and served by a party with notice of entry, and (c) the date the present motion was served. Note: (1) A motion for reargument only at the Appellate Division, which is denied, does not extend a party's time to move for leave to appeal to the Court of Appeals (Eaton v State of New York, lv dismissed 76 NY2d 824 [1990]). Where a motion for reargument is granted, however, even though the original decision is adhered to, the time to appeal does run from the service with notice of entry of the order granting reargument (see, Karger, supra, § 12:5, at 445-446). (2) Where movant's prior motion for leave to appeal at Appellate Division was untimely, the motion for leave to appeal to this Court will be dismissed as untimely, even if made within 30 days after service with notice of entry of an Appellate Division order denying leave to appeal (Lehman v Piontkowski, lv dismissed 84 NY2d 890 [1994]).

b. A motion must be served within 30 days (35 if service is by mail) of service by a party of the order or judgment sought to be appealed from and notice of entry (CPLR 5513[b]; 2103[b][2]; see Matter of Reynolds v Dustman, 1 NY3d 559 [2003] [describing what constitutes "notice of entry"]). Where service is by mailing, "within the state," service is complete upon deposit of the papers, properly addressed and stamped, in the mailbox (CPLR 2103[b][f][1]). Since the postmark date may be later than the date papers are deposited in the mail, the postmark on the envelope in which the Appellate Division order with notice of entry is served should not be used as the starting date for the 35-day period for seeking leave to appeal (see, Kings Park Classroom Teachers Assn. v Kings Park Central School Dist., 63 NY2d 742 [1984]). However, if motion papers are mailed from outside the state, service is not complete until they are received by the adverse party (National Org. For Women v Metropolitan Life Ins. Co., lv dismissed 70 NY2d 939 [1988]). Therefore, motion papers mailed from outside the state on the last day will not be timely served. The return date is determined by counting 8 days (9 if service is by overnight delivery; 13 if by mail) and taking the next available Monday. The return date need not come within the CPLR 5513(b) 30-day time limit.

   Failure to move within the CPLR 5513(b) time period is a jurisdictional defect requiring dismissal (but cf., CPLR 5520[a] [providing Court with discretion to excuse late service or late filing if the other act -- service or filing -- is timely completed]). Moreover, failure to establish the timeliness chain may result in dismissal (see, Metzger v Metzger, lv dismissed 82 NY2d 735 [1993]).

c. Counsel must be especially careful to keep the timeliness chain intact in the following scenario: where the Appellate Division reverses a judgment and orders a new trial on damages unless plaintiff stipulates to a reduced sum. The effect of such an order on the computation of timeliness depends on the precise language of the Appellate Division order (see, Whitfield v City of New York, 90 NY2d 777, 780-781 [1997]). For example, where the Appellate Division reverses a judgment and orders a new trial on damages unless plaintiff stipulates to a reduced sum, that stipulation shall effectively be treated by the Court for timeliness concerns as the final judgment, and the appeal or motion for leave to appeal must be made to the Court within 30 days (or 35 days if served by mail) after the appellant or movant is served with the stipulation and written notice of entry (id.).

d. A party upon whom an adverse party has served a notice of appeal or motion for leave to appeal may serve its own motion for leave to appeal within 10 days (15 days if service was by mail) after service of the notice of appeal or motion by the adverse party, or within 30 days (35 days if service is by mail) after service of the Appellate Division order with written notice of entry, whichever is longer, if such motion is otherwise available (CPLR 5513[c]). If the adverse party had moved at the Appellate Division for leave to appeal to the Court of Appeals, the party relying on CPLR 5513(c) will not be timely unless that party also timely moved at the Appellate Division (511 W 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]; Capasso v Capasso, cross mot for lv dismissed 70 NY2d 988 [1988]).

3. Failure to address finality

Rule 500.22(b)(3) requires a showing that the Court has jurisdiction of the motion and of the proposed appeal, including that the order sought to be appealed from is a final determination or comes within the special class of nonfinal orders which are appealable by permission of the Court of Appeals (CPLR 5602[a][2]). To show finality, the status of every claim, counterclaim, cross claim, or other request for relief pleaded in the action must be indicated. Any post-submission changes in status of such claims must promptly be reported to the Court (see, Court of Appeals Notice to the Bar [9-19-89]; 22 NYCRR 500.6). A failure to comply with these requirements can result in the dismissal of the motion for such defects (see, Rose v Green, lv dismissed 74 NY2d 836 [1989]).

To evaluate whether a particular order is final for purposes of Court of Appeals jurisdiction, see, Section VI of this outline.

Many attorneys mistakenly assume that moving for leave to appeal is a way to cure finality problems. When moving for leave to appeal in the Court of Appeals, as opposed to the Appellate Division, this is absolutely wrong. Except for the limited circumstances authorized by CPLR 5602(a)(2), a motion seeking leave to appeal must be taken from a final determination (see, CPLR 5602[a][1]).

4. Failure to show where arguments are preserved in the record (see 22 NYCRR 500.22[b][4]; see also Section V-C of this outline).

5. Exclusive concentration on the merits of the substantive argument without adequately addressing why leave should be granted.

Arguing error below is not enough. The certiorari factors listed in Rule 500.22(b)(4) must be addressed. The primary function of the Court of

Appeals is to decide legal issues of State-wide significance, not to correct error made in the Appellate Division. In 2009, for example, the Court of Appeals granted 77 of 1074 motions for leave to appeal decided - 7%.

III. GUIDELINES FOR PREPARING A MOTION FOR LEAVE TO APPEAL

A. Certiorari Factors -- 22 NYCRR 500.22(b)(4)

Question of law should be "novel or of public importance, or involve a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." Denial of a motion for leave to appeal is not equivalent to an affirmance and has no precedential value (see, Matter of Marchant v Mead-Morrison Mfg. Co., 252 NY 284 [1929]).

B. Some Reasons Why the Court Denies Leave

The Court does not state reasons why it does not grant leave to appeal in any particular case. In a more general sense, some patterns emerge.

1. The questions presented are not reviewable.

   Many motions are denied because they simply present questions of fact which have been resolved against the movant. The Court of Appeals may review findings of fact which have been affirmed by the Appellate Division only to determine if there is support in the record for them. Rarely is a motion challenging affirmed findings of fact granted. The same is true for cases involving exercises of discretion by the lower courts. Such questions are beyond the Court's review absent an abuse of discretion.

2. Questions are not preserved.

3. The law is settled.

   a. Law is settled and correctly applied.

   b. Law is settled and any error below did not lead to substantial injustice.

   c. General principles of law settled and case involves mere application to unique facts.

4. The law not settled, but . . .

   a. Case offers nothing beyond the parties -- no State-wide implications (e.g., construction of a unique contract provision between private parties).

   b. Arguably correct result reached below or the law has not been sufficiently developed by lower courts.

5. Good issue/bad case

   a. Important issues of unsettled law but record is insufficient to address the legal issues.

   b. Legal issues not squarely presented by attorneys.

C. Some Reasons Why the Court Grants Leave

To address important legal issues and

1. Address a split in authority among Departments of the Appellate Division.

2. Construe statutes in developing areas of regulation.

3. Develop emerging areas of common law.

4. Reevaluate outmoded precedent.

5. Correct error below -- incorrect statements of law in a writing by Appellate Division.

6. Correct error below -- to cure substantial injustice.

D. Conclusion

The surest way to get leave granted by the Court of Appeals is to present a preserved, pure legal question which is unsettled and which has broad State-wide implications. Barring that, at least present a "clean" legal question. Present something new that will allow the Court to develop New York's law. Do not expect the Court to resolve factual disputes or to pass on common exercises of discretion by the lower courts.

IV. RULE 500.11 REVIEW -- ALTERNATIVE PROCEDURE FOR SELECTED APPEALS

A. What Is It?

Previously referred to as the Sua Sponte Merits examination or SSM, alternative review is in essence the presentation of an appeal to the full Court without oral argument. This procedure was implemented by the Court in 1980 as one of several measures to help the Court and the parties better allocate their resources.

B. When Is It Invoked? -- Criteria in 22 NYCRR 500.11(b)

Rule 500.11(b) states: Appeals may be selected by the Court for alternative review on the basis of (1) the presence of lower courts' nonreviewable discretion, mixed questions of law and fact or affirmed findings of fact, all of which are subject to a limited scope of review; (2) clear recent controlling precedent; (3) narrow issues of law not of overriding or State-wide importance; (4) nonpreserved issues; (5) a party's request for such review or (6) other appropriate factors.

C. Countering Misconceptions about the Alternative Procedure

1. Alternative review is not used only when the Court decides to affirm. The statistics for the past five years indicate that the percentage of affirmances and reversals pursuant to the alternative procedure are consistent with those for appeals heard in the normal course.

2. Rule 500.11 appeals are decided by the full Court. The deliberative process is essentially the same for all appeals. Consequently, a Rule 500.11 appeal receives the same attention as a normal course appeal.

D. Benefits of the Alternative Procedure

1. Time saving for the Court and parties. Appeals pursuant to Rule 500.11 reach disposition in almost one-half the time taken to dispose of appeals heard on full briefs and oral arguments.

2. Conserves judicial and attorney resources as well as legal expenses.

E. How To Work with the Alternative Procedure

1. How the alternative procedure works within the Court

The Clerk initiates the alternative procedure after reviewing appellant's preliminary appeal statement (see, 22 NYCRR 500.9), or the Court or an individual Judge may recommend such treatment in granting leave to appeal. After submissions are served and filed by all parties, the case is assigned to a reporting Judge. That Judge is free to terminate the alternative procedure without a report or the Judge may prepare a report to terminate the alternative procedure setting forth reasons why full briefing and oral argument are necessary. If the reporting Judge decides to maintain the alternative procedure, a written report on the merits of the case is prepared. The report and any writings by the courts below are circulated to all of the other Judges and are considered and voted on by the entire Court.

2. Counsel's input in the alternative procedure

a. An appellant may request to proceed under the alternative procedure in the preliminary appeal statement or motion for leave to appeal. On an appeal, respondent may request alternative review by letter to the Clerk of the Court, with proof of service of one copy on each other party, within five days after the appeal is taken.

b. If you receive a Rule 500.11 letter from the Court and you do not wish expedited treatment, your response must be in two parts. First, state objections to the procedure and the reasons supporting them. Note that the guidelines in Rule 500.11(b) include a catch-all subdivision, (b) (6); therefore, counsel are advised to also include reasons why full briefing and oral argument would be of particular benefit in your case. Second, present arguments on the merits of the appeal in case the Court decides to continue alternative review over your objection.

3. Arguments on the merits

a. In a letter of approximately five to ten pages (the Court has set no page limitation) explain the essential facts of your case, the holding of the courts below and the best arguments for your position.

b. Note that Rule 500.11(f) requires a specific statement of incorporation of arguments contained in your Appellate Division brief in order for arguments made in that brief but not highlighted in the Rule 500.11 letter to be considered by the Court.

4. What does it mean if the Court places the case on the alternative review track?

a. It means nothing definitively concerning the merits and the appeal may still end up on full briefing and argument track.

b. Possible implications:

i. The appeal involves application of recent controlling or clearly analogous precedent.

ii. Unsettled issues of law -- but very narrow.

iii. Good issue of law -- however, a threshold issue must be addressed to determine whether the Court is precluded from reaching it (e.g., preservation).

V. APPEALABILITY AND REVIEWABILITY

A. Definitions

The concepts of appealability and reviewability are constitutional limitations on the Court's power to hear cases. More precisely, appealability rules act to limit the kinds of cases which may be heard by the Court of Appeals. Reviewability rules, on the other hand, limit the issues which the Court may determine once the case is before the Court. Article VI, § 3(b) of the State Constitution prescribes what kinds of orders are appealable to the Court, and article VI, § 3(a) states that in most cases "the jurisdiction of the Court of Appeals shall be limited to the review of questions of law."

B. Appealability

In addition to the jurisdictional requirements discussed above for appeals as of right and motions for leave to appeal, certain other appealability requirements must be met.

1. Appropriate Court

Action must originate in an appropriate court. For example, the Court lacks jurisdiction to entertain a motion for leave to appeal from an order of the Appellate Division where the appeal to that court was from a judgment or order entered in an appeal from a third court (Matter of Thenebe v Ansonia Assocs., 89 NY2d 858 [1996]). This jurisdictional problem will arise when an action originates in a court other than Supreme Court, County Court, Surrogate's Court, Family Court, Court of Claims or an administrative agency or an arbitration. The motion will be dismissed regardless of whether the Appellate Division order is final.

Note: The Court does not have jurisdiction to entertain a motion for leave to appeal from a determination of a court other than the Appellate Division, except in the circumstances specified in CPLR 5602(a)(1)(ii). Regarding appeals as of right, see CPLR 5601.

2. Aggrievement

a. CPLR 5511 states that only an aggrieved party may appeal (see, Hecht v City of New York, 60 NY2d 57, 61 [1983]). A party may appeal if the order appealed from does not grant complete relief to it. A party which is granted complete relief but is dissatisfied with the court's reasoning is not aggrieved within the meaning of CPLR 5511 (see, Matter of Sun Co. v City of Syracuse Indus. Dev. Agency, 86 NY2d 776 [1995]; Parochial Bus Sys. v Board of Educ., 60 NY2d 539, 545 [1983]).

b. No appeal lies from an Appellate Division order dismissing an appeal from a determination entered upon a default judgment (CPLR 5511; Matter of Lizette Patricia C., 98 NY2d 688 [2002]).

c. Where the Appellate Division reverses a trial court's judgment and orders a new trial limited to the issue of damages unless plaintiff stipulates to a reduction of damages, and plaintiff so stipulates, the court had held that plaintiff is not aggrieved by the Appellate Division order (see, Whitfield v City of New York, 90 NY2d 777, 780 n * [1997]; see also, Smith v Hooker Chem. & Plastics Corp., cross mot for lv dismissed 69 NY2d 1029 [1987]). However, in Adams v Genie Indus. (14 NY3d 535 [2010]), the court "conclude[d] that...is unfair to bar a party from raising legitimate appellate issues [as to liability] simply because that party has made an unrelated agreement on the amount of damages" (id. at 541). The court rejected the aggrievement rule in Whitfield and Batavia Turf Farms v County of Genesee (lv dismissed 91 NY2d 906 [1998] "to the

extent that they go beyond the original Dudley v Perkins (235 NY 448, 457 [1923]) holding" (14 NY3d at 536, 542).

3. Finality -- covered in detail in Section VI of this outline.

4. Miscellaneous Appealability Problems

a. Dual Review -- Where the same party both appeals to the Appellate Division and appeals to the Court of Appeals, the appeal to the Court will be conditionally dismissed. Where the same party both appeals to the Appellate Division and moves for leave to appeal to the Court of Appeals, the motion will be dismissed outright. Dual review is generally not permitted (Parker v Rogerson, 35 NY2d 751, 753 [1974]; see also, CBS Inc. v Ziff Davis Pub., lv dismissed 73 NY2d 807 [1988]). However, where different parties pursue different avenues of appeal or motion before the Court, they will be permitted to continue (Harry R. Defler Corp. v Kleeman, 18 NY2d 797 [1966]).

b. Appealable paper -- An appeal will be dismissed where the improper paper is sought to be appealed.

i. No order or judgment -- Where appellant/movant seeks to appeal from something other than an order or judgment, the appeal/motion will be dismissed (Matter of Sims v Coughlin, appeal dismissed 86 NY2d 776 [1995] [decision]; Matter of Abdurrahman v Berry, lv dismissed 73 NY2d 806 [1998] [letter]).

ii. Subsequent Supreme Court order or judgment -- CPLR 5611 reads in part "If the Appellate Division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it" (see, American Acquisition Co. v Kodak Elec. Printing Sys., 87 NY2d 1049 [1996]).

iii. Order of individual Appellate Division Justice -- No appeal lies from an order of an individual Justice of the Appellate Division (People ex rel. Mahler v Jablonsky, appeal dismissed 82 NY2d 919 [1994]).

iv. The finality of an Appellate Division order dismissing an appeal to that court is determined by an examination of the

finality of the underlying order (Langeloth Found. v Dickerson Pond Assocs., lv dismissed 74 NY2d 841 [1989]).

v. No civil motion for leave to appeal or appeal as of right lies directly from the order of the Appellate Term of Supreme Court (Williamson v Housing Preservation and Dev. of City of New York, lv dismissed 82 NY2d 919 [1994]).

c. Dismissal of Prior Appeal for Failure To Prosecute -- A prior dismissal of an appeal for failure to prosecute is a determination on the merits and acts as a bar to a subsequent appeal raising the issues that could have been raised on the prior appeal (see, Bray v Cox, 38 NY2d 350 [1976]). Thus, the subsequent motion/appeal may be dismissed (see, id.; compare Rubeo v National Grange Mut. Ins. Co., 93 NY2d 750; Faricelli v TSS Seedman's, 94 NY2d 772 [1999] [Appellate Division has discretion to entertain appeal notwithstanding dismissal of prior appeal for failure to prosecute]).

d. Criminal Appeals -- Appeals in criminal cases must be taken pursuant to the Criminal Procedure Law, not CPLR 5601 or 5602 (Matter of Newsday, Inc. 3 NY3d 651 [newspaper's motion to intervene and obtain access to record in criminal case]; People v Blake, appeal dismissed 73 NY2d 985 [1989] [CPL 450.15, 460.15 application]; People v Dare, appeal dismissed 74 NY2d 707 [1989] [application for writ of error coram nobis]).

e. Corporation Appearance -- CPLR 321(a) dictates that a motion or appeal by a corporate party must be filed by an attorney.

f. Mootness -- Where the issues presented are no longer determinative of a live controversy, the Court will not entertain an appeal or motion for leave to appeal. The Court cannot entertain the motion or appeal because it cannot give advisory opinions (see, Matter of Hearst Corp. v Clyne, 50 NY2d 707, 713-714 [1980]). However, the Court may entertain an appeal or motion when each of the three prongs of the mootness exception is satisfied: "(1) a likelihood of repetition * * *; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e. substantial and novel issues" (id. at 714-715).

C. Reviewability

Once it is determined that an order is appealable, a litigant must consider which issues and orders that arose in the litigation are reviewable by the Court of Appeals.

1. Preservation -- Issues Reviewable

a. The Court of Appeals' power to review lower court rulings made on motions, applications and points of evidence is, in part, limited by statutes and case law requiring that appropriate objections be registered below as a prerequisite to appellate review (see, CPLR 4017, 4110-b and 5501[a][3] and [4]). The Court will, determine whether an issue has properly been preserved below, whether or not the parties raise the question of preservation (see, Halloran v Virginia Chems., 41 NY2d 386, 393 [1977]). Counsel bears the responsibility of showing the Court where each issue raised has been preserved in the record.

b. Differences in Appellate Division and Court of Appeals review

The Appellate Division may reach questions of trial error, even if unpreserved, in an exercise of its "interest of justice" jurisdiction (see, Martin v City of Cohoes, 37 NY2d 162 [1975], rearg denied 37 NY2d 817, on remand 50 AD2d 1035, appeal dismissed 39 NY2d 740, lv denied 39 NY2d 910). The Court of Appeals, on the other hand, generally may only review questions of law and, therefore, may not review unpreserved error even if the Appellate Division has chosen to do so (see, Brown v City of New York, 60 NY2d 893, 894 [1983]).

c. Preservation of legal issues and theories

i. As a general matter, appellate courts are reluctant to review legal arguments raised for the first time on appeal. Several policy reasons underlie this rule, such as avoiding unfairness to the other party, giving deference to the lower courts and encouraging the proper administration of justice by demanding an end to litigation and requiring the parties and trial courts to focus the issues before they reach the Court of Appeals (Bingham v New York City Trans. Auth., 99 NY2d 355, 359 [2003]).

Under appropriate circumstances, however, the Court of Appeals may entertain new legal arguments and theories raised on appeal. Those very limited circumstances include: (1) new arguments based on a change in statutory law while the appeal is pending (see, Post v 120 East End Ave. Corp., 62 NY2d 19, 28-29 [1984]); (2) where the new argument could not have been obviated or cured by factual showings or legal countersteps had the arguments been tendered below (People ex rel. Roides v Smith, 67 NY2d 899, 901 [2001]); (3) questions of pure statutory interpretation (Matter of Richardson v Fiedler Roofing, 67 NY2d 246, 250 [1986]). These "exceptions" are narrowly construed.

ii. The general rule requires that constitutional questions be raised at the first available opportunity as a prerequisite to review in the Court of Appeals (see, e.g., Matter of Barbara C., 64 NY2d 866, 868 [1986]). There is some indication that the Court may make an exception to this doctrine and examine a constitutional issue raised for the first time in the Court of Appeals if the issue implicates grave public policy concerns (see, Park of Edgewater v Joy, 50 NY2d 946, 949, [1980] citing Massachusetts Natl. Bank v Shinn, 163 NY 360, 363 [1900]).

d. Preservation in the administrative agency context

The Court's reluctance to review new legal arguments is equally applicable in the administrative agency context for policy reasons similar to those discussed above. Thus, arguments which were not raised by a party at the administrative level are considered unpreserved and not reviewable by the Court of Appeals, subject to very limited exceptions (see, Matter of Crowley v O'Keefe, mot to dismiss appeal granted 74 NY2d 780 [1989]; Matter of Samuels v Kelly, lv denied 73 NY2d 707 [1989]).

2. CPLR 5501(a) -- Review of Prior Nonfinal Orders and Determinations

a. CPLR 5501(a) provides that an appeal from a final judgment brings up for review, among other things:

i. any nonfinal judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal (CPLR 5501[a][1]),

ii. any order denying a new trial or hearing which was not previously reviewed by the court to which the appeal was taken (CPLR 5501[a][2]), and

iii. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, any charge to the jury, or failure to charge as requested by the appellant, to which the appellant objected (CPLR 5501[a][3]).

b. Note that CPLR 5501(a)(1), which applies to prior nonfinal orders and judgments, contains the "necessarily affects" requirement. CPLR 5501(a)(3), which applies to trial rulings, however, does not.

c. For an in-depth discussion of the "necessarily affects" requirement, see Section VII of this outline.

3. Scope of Review

Once it is determined which orders, determinations, and issues are reviewable, the scope of the Court's review must be considered.

a. Limited to questions of law

As noted earlier, the State Constitution limits the Court's review powers to questions of law. Questions of fact are not reviewable except in:

i. death penalty cases (CPL 470.30[1]);

ii. Commission on Judicial Conduct matters (see, e.g., Matter of Edwards, 67 NY2d 153 [1986]);

iii. cases where the Appellate Division reverses or modifies and finds new facts, in which case the Court's review power is limited as discussed further below (CPLR 5501[b]); and

iv. defamation cases involving a public figure defendant -- where the issue concerns whether plaintiff has proven the essential element of actual malice, the Court has a constitutional duty to review the evidence and to "exercise independent judgment to determine whether the record establishes actual malice with convincing clarity" (Prozeralik v Capital Cities Communications, 82 NY2d 466, 474-475

[1993], quoting Harte-Hanks Communications v Connaughton, 491 US 657, 659 [1989]).

b. Questions that are never reviewable

i. An Appellate Division determination whether the trial judge correctly decided a CPLR 4404(a) motion to set aside the verdict as "contrary to the weight of the evidence" is not reviewable (Levo v Greenwald, 66 NY2d 962 [1962]; Gutin v Frank Mascali & Sons, Inc., 11 NY2d 97, 98-99 [1962]).

However, where a jury verdict has been set aside on the ground that, as a matter of law, the verdict is not supported by sufficient evidence, that determination is reviewable. The relevant inquiry is whether there is any "valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]). Where it is not clear from the Appellate Division writing whether the Appellate Division has set aside a verdict on sufficiency of evidence or weight of evidence grounds in a jury tried case, examine the court's corrective action. New trial ordered -- weight; dismissal of complaint -- sufficiency (see, id. at 498). The foregoing analysis cannot be used in bench trial cases because the Appellate Division can render judgment for the appealing party as a matter of fact without the need for a new trial. When, in a jury case, the Appellate Division reverses a judgment entered on a plaintiff's verdict, on both sufficiency and weight of the evidence grounds, the Court can review whether the legal sufficiency ruling was correct. If the Court disagrees with the Appellate Division and concludes that the verdict is supported by legally sufficient evidence, the Court cannot reinstate the judgment entered on the verdict; instead, it must order a new trial because it cannot disturb the Appellate Division's weight of evidence determination (Sage v Fairchild-Swearingen, 70 NY2d 579, 588 [1987]).

ii. A determination of excessiveness (or inadequacy) of the jury's verdict (Rios v Smith, 95 NY2d 647, 654 [2001]; Woska v Murray, 57 NY2d 928 [1982]; Zipprich v Smith Trucking Co., 2 NY2d 177, 188 [1956]).

iii. An Appellate Division determination to reverse a judgment in a civil action on the basis of unpreserved legal error (Brown v City of New York, 60 NY2d 893 [1983]). The Court of Appeals has no power to review either the unpreserved error or the Appellate Division's exercise of discretion in reaching the issue (see, Elezaj v Carlin Constr. Co., 89 NY2d 992, 994 [1997]).

c. Limited Review

i. Findings of fact that are affirmed by the Appellate Division are only reviewable to determine if there is evidence in the record to support them (Cannon v Putnam, 76 NY2d 644, 651 [1990]; Morgan Servs. v Lavan Corp., 59 NY2d 796, 797 [1983]).

ii. In situations where the Appellate Division reverses or modifies and expressly or impliedly finds new facts, the Court of Appeals can determine which of the findings more nearly comports with the weight of the evidence (CPLR 5501[b]; Matter of Y.K., 87 NY2d 430, 432 [1996]; Loughry v Lincoln First Bank, N.A., 67 NY2d 369, 380 [1986]).

iii. Provided the lower courts had the power to exercise discretion (Brady v Ottaway Newspapers, 63 NY2d 1031 [1984]), the Court of Appeals will not interfere with the exercise of that discretion absent an abuse (Herrick v Second Cuthouse, 64 NY2d 692 [1984]). However, an issue of law will be presented where the Appellate Division in exercising its discretion expressly fails to take into account all the various factors that are properly entitled to consideration (Varkonyi v Varig, 22 NY2d 333, 337 [1968]). In such cases, the Court can set out the proper factors and, if judgment cannot be rendered as a matter of law, remit the case to the Appellate Division to exercise its own discretion on the basis of all the relevant factors (id. at 338).

VI. WHAT IS A FINAL DETERMINATION? -- A SYSTEMATIC APPROACH

A. Constitutional Requirement

In civil cases, the New York Constitution (article VI, §§ 3[1] and [2]) mandates only final orders are appealable to the Court of Appeals with the very limited exceptions of

1. appeals by stipulation for judgment or order absolute recognized in section 3(3);

2. appeals permitted by the Court of Appeals in proceedings by or against a public body or officer allowed by section 3(5);

3. appeals permitted by the Appellate Division on certified questions allowed by section 3(4).

B. Nonfinality

In general, a final order is one that disposes of all the causes of action between the parties and leaves nothing for further judicial intervention apart from mere ministerial matters (Burke v Crosson, 85 NY2d 10, 15 [1995]). Although the definition is simple, identifying the final order is occasionally tricky.

Some orders leave nothing pending in the litigation and yet are still deemed nonfinal for purposes of Court of Appeals jurisdiction. In order to understand this apparent anomaly, one must first understand that the critical question for determining finality is whether the order finally determines an action or proceeding, not whether the order leaves further litigation pending. Thus, finality should be viewed as a point along the continuum of litigation. There are orders which clearly come too early along that continuum, such as those administering the course of litigation or disposing of motions for temporary or provisional relief. Likewise, there are orders which come too late along the continuum, such as those seeking enforcement of a previously rendered final order.

The following is a logical sequence of questions counsel should ask when evaluating whether a particular Appellate Division order is final for purposes of Court of Appeals jurisdiction.

1. Merits Not Addressed -- Too Early

Does the order merely administer the course of litigation or dispose of a motion for temporary or provisional relief?

Examples

- Caceras v Zorbas, lv dismissed 69 NY2d 899 [1987] [discovery from party in a pending action]; Lynn v Jensen Assocs., lv dismissed 64 NY2d 766 [1985] [discovery from nonparty in a pending action]. Compare Matter of Isbrandtsen, lv denied 70 NY2d 616 [1988] [discovery motion not made within a pending action commences a separate special proceeding].

- Avital v Feldman, lv dismissed 87 NY2d 1056 [1996] [order denying a motion to amend a complaint to add a new party].

- Thompson v Whitestone Sav. and Loan Assn., lv dismissed 64 NY2d 610 [1985] [denial of class certification].

- People ex rel. Dunaway v Warden, lv dismissed 87 NY2d 918 [1996] [order denying poor person relief].

- Auer v Power Auth. of State of New York, lv dismissed 62 NY2d 688 [1984] [order granting change of venue].

- Klorman v J. Walter Thompson Co., lv dismissed 61 NY2d 905 [1984] [order addressed to pleadings; complaint dismissed without prejudice to replead].

- Maltby v Harlow Meyer Savage, Inc., lv dismissed 88 NY2d 874 [1996] [order denying motion for temporary restraining order and preliminary injunction].

- Matter of Terrence K., lv dismissed 70 NY2d 951 [1988] [order denying request for a preliminary injunction and a stay].

- Burgess v Burgess, lv dismissed 71 NY2d 889 [1988] [order denying motion for downward modification of temporary support].

- Spillman v City of Rochester, lv dismissed 72 NY2d 909 [1988] [order denying request for a protective order].

- Key Bank of New York v Burgess, lv dismissed 88 NY2d 1064 [1996] [order denying a motion to intervene].

2. Merits Not Addressed -- Too Late

Does the order merely enforce a previous final order? If so, it is nonfinal. Note, however, that an order granting a motion to amend a prior final order is considered a new final order to the extent of the amendment (see, Karger, supra, § 196, at 104-105).

a. Enforcement

- New York State Assn. of Counties v Axelrod, lv dismissed 87 NY2d 918 [1996] [Appellate Division order denying a motion to enforce the judgment entered in the proceeding].

- Furey v Furey, lv dismissed 89 NY2d 916 [1996] [motion for a money judgment to enforce a provision of the judgment].

Note: An action seeking a judgment for maintenance or permanent support arrears is considered final, notwithstanding its apparent similarity to an enforcement proceeding (Creque v Creque, lv denied 86 NY2d 707[1995]; Kohn v Kohn, lv denied in part 70 NY2d 999 [1988]).

Note: Proceedings commenced via petition under the authority of Family Court Act § 454 to enforce a prior determination are treated as separate special proceedings notwithstanding their apparent similarity to enforcement motions made in the context of matrimonial actions in Supreme Court.

b. Contempt Motions

- Matter of Public Emp. Fedn. v Division of Classification and Compensation of New York State Civil Serv. Commn., appeal dismissed 66 NY2d 758 [1985] [order granting or denying motion for finding of contempt with respect to an earlier court order to which contemnor was a party is nonfinal].

Compare Matter of Werlin v Goldberg, lv denied 70 NY2d 615 [1988] [order punishing contempt committed in immediate view and presence of court is reviewable in article 78 proceeding and can result in a final order determining a separate special proceeding].

c. Motions To Amend or Resettle Final Judgments or Orders

- Matter of Kaplan v Werlin, lv dismissed in part & denied in part 87 NY2d 915 [1996] [motion to "correct" judgment denied; Appellate

Division affirmed].

- Cox v Cox, lv dismissed 89 NY2d 860 [1996] [motion to amend granted; Appellate Division reversed].

- Smithtown General Hosp. v State Farm Mut. Automobile Ins. Co., lv dismissed 88 NY2d 1065 [1996] [post judgment motion for attorney's fees, when denied, results in nonfinal order since such orders are treated as denials of motions to amend]; but see, Loretto v Group W. Cable, Inc., lv denied 71 NY2d 802 [1998] [order denying CPLR 909 post judgment motion for attorney's fees in class actions pursuant to 42 USC § 1983 treated as finally resolving a separate special proceeding].

Note: When motion to amend a final determination is granted, it may create a new final paper (see, Matter of Kaplan v Werlin, lv denied 88 NY2d 812 [1996]).

d. Motions To Vacate

- Matter of Babey-Brooke v Ziegner, appeal dismissed 61 NY2d 758 [1984] [order denying motion to vacate a default judgment].

- Jeffs v Janessa, Inc., 88 NY2d 1037 [1996] [order denying motion to restore action to trial calendar after CPLR 3404 dismissal]; Paglia v Agrawal, lv dismissed 69 NY2d 946 [1987] [order denying motion to vacate prior dismissal pursuant to CPLR 3404].

- Brown Cow Farm v Volvo of America Corp., lv dismissed 63 NY2d 605, 770 [1984] [motion to vacate granted; entire action pending].

- Miles v Blue Label Trucking, lv dismissed 89 NY2d 917 [1996] [motion to vacate granted; Appellate Division reversed].

e. Motions for Renewal, Reargument or Leave To Appeal

- Robertson v City of New York, appeal dismissed 90 NY2d 844 [1997] [Supreme Court grants renewal and, on renewal, rules for plaintiff; Appellate Division reverses and denies motion to renew; nonfinal even if rationale supporting Appellate Division order denying motion to renew pertains to merits and not to the standards governing renewal motions].

- Campbell v JSB Realty Co., appeal dismissed 64 NY2d 881 [1985] [Appellate Division order denying leave to appeal to

Appellate Division].

- Cherchio v Alley, lv dismissed 66 NY2d 604, 914 [1985] [Appellate Division order denying reargument or leave to appeal to Court of Appeals].

3. Merits Addressed -- Remittals for Further Judicial Action

Does the order leave further judicial or quasi-judicial action pending?

This category encompasses many nonfinal orders. Counsel should note that the order need not expressly remit for further action; any order which contemplates further judicial or quasi-judicial action is nonfinal.

a. Examples of Remittals

- Glass v Weiner, appeal dismissed 64 NY2d 775 [1985] [for assessment of damages].

- Matter of Donald U., lv dismissed 64 NY2d 603, 775 [1985] [for further "processing" of adoption proceeding].

- Matter of Danon v Department of Fin. of City of New York, appeal dismissed 64 NY2d 601, 885 [1984] [for reaudit].

- Matter of Karaminites v Reid, appeal dismissed 65 NY2d 784 [1985] [for imposition of appropriate penalty].

- Cornell Univ. v Bagnardi, appeal dismissed 65 NY2d 923 [1985] [to Zoning Board for further quasi-judicial action].

- State Communities Aid Assn. v Regan, appeal dismissed 66 NY2d 759 [1985] [for calculation of attorney's fees].

b. Exception -- Remittals for Ministerial Action

Are the further proceedings merely ministerial? (See generally, Karger, supra, § 4:10, at 73-77). If so, order will be considered final.

- Matter of Green v Lo Grande, appeal dismissed 61 NY2d 758 [1984] [remittal to Town Board to issue a special use permit not ministerial because conditions could be imposed].

- Hirschfeld v IC Sec., lv dismissed 72 NY2d 841 [1988] [order remitting to Supreme Court for recalculation of damages in breach of contract counterclaim requires further judicial action and is therefore nonfinal].

- Fra-Dee Constr. v Roberts, lv denied 70 NY2d 611 [1987] [order remitting to Commissioner of Labor to reduce punitive interest rate on a back wages determination from 10% to 6% contemplates purely ministerial action and is final].

c. Exception -- Complete Relief Obtained

Although further quasi-judicial action may be contemplated by the order, did the plaintiff/petitioner receive all relief requested? If so, order will be considered final.

- Matter of Inland Vale Farm Co. v Stergianopolus, 65 NY2d 718, 719 n *[1985] [matter remitted to respondent for the preparation of an environmental impact statement -- the full relief requested. Notwithstanding the remittal, order final].

d. Conditional Orders

A conditional order where the condition has been satisfied may be deemed final where the satisfaction of the condition terminates the litigation.

i. Where an Appellate Division order reverses a Supreme Court judgment and directs a new trial unless the party stipulates to a different amount of damages, the order is nonfinal where the party has not so stipulated (Whitfield v City of New York, lv dismissed in an opinion 90 NY2d 777 [1997]). Note that in analyzing which paper is the final appealable paper in this circumstance (i.e., the stipulation, the judgment entered on the stipulation, or the Appellate Division order itself), strict attention should be paid to the express language of the Appellate Division order (id. at 780-781).

ii. Where an order grants summary judgment conditioned on payment of money, and payment occurs, order is final (Meisner v Crane, lv denied 70 NY2d 613 [1987]).

iii. Where an order dismisses a complaint if defendant accepts conditions, and it is unclear if conditions were satisfied, order is nonfinal (ECU Trust Reg. Vaduz v Union Bank of Switzerland, lv dismissed 71 NY2d 994 [1988]).

4. Merits Addressed -- Claims Pending

Does the order resolve only some of the claims or counterclaims?

To determine whether any claims remain pending, counsel should determine the status of every claim, counterclaim, cross claim or other request for relief pleaded in the action and assure that they have all been finally resolved (see, Court of Appeals Notice to the Bar [9-19-89]).

- Lane-Weber v Plainedge Union Free School Dist., lv dismissed 87 NY2d 968 [1996] [denial of motion to dismiss complaint; entire action pending].

- Dupuy v Hayner Hoyt, 87 NY2d 1056 [1996] [grant of partial summary judgment leaves other causes of action pending].

- Saunder v Baryshnikov, appeal dismissed 65 NY2d 637 [1985] [counterclaim pending].

- Walden v F.W. Woolworth Co., lv dismissed 72 NY2d 840 [1988] [liability resolved; damages to be established].

- Wallis v Falken-Smith, lv dismissed 72 NY2d 807 [1988] [request for attorneys' fees pending].

C. Exceptions to Nonfinality

Under certain circumstances, an otherwise nonfinal order may nevertheless be appealable pursuant to one of several exceptions to finality.

1. Express Severance

Is there an express severance?

An order which expressly severs a pending cause of action will generally be deemed final by the Court of Appeals. However, a severance which does not sever a complete cause of action but merely severs a portion of a cause of action will not be given effect (see, Burke v Crosson, 85 NY2d 10, 18 n 5 [1985]; Tauber v Bankers Trust Co., lv dismissed 95 NY2d 848; Karger, supra, § 5:6, at 114-117).

- Sontag v Sontag, lv dismissed 66 NY2d 554, 555 [order which purports to sever items of relief not a valid express severance; nonfinal].

- F & G Heating Co. v Board of Educ. of City of New York, lv dismissed 64 NY2d 1109 [1985] [express severance of a portion of a damage claim within a single cause of action ineffective; nonfinal].

- Gair, Gair & Conason, P.C. v Stier, lv denied 69 NY2d 606 [1987] [recognizing express severance].

- Weizenecker v Weizenecker, lv denied 72 NY2d 809 [1988] [order finally disposing of certain causes of action and transferring another cause of action to another court for prosecution deemed to effect an express severance].

2. Implied Severance

Are the pending claims impliedly severable from the decided claims?

The doctrine of implied severance is applied only where the causes of action the order or judgment resolves "do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action" (Burke v Crosson, 85 NY2d 10,16 [1985]). As this language from Burke suggests, this doctrine is rarely invoked and narrowly construed. Burke expressly rejects the analysis used in cases such as Sirlin Plumbing Co. v Maple Hill Homes (20 NY2d 401[1967]), Orange & Rockland Utils. v Howard Oil Co. (46 NY2d 880 [1979]) and Ratka v St. Francis Hosp. (44 NY2d 604 [1978]) (Burke, 85 NY2d at 17 n 3).

Burke holds that "an order dismissing or granting relief on one or more causes of action arising out of a single contract or series of factually related contracts would not be impliedly severable and would not be deemed final where the other claims or counterclaims derived from the same contract or contracts were left pending" (id. at 16).

3. Party Finality

Are all claims asserted by or against one party decided?

Referred to as party finality, this rule is an exception to the general proposition that the entire case must be resolved before resort to the Court of Appeals will be allowed. Simply stated, party finality is present in any order which fully disposes of that party's claims and all claims, including cross claims and third-party claims against that party, without

resolving the entire litigation (see generally, Karger, supra, §5:9 at 128-137).

- Barile v Kavanaugh, 67 NY2d 392, 395 n 2 [1986] [party finality where separate causes of action are asserted against different sets of defendants and only one cause of action was finally decided].

- We're Assocs. Co. v Cohen, 65 NY2d 148, 149 n 1 [1985] [party finality as to individual defendants although claims remain pending against corporate defendant]. Compare General Instrument Corp. v Florin, lv dismissed 72 NY2d 909 [1988] [no party finality where order terminates claim against individual partners but leaves claims against partnership pending].

- Herbert v Morgan Drive-A-Way, 84 NY2d 836 [1994] [no party finality; although complaint dismissed as to owner and operator defendants, the complaint remained pending against administratrix defendant and that defendant's cross claim against owner and operator defendants had not been dismissed].

- Landon v New York Hosp., appeal dismissed in part 65 NY2d 639 [1984] [in a mother's and father's medical malpractice action, six causes of action asserted: two by each of the parents in their own right and two by the father on behalf of the injured infant. The four causes asserted by the parents were dismissed, leaving pending the two causes asserted on behalf of the child. Party finality as to the mother but not as to the father].

Party finality is an exception to the rule that the action or proceeding must be finally determined and there are instances where countervailing policy considerations make invocation of the doctrine unwarranted (see Sunrise Auto Partners, L.P. v H.N. Frankel & Co., 90 NY2d 842 [1997]).

4. Irreparable Injury

Does the doctrine of irreparable injury apply to make an otherwise nonfinal order appealable?

The doctrine of irreparable injury will apply to make appealable an otherwise nonfinal order in those rare instances where the order sought to be appealed from directs an irrevocable change in position that will cause immediate irreparable injury (see generally, Karger, supra, § 5:2, at 103-109).

- Regional Gravel Prods. v Stanton, lv denied in part 71 NY2d 949 [1988] [irreparable injury where order directs transfer of title to real property].

- Matter of Christopher T., lv granted 63 NY2d 601 [1984] [in a proceeding to permanently terminate parental rights, order which authorizes DSS to consent to adoption as to one child and remits for further hearings as to a second child is nonfinal but appealable due to irreparable injury].

- Gardstein v Kemp & Beatley, Inc., mot to dismiss appeal denied 61 NY2d 900 [1984] [order directing corporate dissolution resulting in loss of corporate name and selling off of assets causes irreparable injury]. Compare May v Flowers, lv dismissed 65 NY2d 637 [1985] [order dissolving partnership, expelling certain defendants, and ordering an accounting, but which specifically authorized the business to continue under the same name nonfinal; no irreparable injury].

NOTE: The irreparable injury doctrine is rarely used, and almost never used where the mere transfer of money is involved (see, e.g., Town of Orangetown v Magee, appeal dismissed 86 NY2d 778 [1995]).

D. Separate Special Proceedings

Does the order finally determine a separate special proceeding?

Some apparently nonfinal orders that do not finally determine an entire litigation, but do finally determine a separate special proceeding, are final and appealable for purposes of the finality rule (see generally, Karger, supra, §§ 5:21-5:28, at 160-190). Some special proceedings are defined as such in the Consolidated Laws (see, e.g., Family Court Act arts 4-10). Others have been recognized as such by the Court. Some examples of separate special proceedings follow:

- Baker v New York City Health & Hosps. Corp., 36 NY2d 925 [1975] [an order granting or denying a motion pursuant to section 50-e of the General Municipal Law for leave to serve and file a late notice of claim on a municipality is a final order in a special proceeding]. Compare Marabello v City of New York, appeal dismissed 62 NY2d 942 [1984] [order denying application to supplement an original notice of claim pursuant to General Municipal Law § 50-e(6) is nonfinal] and Barrios v City of New York, lv dismissed 100 NY2d 534 [2003] [order granting application to amend a notice of claim is nonfinal even when the application to amend the notice of claim is the first application filed in court].

- Matter of Departmental Disciplinary Comm. for the First Judicial Dept. [Malatesta], lv denied 61 NY2d 601 [1983] [an order granting or denying a motion to quash a subpoena which is not issued in a pending proceeding, but rather precedes any judicial activity, commences a separate special proceeding]. Compare Weissman v 4 West 16th St. Sponsor Corp., appeal dismissed 68 NY2d 807 [1986] [order in pending proceeding is nonfinal].

- Matter of Codey (Capital Cities, Am. Broadcasting Corp.), 82 NY2d 521, 526-527 [1993] [a CPL 640.10 application by a party to a criminal proceeding in one state to compel the presence of a witness residing in another state or to compel the production of evidence located in another state commences a separate special proceeding on civil side of Court's docket].

- Matter of Board of Educ. of City of Auburn (Auburn Teachers Assn.), lv denied as unnecessary 38 NY2d 740 [1975] [order denying motion to stay arbitration is a final order resolving a separate special proceeding]; see also, Flanagan v Prudential-Bache Sec., 67 NY2d 500, 505 n * [1986] [order granting or denying a motion to compel arbitration is a final order resolving a separate special proceeding]. However, a motion to stay action pending arbitration, as opposed to motion to compel arbitration, is not treated as a separate special proceeding (see, Karger, Powers of the New York Court of Appeals § 5:21, at 166 [3d ed]).

- Matter of Vilcek v Biochem, Inc., lv denied in part 70 NY2d 728 [1987] [motion to disqualify an arbitrator commences a separate special proceeding].

- Miller v Macri, lv denied 70 NY2d 610 [1987] [application for provisional relief in an arbitrable controversy commences a separate special proceeding].

VII. THE "NECESSARILY AFFECTS" REQUIREMENT

A. General Overview

In accordance with the strong public policy against piecemeal appeals in a single litigation, nonfinal Appellate Division orders are generally not appealable to the Court of Appeals, except under certain limited circumstances. Nevertheless,

> the correctness of a final determination may often turn on the correctness of such a nonfinal order, and the appeal from the final determination would then be pointless if that order could not also be reviewed. It has accordingly long been the practice in this State to permit review, on an appeal from a final determination, of any nonfinal determination necessarily affecting the final determination which has not previously been reviewed by the appellate court

(Karger, supra, § 9:5, at 297-314). The "necessarily affects" requirement now appears in several places throughout the CPLR:

1. Appealability: The "necessarily affects" requirement appears as a limitation on appeals:

   a. Appeals as of Right Directly from Final Trial Court Judgments - CPLR 5601(d): An appeal as of right may be taken to the Court of Appeals from a final Appellate Division order or directly from a final trial court judgment or order where the Appellate Division made an order on a prior appeal that "necessarily affects" the final determination (see, Section I-A-5 of this outline).

   b. Motion for Leave To Appeal Directly from a Final Trial Court Judgment - CPLR 5602(a)(1)(ii): A litigant may seek leave to appeal directly from a final trial court judgment, where the Appellate Division made an order on a prior appeal that "necessarily affects" the final determination (see, Section II-C-2 of this outline).

2. Reviewability: The necessarily affects" requirement also appears as a limitation on reviewability. CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review any nonfinal judgment or order that "necessarily affects" the final judgment (see, Section V-C-2 of this outline).

B. The "Necessarily Affects" Requirement

1. As this Court recently stated, its "opinions have rarely discussed the meaning of the expression 'necessarily affects'. . . [and] have never attempted . . . a generally applicable definition" (Oakes v Patel, 20 NY3d 633, 644 [2013]). Indeed, it is difficult to distill a rule of general applicability in this area. Arthur Karger gives a workable definition of the "necessarily affects" requirement. According to Karger, a nonfinal order "necessarily affects" a final determination "if the result of reversing that order would necessarily be to require a reversal or modification of the final determination" and "there shall have been no further opportunity during the litigation to raise again the questions decided by the nonfinal order" (Karger, supra, § 9:5, at 304-305, 311; see also, Cohen and Karger, supra, § 79, at 340).

2. A prior nonfinal Appellate Division order cannot necessarily affect a final judgment or order unless it is issued in the same proceeding (Town of Oyster Bay v Preco Chem. Corp., lv dismissed 58 NY2d 1066).

3. For a helpful discussion of the types of orders that necessarily affect

subsequent orders, see, Karger, supra, § 9:5 , at 297-314; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5501:4, at 18; 12 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 5501.05-5501.08.

C. Examples of Orders That Necessarily Affect Final Judgments

1. An order denying defendant's motion for summary judgment to dismiss complaint which establishes a law issue in the case (GIT Indus. v Rose, mot to dismiss appeal denied 60 NY2d 631 [1983]; compare, Quinn v The Stuart Lakes Club, appeal dismissed 56 NY2d 569 [1981] [order denying summary judgment does not necessarily affect final judgment when the Appellate Division did not foreclose the possibility of summary relief on expanded record]).

2. An order granting a new trial, but restricting the scope of the issues involved in the retrial (Kenford Co. v County of Erie, mot to dismiss appeal denied 72 NY2d 939 [1988]). However, an order granting a new trial of the whole case, thereby permitting every question raised in the first trial to be raised in the new trial, does not "necessarily affect" the final judgment rendered after retrial (Atkinson v County of Oneida, mot to dismiss appeal granted 57 NY2d 1044 [1982]).

3. An order granting a motion to dismiss counterclaims and third-party claims pleaded with the answer, for failure to state a cause of action (Siegmund Strauss, Inc. v 149th Realty Corp., 20 NY3d 37, 42-43 [2012]).

4. An order granting or denying a motion to amend a pleading to include a new cause of action or defense (Oakes v Patel, 20 NY3d 633, 644-645 [2013]).

D. Examples of Nonfinal Orders That Do Not Necessarily Affect Final Judgments

1. An order which denies a party the right to include certain materials in the record on appeal (Kasachkoff v City of New York, mot to dismiss appeal granted in part 67 NY2d 645 [1986]).

2. An order holding a party in contempt (New York City Tr. Auth. v Lindner, lv dismissed 58 NY2d 796 [1983]).

3. An order denying a party's application for class certification (Karlin v IVF Am., 93 NY2d 282, 290 [1999]).

FINALITY CONTINUUM

TOO EARLY	FINAL	TOO LATE
Order Administering Course of Litigation		Order Denying Motion for Renewal, Reargument or Leave to Appeal; Order Denying Motion to Vacate
Order Awarding or Denying Provisional Relief (e.g., denial of stay pending appeal to intermediate appellate court)		
Order Denying (in whole or part) Motion to Dismiss	Order Resolving All Causes of Action in Complaint and all Cross Claims and Counterclaims, including all nonministerial items of relief	Order Denying or Granting a Motion to Enforce Final Determination
Order Denying (in whole or part) Motion for Summary Judgment		
Interlocutory Judgment (e.g., fixing liability but leaving damages to be tried)		Order Denying Motion to Amend Prior Order or Judgment

This table is intended for use as a conceptual aid only. Exceptions and variations abound, so make sure you research your particular situation.

THE NEW YORK COURT OF APPEALS

CRIMINAL LEAVE APPLICATION PRACTICE

OUTLINE

BY

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The New York State Court of Appeals
Criminal Leave Application Practice Outline

Prepared by the Clerk's Office
New York State Court of Appeals
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The rules of all four Departments of the Appellate Division require assigned or retained defense counsel in that court to advise defendants of their right to appeal, and to timely file an application for leave to appeal to the Court of Appeals in the event of the intermediate appellate court's affirmance or modification of the defendant's conviction, if the defendant requests that such application be made. Thus, even intermediate appellate court counsel having no intention of pursuing an appeal to this Court must be familiar with the procedure for timely filing a Criminal Leave Application, as it is part of that counsel's representation responsibilities.

The best place to start for anyone not experienced in this area is by reading the applicable statutes and rules. Fortunately, in the area of Criminal Leave Applications to Judges of this Court, this is not a daunting task -- the relevant sections of articles 450 and 460 of the Criminal Procedure Law (CPL) and Rule 500.20 of the Court of Appeals Rules of Practice can be read and re-read in just a few minutes. A few other sources that may be helpful are Meyer, The Defense Point of View, The Defender, Spring 1987, p 27; 25 Ostertag and Benson, General Practice in New York, §§ 39.37 - 39.57; and Karger, Powers of the New York Court of Appeals §§ 20:1 - 21:18 (3d ed rev).

The outline below is designed to summarize the above statutes and rule and other pertinent provisions, provide a few practice hints, and serve as a convenient reference. This outline is not an official communication of the Court of Appeals. In the event of any conflict between the text of an applicable Court rule or Court decision and a statement in this outline, the rule or decision controls. The information in this outline is intended only as a research guide, and is not a substitute for professional advice or individual legal research.

I. **Necessity for criminal leave application**

No appeal currently lies as of right in criminal cases. CPL 450.70 and CPL 450.80 provide for appeals as of right in cases involving the death penalty. However, in People v LaValle, 3 NY3d 88 (2004), the Court of Appeals held the death penalty sentencing statute unconstitutional, and in People v Taylor, 9 NY3d 129, 155 (2007), the Court stated unequivocally, "the death penalty sentencing statute is unconstitutional on its face." Thus, at present, all appeals to the Court of Appeals in criminal cases must be from an order of an intermediate appellate court and must be by permission (see CPL 450.90).

II. **Definition of criminal case**

CPL 1.20(16) defines a criminal action as an action that "commences with the filing of an accusatory instrument against a defendant in a criminal court," and CPL 1.20(18) defines a criminal proceeding as "any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action." As a general rule, we are talking about cases with a "People v _____" caption.

Some exceptions to cases using "People v _____" captions constituting criminal cases are:

(1) appeals pursuant to CPL 330.20(21)(c) (commitment order);

(2) proceedings for remission of forfeiture of bail (see CPL article 540; People v Public Serv. Mut. Ins. Co. [Robinson], 37 NY2d 607, 610 [1975]);

(3) appeals of orders determining level of notification under the Sex Offender Registration Act (see Correction Law § 168-d[3]).

Additionally, criminal actions and/or proceedings under the CPL do not include "quasi-criminal" proceedings which are governed by the civil appeal provisions of the CPLR. Examples of these are:

(1) habeas corpus (People ex rel. _____)(art 70 of the CPLR); and

(2) CPLR article 78 proceedings to review prison disciplinary determinations, parole determinations, etc., or to compel or prohibit a judge or prosecutor from taking some action within a criminal action.

III. **Orders appealable**

A. **CPL 450.90(1)**

CPL 450.90(1) specifies some of the orders from which a criminal leave application may be made. Provided that a certificate granting leave to appeal is issued, an appeal may be taken to the Court of Appeals:

(1) from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court pursuant to CPL 450.10 (appeal as of right to intermediate appellate court

by defendant), 450.15 (appeal to intermediate appellate court by defendant by permission), or 450.20 (appeal as of right to intermediate appellate court by the People);

(2) from an order granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance or wrongful deprivation of appellate counsel; and

(3) from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court from an order entered pursuant to CPL 440.46 (motion for resentence; certain controlled substance offenders).

It is important to note, however, that subdivision (3) above does not make all orders disposing of controlled substance resentencing applications appealable (see People v Bautista, 7 NY3d 838 [2006] [denial of defendant's motion to be resentenced pursuant to the Drug Law Reform Act of 2005 not appealable to the Court of Appeals]; People v Sevencan, 12 NY3d 388 [2009] [order informing defendant of the resentence to be imposed under the Drug Law Reform Act of 2004 not appealable to the Court of Appeals]).

B. **Intermediate appellate court order dismissing appeal**

CPL 470.60 allows for an appeal from an order of an intermediate appellate court dismissing an appeal thereto (see CPL 470.60[3]). Such an appeal may be based either upon the ground that the dismissal was invalid as a matter of law or upon the ground that the dismissal constituted an abuse of discretion.

C. **Intermediate appellate court 460.30 order**

An order of an intermediate appellate court granting or denying a motion for an extension of time under CPL 460.30 is appealable to the Court of Appeals if the order states that the determination was made on the law alone (see CPL 460.30[6]).

D. **Illegal corrective action**

Illegal corrective action by the intermediate appellate court provides another predicate for jurisdiction (see CPL 450.90(2)(b), 470.10).

IV. **Limitations**

A. **Adversely affected**

Generally, the intermediate order of the appellate court must be adverse or partially adverse to the appellant for a criminal leave application to properly lie.

An intermediate appellate court order of affirmance is adverse to the party who was appellant in that court. An intermediate appellate court order of reversal is adverse to the party who was respondent in that court. An intermediate appellate court order of modification is partially adverse to each party (see CPL 450.90[1]).

In this connection, it is important to note the difference between adversely affected under CPL 450.90(1) and aggrieved under CPLR 5511. Aggrievement under CPLR 5511 may often be a broader concept (see People v Griminger, 71 NY2d 635, 641 [1988] [Defendant was not adversely affected or partially adversely affected by an Appellate Division order of reversal of two judgments of conviction and sentence and remand for further proceedings, notwithstanding that defendant was "aggrieved" by the denial of portions of his pretrial motion.]).

B. **Reversal or modification**

Where the order of the intermediate appellate court is one of reversal or modification, an appeal lies when the Court of Appeals determines that the intermediate appellate court's determination of reversal or modification was "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification" (CPL 450.90[2][a]).

It should be stressed that it is not what the intermediate appellate court says, but what the Court of Appeals determines is the basis for the reversal or modification that controls (see People v Giles, 73 NY2d 666, 670 [1989]).

Determinations that have been held not to satisfy this requirement of CPL 450.90(2)(a) include instances where the reversal or modification:

> (1) is in the interest of justice (e.g., on an unpreserved issue [see People v Dercole, 52 NY2d 956, 957(1981); compare with People v Cona, 49 NY2d 26, 33-34 (1979) (where the question of preservation itself presented a law-based reversal upon which jurisdiction was predicated)]);
>
> (2) is based on an exercise or substitution of discretion (as opposed to a conclusion that there was an abuse of discretion);
> (3) is based on a question of fact;
>
> (4) is based on a mixed question of law and fact (see People v Harrison, 57 NY2d 470, 477-478 [1982] [e.g., probable cause, consent, custody]);

(5) is based on a determination that the verdict is contrary to the weight of the evidence (but sufficiency rather than weight is a law determination).

C. **Other limitations**

Even if the order is otherwise appealable, an application for leave to appeal will be dismissed if:

(1) a previous application for leave to appeal has been made (see People v McCarthy, 250 NY 358, 361 [1929]);

(2) the defendant dies, in which case the prosecution abates (see People v Parker, 71 NY2d 887 [1988]); or

(3) the defendant is unavailable to obey the mandate of the Court. As stated in People v Genet, 59 NY 80, 81 (1874), "[t]he whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person." Thus, this Court has consistently dismissed appeals where a defendant has absconded (see People v Smith, 44 NY2d 613 [1978]). In People v Del Rio, 14 NY2d 165 (1964), the Court dismissed where a defendant voluntarily absented himself by consenting to deportation. Compare, however, People v Diaz, 7 NY3d 831 (2006), a case where defendant was involuntarily deported and the Court dismissed without prejudice to an application by defendant to reinstate the appeal should defendant return to the Court's jurisdiction. The Court noted that defendant's absence did not "mandate dismissal of the appeal," but rather presented "a situation analogous to that of mootness." (id. at 832).

V. **To whom criminal leave application may be made**

As opposed to civil motions for leave to appeal, where a litigant can seek leave to appeal from both the Appellate Division and the Court of Appeals, only one criminal leave application may be made (see People v McCarthy, 250 NY 358, 361 [1929]).

A. **Appellate Division orders under CPL 450.90(1)**

When a motion for leave to appeal is made from an Appellate Division order described in CPL 450.90(1), the application may be made to either a Justice of the Appellate Division or a Judge of the Court of Appeals (see CPL 460.20[2][a]).

In the Court of Appeals, the application is made to the Chief Judge of the Court (see Court of Appeals Rules of Practice 500.20[a]). The Chief Judge directs the assignment of each application to a Judge of the Court through the Clerk of the Court. Applicants may not choose the Judge to whom it is assigned (see Court of Appeals Rules of Practice 500.20[c]).

CPL 460.20(2)(a)(ii) provides that if the application is to a Justice of the Appellate Division, you may direct your application to any Justice of the Appellate Division Department that entered the order sought to be appealed from. Although the statute does not provide further, in each Department an applicable Appellate Division rule gives greater specificity. The First Department provides that the application "shall be addressed to the court for assignment to a justice" (22 NYCRR § 600.8 [d][2]). The Second and Fourth Departments have rules that provide that the application may be made to any Justice that sat on the panel that decided the case (see 22 NYCRR § 670.6[d]; 22 NYCRR § 1000.13[p][4][iii]). The Third Department rule states that the application "may, but need not be, addressed to a named justice" (22 NYCRR § 800.3).

B. **Appellate Division order of dismissal**

An application for leave to appeal from an Appellate Division order of dismissal may only be made to a Judge of the Court of Appeals (see CPL 470.60[3]).

C. **Appellate Division order granting or denying a motion for an extension of time to take an appeal**

An application for leave to appeal from an Appellate Division order granting or denying a CPL 460.30 motion for an extension of time may be made only to a Judge of the Court of Appeals (see CPL 460.30[6]).

D. **Order of an intermediate appellate court other than the Appellate Division**

An application for leave to appeal from an order of an intermediate appellate court other than the Appellate Division may be made only to a Judge of the Court of Appeals (see CPL 460.20[2][b]).

VI. **Time within which application must be made**

A. **Generally**

A criminal leave application must be made within 30 days after service upon the

appellant of a copy of the order sought to be appealed (see CPL 460.10[5]). A motion for reargument in the Appellate Division does not stay the 30-day period in which to make a 460.20 application.

B. **Extension of time**

CPL 460.30 provides authority for the Court of Appeals to entertain a motion for an extension of time to file a CPL 460.20 criminal leave application. The application is only available to a defendant, not the People (see CPL 460.30[1]).

(1) **When to make motion**

The motion must be made with due diligence after the time for the making of a criminal leave application has expired, but in no case more than one year thereafter (see CPL 460.30[1]).

(2) **How to make motion**

"The motion must be in writing and upon reasonable notice to the People and with opportunity to be heard" (CPL 460.30[2]). The motion should be made in compliance with Rules 500.20(g) and 500.21 of the Court of Appeals Rules of Practice.

(3) **Grounds for motion**

The motion must specify that the failure to bring a timely CPL 460.20 application 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, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to the defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant" (CPL 460.30[1]).

VII. Form and content of criminal leave application to Judge of Court of Appeals

A. Form

The application itself should be in letter form, sent to the attention of the Clerk of

the Court, with a copy sent to opposing counsel, the adverse party or both, as circumstances warrant (formal affidavit of service not required). Note, however, that the application may be made "first orally and then in writing" (CPL 460.20 [3][b]).

B. **Content**

(1) The letter should state:

(a) That an application has not been made to a Justice of the Appellate Division

(b) Whether there are any co-defendants and, if so, the status of their appeals

(c) The issues sought to be raised on appeal to the Court of Appeals, why such issues are reviewable and leaveworthy, and where such issues are preserved in the record

(d) Whether oral argument is sought

(see Rule 500.20[a] of the Court of Appeals Rules of Practice)

(2) Material to be provided with application (Rule 500.20[b] of the Court of Appeals Rules of Practice)

(a) One copy of each brief submitted by the parties below (including pro se supplemental briefs)

(b) The order and decision of the intermediate appellate court sought to be appealed from

(c) All other relevant opinions of the courts below, and any other papers to be relied upon in furtherance of the application

VIII. **Process**

A. **Submission of papers**

Once the application is assigned, the appellant will have three weeks to submit additional papers, if any. The respondent will then have two weeks to submit responsive

papers. There is no right to reply.

B. **Oral argument**

A request for oral argument will not automatically entitle one to an oral hearing. If the Judge determines that oral argument is warranted, a member of the Judge's staff will contact counsel to schedule either an in-person or a telephone conference.

C. **Time to decide**

There is no set time in which an application is decided. It varies from Judge to Judge and on the complexity of the issues raised.

IX. Factors considered in deciding applications

A. Limited reviewability or nonreviewability

(1) Preservation

Generally, the Court of Appeals cannot review unpreserved errors of law (see People v Hawkins, 11 NY3d 484 [2008]). It does not have interest of justice jurisdiction like the intermediate appellate courts. Thus, generally, issues need to be raised in the courts below, most often in the trial court, to be preserved and present an issue of law for this Court's review.

In this regard, however, litigants should be aware that certain matters are regarded as "mode of proceedings" errors, and such errors need not be preserved to be reviewed by the Court of Appeals (see People v Ahmed, 66 NY2d 307, 310 [1985]).

(2) Mixed questions of law and fact

It is important to note that with mixed questions, the Court's review is generally limited to whether there is any support in the record for the Appellate Division determination (see People v Bradford, 15 NY3d 329 [2010]; People v Konstantinides, 14 NY3d 1 [2009]).

(3) Excessive Sentence

The Court of Appeals is not empowered to review a sentence on the ground of excessiveness (see People v Thompson, 60 NY2d 513, 521 [1983];

People v Discala, 45 NY2d 38, 44 [1978]).

(4) Weight of the Evidence

Unlike the Appellate Division, the Court of Appeals has no power to engage in a weight of the evidence analysis in a non-capital criminal case (see People v Bleakley, 69 NY2d 490 [1987]).

Please note that issues which relate to nonreviewability in an affirmance posture may create nonappealability in a reversal or modification context (see part IV B, supra).

B. **Other certiorari factors**

(1) Whether the law is well settled

(a) Discuss whether this is a case of first impression

(b) Mention whether there is a split in the Appellate Division Departments

(2) Significance and novelty of issue

(a) Note whether the case involves a recent United States Supreme Court decision and, if so, how it should be interpreted in New York. Also, mention whether the case involves the construction of new state statutory provisions.

(b) Explain why this case may otherwise present an issue of statewide importance.

(3) Case specific factors

The Court will consider how well the case is presented by the attorneys, both in terms of quality of arguments and focus on key issues.

X. **Stays**

A. **Not automatic**

With rare exception (see CPL 460.40[1] and CPL 460.40[2]), the taking of an appeal by either party does not stay a judgment, sentence or order of either a criminal court of original jurisdiction or an intermediate appellate court. CPL 460.60 provides the procedures for moving for a stay.

B. **Making the application**

An application pursuant to CPL 460.60 must be made upon reasonable notice. The application may be made immediately after the entry of the order sought to be appealed or at any subsequent time during the pendency of the appeal. Only one application may be made under CPL 460.60 (see 460.60[2]).

The stay request may be made in the letter application for leave to appeal or in a separate letter. The request must state whether the relief sought has previously been requested, whether defendant is incarcerated or at liberty and, if at liberty, the conditions thereof and any surrender date (see Rule 500.20[f] of the Court of Appeals Rules of Practice).

C. **Order issued**

A judge to whom a 460.20 criminal leave application has been assigned may issue an order "both (i) staying or suspending the execution of the judgment pending the determination of the application for leave to appeal, and, if that application is granted, staying or suspending the execution of the judgment pending the determination of the appeal, and (ii) either releasing the defendant on his own recognizance or continuing bail as previously determined or fixing bail pursuant to the provisions of article five hundred thirty" (CPL 460.60 [1][a]).

D. **When stay not available**

A stay is not available to those convicted of certain crimes. A judge who is otherwise authorized pursuant to CPL 460.60 to issue an order of recognizance or bail pending the determination of an appeal may do so unless the defendant received a class A felony sentence or a sentence for any class B or class C felony offense defined in article 130 of the Penal Law (sex offenses) committed or attempted to be committed by a person 18 years of age or older against a person less than 18 (see CPL 530.50).

CPL 460.60 indicates that no stay may obtain unless the judgment or order includes a sentence of imprisonment (see 460.60[1][a]; but see People v Letterlough, 86 NY2d 259, 263 [1995]).

E. **Continuation of stay**

If within 120 days after the issuance of a certificate granting leave to appeal, the appeal has not been argued or submitted in the Court of Appeals, a stay order issued under CPL 460.60(1) terminates. Thus, if the need arises, a defendant should move under

CPL 460.60(3) to extend the time for argument or submission of the appeal to a date beyond the 120-day period and for a continuation of the stay until such time as the appeal is decided.

XI. **Reargument or reconsideration**

Requests for reargument or reconsideration should be in letter form addressed to the Clerk of the Court, with proof of service on the adverse party. Such requests are assigned to the Judge who ruled on the original application. The application must be made within 30 days after the original application was decided, unless otherwise permitted by the assigned Judge. A request for reargument or reconsideration shall not be based on the assertion of new arguments, "except for extraordinary and compelling reasons" (Rule 500.20[d] of the Court of Appeals Rules of Practice).

XII. **Withdrawal of criminal leave application**

A request to withdraw a criminal leave application must be in writing and, if made on behalf of a defendant, shall also be signed by the defendant. It shall contain an indication of service of one copy upon all parties. If the request is made by a defendant personally, and the defendant is represented, proof of service upon defense counsel must be made. The request is submitted to the Judge assigned the criminal leave application (Rule 500.8[c] of the Court of Appeals Rules of Practice).

XIII. **Miscellaneous practice pointers**

If you are requesting a stay, call your adversary first to see if you can reach any sort of agreement before contacting the Clerk's Office or the Judge assigned to your application.

It is the applicant's burden to establish appealability and reviewability on a criminal leave application (see Rule 500.20[a][4]).

If you wish to continue your representation as assigned counsel after leave to appeal is granted, you must move to be assigned (Rule 500.21 governs general motion practice).

If your application for assignment is granted, you should, within ten days after the issuance of the order granting your motion for assignment, serve and file a preliminary appeal statement as required by Rule 500.9.

If you work in a large office, include your direct-dial telephone number in all

correspondence.

Of the 2,637 Criminal Leave Applications decided by Judges of the Court of Appeals in 2008, 53 (2%) were granted. Of the 2,380 applications decided by Judges of the Court of Appeals in 2009, 81 (3.4%) were granted. Of the 2,200 applications decided by Judges of the Court of Appeals in 2010, 108 (4.9%) were granted.

APPELLATE PRACTICE PITFALLS: BEYOND THE BASICS, ANTICIPATING PROBLEMS

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General Commentary on Article 55, Prof. David D. Siegel

"Article 55 supplies the procedural instruction for the taking and perfecting of appeals, but it does so only after leading off, in CPLR 5501, with "scope of review", a subject more substantive than procedural in its impact. "Reviewability", as scope of review is sometimes called, is easily confused with "appealability", which determines what dispositions may be appealed." Judgments and orders appealable to the Court of Appeals are the subject of Article 56; those appealable to the appellate division, Article 57. Once an appeal is taken, however, on the authority of whichever of the two articles is in point, the question of what will be reviewed by the appellate court is determined by the "scope of review" instruction of CPLR 5501."

> **Patron v. Patron 40 N.Y.2d 582, 584, 388 N.Y.S.2d 890 (1976)**:
> Appealability = the right to be in the Court of Appeals, "depends on the scope of the Court's power to review" [what dispositions may be appealed].
>
> Reviewability = the authority of the Court of Appeals once the appeal is before the Court to consider the issues (Cohen and Karger, Op. cit., pp. 4, 447).

"Reviewability" and "Appealability" Distinguished.
Prof. David Siegel, Practice Commentaries, C5501:2

"Article 57 of the CPLR sets forth the list of judgments and orders that may be appealed to the appellate division. Article 56 does the same for the Court of Appeals. But the fact that a given case may be appealed does not automatically insure the appellant review of the point that aggrieves her. 'Reviewability', as we may call it, is not always coextensive with 'appealability'. Examples of where the two diverge are likely to involve the Court of Appeals more than any other court, because of the court's narrow powers of review. An appeal may be taken to the Court of Appeals, for example, from an appellate division order finally determining an action, upon a showing that two appellate division justices dissented on a point of law. On that appeal, the Court of Appeals can review any question of law. But because the Court of Appeals lacks the general power to review findings of fact, the mere presence of the case before the Court of Appeals, brought there readily enough under the "appealability" standards of CPLR 5601, will not earn review of the fact findings because of the restrictions imposed on 'reviewability' by subdivision (b) of CPLR 5501.

In rare instances the question of whether a given case is 'appealable' to the Court of Appeals may even turn on whether or not the point it presents is 'reviewable'. See, e.g., Patron v. Patron, 40 N.Y.2d 582, 388 N.Y.S.2d 890 (1976). Patron was decided when, under CPLR 5601(a), a showing that the appellate division had merely 'modified' the lower court's judgment could set the stage for an appeal to the Court of Appeals. The modification option was later removed--see Commentary C5601:3 on CPLR 5601 below--but the case remains a good instruction on the occasional interplay between 'appealability' and 'reviewability'."

REVIEWABILITY

Court of Appeals May Not Review Question of Weight of Evidence
But It May Review Issue of Sufficiency of the Evidence

Heary Bros. Lightning Protection Co., Inc. v. Intertek Testing Services, N.A., Inc. 4 N.Y.3d 615, 797 N.Y.S.2d 400 (2005)
Defendant argues that we have no power to review the Appellate Division's decision because it resolved a question of fact, not a question of law (CPLR 5501[b]). We disagree, and hold that the decision is reviewable.

[1] The problem arises because the Appellate Division opinion says that Supreme Court's order is "modified on the law," but also says that "the jury's award of damages is against the weight of evidence"...A "weight of the evidence" determination is a factual one that we have no power to review (Cohen v. Hallmark Cards, 45 N.Y.2d 493, 498–500, 410 N.Y.S.2d 282 [1978]).

The result reached shows that in reality the Appellate Division ruled on the sufficiency, not the weight, of the evidence. The Appellate Division held that the new trial it ordered "shall be on damages from September 1998 to April 2000," thus prohibiting any award of damages for a later time...In effect, the Appellate Division directed a verdict against plaintiffs as to post-April 2000 damages—a ruling of law that this Court is empowered to review (Cohen, 45 N.Y.2d at 497–498, 500, 410 N.Y.S.2d 282; Karger, Powers of the New York Court of Appeals § 77[c], at 475–476 [3d ed]).

Settlement of the Record
Every appellant has a clear legal right to settlement of the record.[1]

[1] Weeden v. Ark, 2 A.D.3d 1280, 768 N.Y.S.2d 891 (4th Dept.,2003); Matter of Lavar C., 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept.,1992).

CPLR 5601(c), JUDGMENT ABSOLUTE

CPLR 5601. Appeals to the court of appeals as of right
(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

➤**Morales v. County of Nassau, 94 N.Y.2d 218, 703 N.Y.S.2d 61 (1999)**:
Lacking finality, an order of the Appellate Division granting a new trial typically would not be appealable to this Court, but plaintiff has stipulated that, upon affirmance, judgment absolute shall be entered against her, permitting an exceptional appeal as of right (CPLR 5601[c]).

Absent prejudice, CPLR 3025 authorizes amendment to pleadings “at any time.” However, the procedural posture of this case prohibits our addressing plaintiff's motion to amend. On an appeal taken pursuant to stipulation for judgment absolute, the only matter this Court may consider is whether the Appellate Division erred as a matter of law in granting the new trial (Matter of Wilcox v. Zoning Bd. of Appeals, 17 N.Y.2d 249, 254, 270 N.Y.S.2d 569; Karger, Powers of the New York Court of Appeals § 47, at 293 [3d ed.]). After the stipulation, which confines our review to the question whether the Appellate Division's reversal was proper, the time to amend had passed.

Weiman v. Weiman, 295 N.Y. 150 (1946):
➤A judgment entered upon a stipulation for judgment absolute is ‘* * * founded upon the agreement of the parties that a certain result should follow the decision of this court upon the questions of law presented to it by the record in court.' Roberts v. Baumgarten, 126 N.Y. 336, 341. It is ‘* * * in effect a stipulation for judgment by consent in case of affirmance.' Christensen v. Morse Dry Dock & Repair Co., 243 N.Y. 587; Canfield v. Elmer E. Harris & Co., 252 N.Y. 502, 505. Where, as in this case, the reversal is upon the facts as well as the law, any evidence which supports the determination of the Appellate Division would require an affirmance by this court. Curcio v. City of New York, 275 N.Y. 20...

Prof. David Siegel, Practice Commentaries, C5615:1.
Disposition in Judgment Absolute Situation.
In three instances in New York appellate practice there is the procedure called the stipulation for judgment absolute. In two of them, the appellate division has made an order granting a new trial and the party whose lower court judgment is lost because of that order wants to appeal the order to the Court of Appeals. (The third instance involves a similar new trial order, but on appeal from an appellate term to the appellate division. See CPLR 5703[a].) The order violates one of the cardinal rules of Court of Appeals jurisdiction, however, in that it's nonfinal. It may nevertheless be taken up, but only if the appellant--the party who would take it to the Court of Appeals--stipulates that judgment absolute may be entered against her if the Court of Appeals determines that the appellate division was correct, or merely within its prerogatives, in ordering a new trial.

In one of these two instances the appeal may be taken to the New York Court of Appeals as of right. That's where the action originated in one of the superior trial courts or in an administrative agency. CPLR 5601(c). In the other instance, it originated in one of the lower trial courts and in that event, even with the judgment absolute stipulation, the appeal to the Court of Appeals lies only with the permission of the appellate division. CPLR 5602(b)(2)(iii). The pitfalls of the judgment absolute procedure in both instances were discussed earlier--see Commentaries C5601:5 and C5602:3--with the warning that the procedure should

be used, if at all, only when a question of law is involved, and hardly ever even in that instance.

Never should it be used if the appellate division ordering of a new trial can be justified on the basis either of fact findings or the exercise of discretion. If the Court of Appeals finds it supportable on either basis, the result that this procedure decrees and which CPLR 5615 confirms is a judgment absolute against the appellant: no restored judgment and no new trial, either.

Prof. David Siegel, Practice Commentaries,
C5601:5. New Trial and Stipulation for Judgment Absolute.
[S]ubdivision (c) of CPLR 5601 offers a way to appeal an appellate division order granting a new trial, or affirming an order granting a new trial...There are few if any instances in which the stipulation procedure of CPLR 5601(c) should be used. It is a perilous device whose potential is at best unpredictable. In the following example we will have the plaintiff in the role of the one who wants to go to the Court of Appeals. It can as well happen on the defendant's side.

Plaintiff P has had a verdict and a judgment for $500,000 after a jury trial. On appeal by defendant D, the appellate division has reversed and granted a new trial. P wants to appeal the appellate division order granting the new trial. P may do so if he stipulates that, on affirmance by the Court of Appeals, “judgment absolute shall be entered against him”. This means that if the Court of Appeals finds that the appellate division had ground for ordering the new trial, whatever that ground might be, there will be no new trial, just a final judgment dismissing the plaintiff's action. CPLR 5601(c) is, in practical effect, a vindictive statute that tells the appellant that he imposes on the Court of Appeals at his peril.

The appellate division's discretion in the granting of a new trial is broad. It can grant a new trial, for example, simply in the interests of justice because of some cumulative effect of otherwise minor colloquies or rulings at the trial, or because it finds the verdict contrary to the weight of the evidence, or for any number of other discretionary grounds that have little hope of being overturned in the Court of Appeals. Indeed, unless an “abuse” of discretion is found, which can qualify as a question of law, the Court of Appeals does not even have the power to review such exercises of discretion. The plaintiff who uses CPLR 5601(c) when one of these factual or discretionary grounds is the basis for the appellate division's order is therefore courting disaster. See CPLR 5615. The plaintiff will doubtless think the discretion was abused, but if the Court of Appeals disagrees, as just as likely it will, P's lawsuit is at an end. P gets no restoration of the judgment he wants to keep, nor even a second chance for a new one.

If the basis of the new trial rests on an issue of law, it is a bit closer to justifying

the use of subdivision (c). Suppose, for example, that the sole ground for the new trial is the appellate division's holding that the trial judge erroneously admitted a piece of evidence; that as matter of law it is not admissible. If the appellate division disposition makes it clear that that is the ground for the new trial, and the plaintiff is convinced the appellate division is in error, perhaps the subdivision (c) stipulation procedure can be used. Even here, however, it is perilous. If the Court of Appeals agrees with the appellate division, the plaintiff may lose everything.

Is it worthwhile? Only if P is of the view that without the now-to-be-excluded evidence he has no case. If there is still a chance of prevailing at the new trial, despite the loss of this evidence, P may forfeit that chance by appealing the order of the appellate division granting the new trial.

The consequences work the same way when D is the appellant. Suppose, for example, that the verdict and judgment go for D, dismissing P's action. On appeal the appellate division reverses and grants a new trial. If D, using subdivision (c), appeals to the Court of Appeals with the stipulation for judgment absolute, and the Court of Appeals upholds the order granting the new trial, there will be "judgment absolute" for P. In this context it means that liability is established and that the remand of the case to the trial court will be only for a trial of damages.

If the appellant has already given the stipulation but has second thoughts about it--a tardy but probably healthy development--he should seek the other side's permission to withdraw the stipulation, or move the Court of Appeals for leave to withdraw it. The motion should be made before the oral argument, although it has sometimes been entertained at or after it. See the several columns by Thomas R. Newman addressed to the stipulation procedure, N.Y.Law Journal, January 15, February 18, and March 18, 1976, and Siegel, New York Practice 2d Ed. § 527.

In one recent case, a defendant who took the risk of the stipulation for judgment absolute procedure was spared its consequences when--ironically--the Court of Appeals dismissed his appeal for a procedural defect. Lusenskas v. Axelrod, 81 N.Y.2d 300, 598 N.Y.S.2d 166, 614 N.E.2d 729 (1993). The defect was that when the appellate division, after a defendant's verdict, reversed and granted a new trial, and the defendant sought to appeal the new trial order, he stipulated to judgment absolute on the issue of liability only. That won't do, held the court. It's got to be a stipulation that disposes of everything, because the purpose of this small opening in the wall of finality is to create at least the possibility of a final determination. That possibility is lost with the kind of fractional stipulation the defendant offered here. An affirmance would not put an end to the case, because there would still have to be a trial of the damages issues. Hence the CPLR 5601(c) path was closed and the appeal was dismissed without reaching the merits.

CPLR 5615 reflects further on the Court of Appeals disposition when the case is

there under one of the judgment absolute stipulations. See the Commentary on CPLR 5615.

Prof. David Siegel, 2006, C5601:5. New Trial and Stipulation for Judgment Absolute.

Forfeiture Potential of Stipulation for Judgment Absolute Procedure Is Again Shown in Court of Appeals Case

We had an example of this unpredictable device in the 2000 Commentary C5601:5, built around the Court of Appeals Morales case. Another and more recent Court of Appeals example is Heary Bros. Lightning Protection Co. v. Intertek Testing Services, N.A., 4 N.Y.3d 615, 797 N.Y.S.2d 400 (2005), built on a case whose substantive issue concerned the gauging of lost profits.

In most cases an appellant can get to the Court of Appeals only with the court's leave. Amendments in the 1980s largely reduced the appeal as of right. One of the survivors in the of-right category, however, is known as the “stipulation for judgment absolute”, provided for in CPLR 5601(c), again involving a plaintiff (P) who won at the trial, but lost the victory on appeal before the appellate division. Not in a final judgment, but in an appellate division order that merely directs a new trial, meaning that all is not yet lost.

P can accept the new trial, which offers at least some opportunity for winning again and getting at least something out of the case, or instead appeal the appellate division order to the Court of Appeals--as a matter of right under CPLR 5601(c)--and hope for a reversal, which would restore P's trial-level victory.

The difficulty is that this step requires P to stipulate that if the Court of Appeals affirms the appellate division order, there will not be a new trial at all, but a final judgment entered against P dismissing the case on the merits and foreclosing any recovery. P in this situation is placing all bets on being able to convince the Court of Appeals that the appellate division was wrong as a matter of law.

CPLR 5511, AGGRIEVED PARTY, DEFAULTS

CPLR 5511. Permissible appellant and respondent:
An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent.

Krause v. Krause, 282 N.Y. 355 (1940):
An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of stipulation.

Hecht v. City of New York, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983):
[A]n appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party (CPLR 5501, subd. [a]; 5511; Segar v. Youngs, 45 N.Y.2d 568, 410 N.Y.S.2d 801; Stark v. National City Bank, 278 N.Y. 388, 394; St. John v. Andrews Inst. for Girls, 192 N.Y. 382, 386–389).

Signorile v. Signorile, 102 A.D.3d 949, 958 N.Y.S.2d 476 (2nd Dept.,2013):
The cross appeal must be dismissed as abandoned, as the brief filed by the defendant does not seek reversal or modification of any portion of the judgment.

Spielman v. Mehraban, 105 A.D.3d 943, 963 N.Y.S.2d 704 (2nd Dept.,2013):[2]
A party is not aggrieved by an order which does not grant relief [he or she] did not request" (Schlecker v. Yorktown Elec. & Light. Distribs., Inc., 94 A.D.3d 855, 941 N.Y.S.2d 886 [internal quotation marks omitted]). "Merely because the order appealed from contains language or reasoning that a party deems adverse to its interests does not 'furnish a basis for standing to take an appeal' " (Castaldi v. 39 Winfield Assoc., LLC, 22 A.D.3d 780, 781, 803 N.Y.S.2d 716, quoting Pennsylvania General Ins. Co. v. Austin Powder Co., 68 N.Y.2d 465, 472–473, 510 N.Y.S.2d 67).

[2] Musacchio v. Musacchio 107 A.D.3d 1326, 968 N.Y.S.2d 664 (3rd Dept.,2013) (The husband's arguments that Supreme Court erred in failing to appoint an attorney for the children, order forensic evaluations or conduct in camera interviews of the children prior to reaching its custody determination are not preserved for appellate review because, when given the opportunity, he failed to request any of the foregoing.); Dana-Sitzer v. Sitzer, 48 A.D.3d 354, 851 N.Y.S.2d 530 (1st Dept.,2008).

Parochial Bus Systems, Inc. v. Board of Educ. of City of New York, 60 N.Y.2d 539, 470 N.Y.S.2d 564 (1983):

[1] [2] Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal. (CPLR 5511; 10 Carmody-Wait 2d, N.Y.Prac., § 70:54; Siegel, N.Y.Prac., § 525; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5511.05.) ➤The major exception to this general rule, however, is that the successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief. This exception would include those situations in which the successful party received an award less favorable than he sought (Norton & Siegel v. Nolan, 276 N.Y. 392) or a judgment which denied him some affirmative claim or substantial right (City of Rye v. Public Serv. Mut. Ins. Co., 34 N.Y.2d 470, 358 N.Y.S.2d 391). But where the successful party has obtained the full relief sought, he has no grounds for appeal or cross appeal (Matter of Bayswater Health Related Facility v. Karagheuzoff, 37 N.Y.2d 408, 413, 373 N.Y.S.2d 49). This is so even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor (Matter of Zaiac, 279 N.Y. 545, 554), or where he failed to prevail on all the issues that had been raised (Matter of Kaplan v. Rohan, 7 N.Y.2d 884, 197 N.Y.S.2d 187; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5511.06).FN1

FN1. Indeed, even where the order of the Appellate Division "directs a modification * * * in a substantial respect", the successful party has no right to appeal unless it is actually "aggrieved" by that modification. (CPLR 5601, subd. [a], par. [iii]; Matter of Mize v. State Div. of Human Rights, 31 N.Y.2d 1032, 342 N.Y.S.2d 65; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5601.05.)

[3] [4] ➤The question remaining in such cases, however, is whether the successful nonaggrieved party, thus barred from bringing an appeal or cross appeal, may nonetheless seek review of an adverse holding rendered below, on the appeal from the final judgment or order brought by the losing party. Whatever may have been the confusion existing under section 580 of the old Civil Practice Act (repealed Sept. 1, 1963), the provisions of CPLR 5501 (subd. [a], par. 1) permit a broad scope of review of any such determinations that were "adverse to the respondent", as long as the final judgment or order has been properly appealed by the appellant. (10 Carmody-Wait 2d, N.Y.Prac., § 70:337; Siegel, N.Y.Prac., § 530, pp. 736–737; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., pars. 5501.04, 5511.06.) An appeal from a final judgment or order brings up for review any determination of the court below "which was adverse to the respondent" and which "if reversed, would entitle the respondent to prevail in whole or in part on [the] appeal". (CPLR 5501, subd. [a], par. 1.) This rule permits a respondent to obtain review of a determination incorrectly rendered below where, otherwise, he might suffer a reversal of the final judgment or order upon some other ground.

Hence, the successful party, who is not aggrieved by the judgment or order appealed from and who, therefore, has no right to bring an appeal, is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in his favor. (Town of Massena v. Niagara Mohawk Power Corp., 45 N.Y.2d 482, 488, 410 N.Y.S.2d 276; Kulaga v. State of New York, 37 A.D.2d 58, 63, 322 N.Y.S.2d 542 [concurring opn], affd. 31 N.Y.2d 756, 338 N.Y.S.2d 436; cf. Ferro v. Bersani, 78 A.D.2d 1010, 433 N.Y.S.2d 666 see, generally, Appeal—Right of Winning Party, Ann., 69 A.L.R.2d 701.) Any such error is reviewable once the final judgment or order has been properly appealed from by the losing party.

Cusson v. Hillier Group, Inc., 97 A.D.3d 1042, 949 N.Y.S.2d 259 (3rd Dept.,2012): Plaintiff sustained personal injures when he was struck by ice and snow that fell from a roof of one of Cornell's dormitory buildings. Plaintiff commenced this personal injury action against the architect, defendant The Hillier Group, Inc., and the general contractor, defendant Welliver McGuire, Inc...Welliver McGuire commenced a third-party action seeking indemnification from Charles F. Evans Company, Inc., the subcontractor that performed the roof work on the building.

[W]elliver McGuire moved for summary judgment dismissing the complaint against it on the basis that it owed no duty to plaintiff, a third party to its contract with Cornell to construct the building. [W]hile that motion was pending, Hillier's counsel moved to withdraw as counsel of record...Evans cross-moved for summary judgment dismissing the third-party complaint. While both motions for summary judgment were pending, Supreme Court... permitted [Hillier's] counsel to withdraw but without a stay of the proceedings. Thereafter, Supreme Court granted both motions for summary judgment dismissing all claims against Welliver McGuire and Evans. Hillier now appeals from the order.

The appeal must be dismissed. Hillier did not assert any cross claims against Welliver McGuire or Evans. Hence, Hillier is not aggrieved and may not appeal the grant of summary judgment to those parties ([cites omitted]). Likewise, Hillier's challenge to Supreme Court's order granting counsel's motion to withdraw without staying the proceedings is not properly before this Court as Hillier did not appeal from that order (cites omitted).

No Appeal from a Consent to a Divorce

Saleh v. Saleh 40 A.D.3d 617, 617 (2nd Dept.,2007):[3]
The appeal from so much of the judgment as dissolved the parties' marriage must be dismissed because that portion of the judgment was, in effect, entered upon the defendant's consent, and thus, the defendant is not aggrieved thereby.

Vernon v. Vernon, 10 A.D.3d 722, 723 (2nd Dept. 2004):
The defendant contends that the Supreme Court erred in failing to provide him with an opportunity to proceed at the trial on his counterclaims for divorce. However, the defendant's challenge to that portion of the judgment awarding the plaintiff a divorce must be dismissed since the defendant, through an April 5, 2001, preliminary conference order, in effect, withdrew his counterclaims for divorce and consented to the entry of judgment in favor of the plaintiff.

Shifer v. Shifer 27 A.D.3d 549, 810 N.Y.S.2d 361 (2nd Dept. 2006):
The defendant contends that the Supreme Court erred in failing to allow him to contest the grounds for divorce at trial. However, the defendant's appeal from that portion of the judgment awarding the plaintiff a divorce must be dismissed since the defendant, through a February 5, 2003, preliminary conference order, in effect, agreed to waive any challenge to the grounds for the divorce.

Defaulting Party Must First Move to Vacate Default

If a party has defaulted, he is not deemed to be aggrieved until he has moved to vacate the default and the motion has been denied. It is thus not the default which is appealable but the motion to vacate the default.

Quigley v. Coco's Water Cafe, Inc. 43 A.D.3d 1132, 842 N.Y.S.2d 545 (2nd Dept.,2007):
The order did not decide the branch of the motion which was to vacate the judgment entered against [defendant] upon his default in answering. Accordingly, no appeal lies as of right from that portion of the order (CPLR 5701[a][2][v]; Acunto v. Stewart Ave. Gardens, LLC, 26 A.D.3d 305, 808 N.Y.S.2d 782; Rosen v. Swarzman, 296 A.D.2d 392, 745 N.Y.S.2d 465; Avis Rent–A–Car Sys. v. Edmin Realty Corp., 209 A.D.2d 656, 619 N.Y.S.2d 334; Matter of Fritsch v. Westchester County Dept. of Transp., 170 A.D.2d 602, 566 N.Y.S.2d 377).

[3] Dudla v. Dudla, 50 A.D.3d 1255, 1257 (3rd Dept.,2008); Ralph M. v. Nancy M. 280 A.D.2d 995, 996 (4th Dept.,2001) (Plaintiff sought a divorce on that ground in his complaint and stipulated to a divorce on that ground at trial, and thus he is not an aggrieved party within the purview of CPLR 5511.)

Palmiotti v. Piscitelli, 100 A.D.3d 637, 953 N.Y.S.2d 255 (2nd Dept.,2012):
[F]amily Court did not err by...dismissing the petition for a writ of habeas corpus as deficient. A writ of habeas corpus is not the proper procedure for seeking review of the Family Court's order of custody and visitation entered upon the mother's default...The proper procedure is to move to vacate the order of custody and visitation, and, if the motion is denied, to appeal from the order denying the motion.

Where a Party Contests the Application for Entry of a Default Judgment the Judgment Predicated on the Default Is Appealable

Jann v. Cassidy 265 A.D.2d 873, 696 N.Y.S.2d 337 (4th Dept.,1999):
Plaintiff moved for a default judgment based upon defendant's failure to answer or appear in a timely manner. "[W]here [] a party appears and contests an application for entry of a default judgment, CPLR 5511, prohibiting an appeal from an order or judgment entered upon default, is inapplicable, and the judgment predicated upon the party's default is therefore appealable" (Spatz v. Bajramoski, 214 A.D.2d 436, 624 N.Y.S.2d 606, citing Marrocco v. Marrocco, 90 A.D.2d 989, 456 N.Y.S.2d 906).

When a Party Has Not Appeared but Counsel Appeared the Party Is Not in Default

Manning v. Sobotka, 107 A.D.3d 1638, 969 N.Y.S.2d 627 (4th Dept.,2013):
Although respondent did not appear before the Support Magistrate on the scheduled date for the hearing, his attorney had previously made a written request for an adjournment and appeared in court on the date of the hearing to reiterate that request..."A party who is represented at a scheduled court appearance by an attorney has not failed to appear"

In re Edward J. Mc., Jr., 92 A.D.3d 887, 888 940 N.Y.S.2d 516 (2nd Dept.,2012):
Although the father did not appear at the hearing, the order appealed from was not rendered upon default, as his counsel appeared and participated at the hearing (see Matter of Elijah P. [C.I.P.], 76 AD3d 631; Matter of Newman v. Newman, 72 AD3d 973). Accordingly, the father may appeal from the order of fact-finding and disposition (see Matter of Amber Megan D., 54 AD3d 338; Matter of Vanessa M., 263 A.D.2d 542; Matter of Geraldine Rose W., 196 A.D.2d 313).

O'Leary v. Frangomihalos, 89 A.D.3d 948, 949, 933 N.Y.S.2d 88, 89 (2nd Dept.,2011):
Although the mother failed to appear in person at the hearing, her counsel appeared on her behalf and participated in the hearing. Accordingly, the order was

not entered on the mother's default, and this appeal is properly before us.

Newman v. Newman, 72 A.D.3d 973, 899 N.Y.S.2d 621 (2nd Dept., 2010).

In re N., 108 A.D.3d 551, 969 N.Y.S.2d 92 (2nd Dept. 2013).

No Appeal from a Consent Order, Except where It Differs from the Consent

Chiakpo v. Obi, 255 A.D.2d 579, 680 N.Y.S.2d 869 (2nd Dept. 1998):[4]
No appeal lies from an order entered upon consent of the appealing party, since a party who consents to an order is not aggrieved thereby.

Hatsis v. Hatsis, 122 A.D.2d 111, 504 N.Y.S.2d 508 (2nd Dept.,1986):
No appeal lies from a judgment entered on consent, ➤except to the extent that it differs from or exceeds the consent (Norton & Siegel, Inc. v. Nolan, 276 N.Y. 392).

Warner v. Warner, 94 A.D.3d 1524, 942 N.Y.S.2d 858 (4th Dept.,2012):
Defendant appeals from that part of the judgment of divorce providing that all future "issues relative to income tax deductions and exemptions [concerning] the children" shall be referred to Family Court. Although the judgment was entered upon consent, the provision at issue was added by Supreme Court sua sponte, and defendant's attorney objected to that provision. Thus, defendant's contention is properly before us (Hatsis v. Hatsis, 122 A.D.2d 111, 111, 504 N.Y.S.2d 508).

Griffin v. Griffin, 104 A.D.3d 1270, 961 N.Y.S.2d 677 (4th Dept.,2013):
We reject plaintiff's contention that certain issues raised by defendant with respect to the modification of the access schedule are not appealable because they were the subject of a consent order. Although the [consent]-order states at the end that it is a "[s]tipulation," it states at the beginning that it is an order entered after the court heard "testimony and ... consider[ed] ... evidence in this matter, in the best interests of the children." Additionally, the November 2011 order states that the amended access provisions were the result of the modification proposed by the Attorney for the Children. Notably, "no agreement or stipulation was placed upon the record during the ... [action]" and "the court issued a written decision, a fact that supports the notion that the determination was made on the merits" (Matter

[4] Lockett S. v. Onya S., 247 A.D.2d 622, 669 N.Y.S.2d 248 (2nd Dept., 1998); Shteierman v. Shteierman, 29 A.D.3d 810, 815 N.Y.S.2d 224 (2nd Dept.,2006), during arbitration husband agreed to child support award.

of Schunk, 136 A.D.2d 904, 905, 524 N.Y.S.2d 925; see generally CPLR 2104). Thus, the record before us "does not clearly indicate that the [relevant] order was made by consent" (Schunk, 136 A.D.2d at 905, 524 N.Y.S.2d 925).

Issues Not Discussed in Notice of Appeal Are Deemed Abandoned

Lurie v Lurie, 94 A.D.3d 1376 (3rd Dept.,2012):
FN2. Inasmuch as plaintiff's appellate brief does not address any of the issues raised in his notice of cross appeal, plaintiff has abandoned his appeal of those issues (see Suriel v. Dominican Republic Educ. & Mentoring Project, Inc., 85 A.D.3d 1464, 1465 n., 926 N.Y.S.2d 198 [2011]).

"A Litigation Strategy Cannot Be a Reasonable Excuse for a Default"

Community Network Service, Inc. v. Verizon New York, Inc., 63 A.D.3d 547, 880 N.Y.S.2d 483 (1st Dept. 2009):
We reject plaintiff's argument that the trial court's assertedly erroneous oral in-limine ruling limiting plaintiff's proof of damages gave it a reasonable excuse for refusing to proceed to trial (48 A.D.3d 249 [2008]). A litigation strategy cannot be a reasonable excuse for a default (cf. Manhattan Vermeer Co. v. Guterman, 179 A.D.2d 561, 579 N.Y.S.2d 874 [1992]). Plaintiff's remedy was not to defy the court's order to proceed, but to make an offer of proof, concede that it has no case, and then appeal the in limine ruling as part of an appeal from the final judgment. Absent a reasonable excuse we need not consider the merits of the action.

Manhattan Vermeer Co. v. Guterman, 179 A.D.2d 561, 579 N.Y.S.2d 874 (1st Dept. 1992):
The appealing-defendants did not show a reasonable excuse for their default, and indeed that the default was deliberate. Accordingly, the motion to vacate the default was properly denied.

No Relief to a Non-Appealing Party

Citnalta Const. Corp. v. Caristo Associates Elec. Contractors, Inc., 244

A.D.2d 252, 664 N.Y.S.2d 438 (1st Dept.,1997):
Neither CPLR 5522 nor any other statutory or constitutional authority permits an appellate court to exercise any general discretionary power to grant relief to a nonappealing party.

-- <u>Exception to Rule of No Relief to Non-Appealing Party</u>

Hecht v. City of New York, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983):
This appeal presents a question respecting the limits of an appellate court's scope of review of a judgment rendered against multiple parties but appealed by only one. Generally, an appellate court cannot grant affirmative relief to a nonappealing party unless it is necessary to do so in order to accord full relief to a party who has appealed. [I]t was error [] for the Appellate Division...to dismiss the action against a joint tort-feasor found liable at trial, but who took no appeal from the judgment.

And an appellate court's scope of review with respect to an appellant, once an appeal has been timely taken, is generally limited to those parts of the judgment that have been appealed and that aggrieve the appealing party...The corollary to this rule is that an appellate court's reversal or modification of a judgment as to an appealing party will not inure to the benefit of a nonappealing coparty...unless the judgment was rendered against parties having a united and inseverable interest in the judgment's subject matter, which itself permits no inconsistent application among the parties...

It is [] axiomatic that, once an appeal is properly before it, a court may fashion complete relief to the appealing party. On rare occasions, the grant of full relief to the appealing party may necessarily entail granting relief to a nonappealing party (cf. United States Print. & Lithograph Co. v. Powers, 233 N.Y. 143). At this time, there is no need to detail or enumerate the specific circumstances when such a judgment or order might be appropriate.

511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131 (2002):
These issues are beyond this Court's review because plaintiffs failed to cross-move for leave to appeal. We will generally deny affirmative relief to a nonmoving party (Hecht v. City of New York, 60 N.Y.2d 57, 467 N.Y.S.2d 187 [1983]), even where the Appellate Division broadly certifies the propriety of its order for review by this Court (Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 118 and n. 2, 629 N.Y.S.2d 1009 [1995]). ➤An exception exists only for cases where granting relief to a nonappealing party is necessary to give meaningful relief to the appealing party (Cover v. Cohen, 61

N.Y.2d 261, 473 N.Y.S.2d 378 [1984]; Hecht, 60 N.Y.2d at 62, 467 N.Y.S.2d 187).

DEFAULTS AND SUBJECT OF CONTEST

Delijani v. Delijani, 100 A.D.3d 951 954 N.Y.S.2d 479 (2nd Dept.,2012):
[D]efendant contends that the Supreme Court improvidently exercised its discretion in denying his attorney's request for an adjournment in which to appear to oppose the plaintiff's motion...for an award of interim counsel fees... and in granting that branch of the plaintiff's unopposed motion. [W]hile CPLR 5511 prohibits an appeal from an order or judgment entered upon the default of the appealing party, the appeal from the order and money judgment...brings up for review those matters which were the subject of contest before the Supreme Court...Since the adjournment requested by defendant's attorney was the subject of dispute...the denial of that request may be reviewed on appeal.

Branch v. Cole-Lacy, 96 A.D.3d 741, 945 N.Y.S.2d 743) (2nd Dept.,2012):
A hearing was scheduled [] in the Family Court. The mother appeared that morning, pro se, but allegedly became ill before the case was called. The mother submitted an adjournment request, indicating that she was ill, and then left the courthouse, allegedly to go see a doctor. When the case was called at approximately 3:00 P.M., the Support Magistrate acknowledged receiving the adjournment request, but proceeded with the hearing in the mother's absence, in effect, denying the mother's request for an adjournment. Thus, when the Support Magistrate granted the father's petition, it did so on the mother's default. The mother filed objections to the Support Magistrate's orders, including an objection to the denial of her request for adjournment. Family Court denied the objections.

[1] [2] "[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from the order brings up for review those 'matters which were the subject of contest' before the [Family] Court" (Tun v. Aw, 10 A.D.3d 651, 782 N.Y.S.2d 96, quoting James v. Powell, 19 N.Y.2d 249, n. 3, 279 N.Y.S.2d 10; Matter of Brittany C. [Linda C.], 67 A.D.3d 788; Matter of Mary C. v. Anthony C., 61 A.D.3d 682). The only matter which was the subject of contest before the Support Magistrate and, hence, the Family Court, was the denial of the mother's request for an adjournment. Accordingly, review is limited at this juncture to the denial of the mother's objection to the denial of her request for an adjournment.

Romero v. Ramirez, 100 A.D.3d 909, 955 N.Y.S.2d 353 (2nd Dept.,2012):
[T]he mother appeals from an order of the Family Court...which, upon her default in answering or appearing, and, in effect, upon the denial of her motion to dismiss the petition for lack of personal jurisdiction, granted the father's petition for custody of the [] child.

"[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal

from the order brings up for review those ‘matters which were the subject of contest’ before the [Family] Court” (Tun v. Aw, 10 AD3d 651, 652, quoting James v.. Powell, 19 N.Y.2d 249, 256 n. 3; Matter of Branch v. Cole–Lacy, 96 AD3d 741, 742). Since the issue of whether the Family Court had personal jurisdiction over the mother was the subject of contest, it is brought up for review on this appeal (James v. Powell, 19 N.Y.2d at 256 n. 3).

O'Donnell v. O'Donnell, 80 A.D.3d 586, 914 N.Y.S.2d 300 (2nd Dept., 2011):
[F]ollowing a hearing, the referee issued his report, with recommendations. [P]laintiff moved to confirm the referee's report. The defendant did not move to reject the referee's report (CPLR 4403), nor did he oppose the plaintiff's motion to confirm the report...the Supreme Court confirmed the report. Upon the order... the Supreme Court entered a judgment...awarding the plaintiff a divorce on the ground of cruel and inhuman treatment.

Although defendant failed to oppose plaintiff's motion to confirm the referee's report, or cross-move to reject it, his appeal from portions of the judgment is properly before us since the underlying issues he addresses, including whether there was a proper ground for divorce and whether plaintiff was properly awarded certain ancillary relief, were the “subject of contest” at the hearing (James v. Powell, 19 N.Y.2d 249, 256 n. 3, 279 N.Y.S.2d 10). On appeal, however, the defendant raises these issues in the context of numerous objections to the referee's report. By failing to challenge the alleged errors in the referee's report before Supreme Court, defendant waived his right to raise those objections on appeal.

French v. French 260 A.D.2d 430, 687 N.Y.S.2d 725 (2nd Dept.,1999):
Notwithstanding the prohibition [] in CPLR 5511 against an appeal taken from a judgment entered upon the default of the appealing party, the appeal from the judgment [] brings up for review those “matters which were the subject of contest.” The issues pertaining to whether the Supreme Court properly refused to vacate the husband's default in opposing his wife's application for attorney's fees are reviewable since they were contested in the motion papers.

Lewis v. Lewis 183 A.D.2d 875, 584 N.Y.S.2d 594 (2nd Dept.,1992):
[T]he [] order...entered after the plaintiff defaulted in appearing at the hearing, is appealable, although review is limited to the matters which were the subject of contest before the Supreme Court. [P]laintiff moved for expanded visitation rights with the children. The defendant cross-moved for an award of maintenance. In July 1989 a hearing was commenced...The hearing continued on September 25, 1989, at which point the parties entered into a stipulation on the record with respect to the plaintiff's request for expanded visitation. The plaintiff thereafter failed to appear at the hearing, and the court held an inquest on the other issues raised in the parties' motions. Following the inquest, the court denied the plaintiff's motion for expanded visitation, despite the stipulation, and granted the

defendant open-ended maintenance of $125 per week. [T]he two issues raised by the appellant [] whether he is entitled to expanded visitation, and whether the wife is entitled to any maintenance, were contested in Supreme Court, and may be reviewed on appeal.

Feldman v. Teitelbaum, 160 A.D.2d 832, 554 N.Y.S.2d 265 (2nd Dept.,1990):
Although the judgment appealed from was entered upon the appellant's default in answering the complaint, it is now well settled that "an appeal would lie from such a final judgment but review would be limited to 'matters which were the subject of contest below. [T]he appellant moved to dismiss the complaint "in it's [sic] entirety" based "upon the grounds [sic] that the alleged causes of action are barred by the statute of limitations". This motion was opposed by the plaintiff, and by order entered November 16, 1988, the Supreme Court denied the motion.

Photo Medic Equipment, Inc. v. Suffolk County Dept. of Health Services 122 A.D.2d 882, 505 N.Y.S.2d 927 (2nd Dept.,1986):
[B]y refusing to participate in the hearing, the petitioner failed to contest the findings of the hearing officer. Since our review is limited to matters which were the subject of contest at the hearing, we may not consider the merits of the respondent's determination.

Katz v. Katz, 68 A.D.2d 536, 418 N.Y.S.2d 99 (2nd Dept.,1979):
➤In [] James v. Powell, 19 N.Y.2d 249, 279 N.Y.S.2d 10, the Court of Appeals noted that where a defendant's answer has been stricken, a judgment entered thereafter in favor of the plaintiff is, in effect, based in part upon a default by the defendant. The court held that despite the provisions of CPLR 5511 (which prohibit appeals from judgments or orders entered upon the default of an aggrieved party) an appeal would lie from such a final judgment but review would be limited to 'matters which were the subject of contest below.'

Paul v. Cooper, 100 A.D.3d 1550, 954 N.Y.S.2d 799 (4th Dept.,2012):
Addressing first the order in appeal No. 2 [] the court erred in determining that the prior nonfinal orders and related motion papers submitted by plaintiff should not be included in the record in appeal No. 1. The complete record on appeal must include "all necessary and relevant motion papers" as well as "any other reviewable order" when the appeal is from a final order or judgment (22 NYCRR 1000.4[a][2]; see generally Matter of Lavar C., 185 A.D.2d 36, 39, 592 N.Y.S.2d 535). Plaintiff is permitted to appeal from the final order entered on her default for the sole purpose of securing review, pursuant to CPLR 5501(a)(1), of any prior contested nonfinal order that necessarily affected the final order (James v. Powell, 19 N.Y.2d 249, 256 n. 3, 279 N.Y.S.2d 10, rearg. denied 19 N.Y.2d 862).

APPEALS AS OF RIGHT

CPLR 5701. Appeals to appellate division from supreme and county courts:
(a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court:

1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; or

2. from an order not specified in subdivision (b), where the motion it decided was made upon notice and it:

(i) grants, refuses, continues or modifies a provisional remedy; or

(ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or

(iii) grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or

(iv) involves some part of the merits; or

(v) affects a substantial right; or

(vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or

(vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision; or

(viii) grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221; or

3. from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.

(b) Orders not appealable as of right. An order is not appealable to the appellate division as of right where it:

1. is made in a proceeding against a body or officer pursuant to article 78; or

2. requires or refuses to require a more definite statement in a pleading; or

3. orders or refuses to order that scandalous or prejudicial matter be stricken from a pleading.

(c) Appeals by permission. An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court or a county court by permission of a judge who made the order granted before application to a justice of the appellate division; or by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application.

Family Court Act § 1112: An appeal may be taken as of right from any order of disposition.

Dalcollo v. Dalcollo, 99 A.D.3d 656, 952 N.Y.S.2d 63 (2nd Dept., 2012):
...[P]laintiff made an untimely cross motion to restrain defendant from removing the child from Suffolk County until final disposition of the action. [S]upreme Court...sua sponte, restrained [defendant] from removing the child from Suffolk County until final disposition of the action.

[W]hile no appeal lies as of right from an order that does not determine a motion made on notice (CPLR 5701[a][2]), this Court granted defendant leave to appeal from that portion of the order [] (CPLR 5701[c]). When plaintiff cross-moved to restrain defendant from removing the child from Suffolk County until final disposition of the action, defendant objected to the cross motion as untimely, and did not submit any substantive opposition thereto...Under these circumstances, Supreme Court's order prejudiced defendant, who had no fair notice of plaintiff's cross motion and was deprived of a sufficient opportunity to address the issues raised. Accordingly, we modify the order [] by deleting the provision thereof restraining defendant from removing the child from Suffolk County until final

disposition of the action. Our determination is without prejudice to plaintiff making a motion for the same relief, on proper notice to defendant.

➤**Yuen Lin Lee v. Kwok Wai Lee, 68 A.D.3d 421, 889 N.Y.S.2d 577 (1st Dept.,2009)**: Defendant's contention that the stipulation vacating the judgment of divorce was inaccurate and defective and should not have been sua sponte so-ordered by the motion court was not properly before the Appellate Division, since neither party moved on notice to have the stipulation so-ordered and defendant never moved to vacate the stipulation once it was so-ordered. Defendant did not file papers in opposition to plaintiff's motion to vacate the judgment of divorce, the record does not contain a transcript of any oral argument that may have been heard on the return date of that motion, and the record is otherwise insufficient to permit review of the motion court's implicit finding that the stipulation was valid and enforceable.

Prof. David Siegel, Practice Commentaries, 2003, C5701:5.
Ex Parte Orders, Court's Sua Sponte Order Is Treated as Ex Parte Order, and Is Hence Unappealable; What Remedy for Appellant?
[A]n order not appealable of right under subdivision (a) of CPLR 5701 may be appealed by permission under subdivision (c). The aggrieved lawyer in this case did not seek such permission, apparently relying all the way on the assumption that the order was appealable of right. In the course of reviewing a record on an appeal improperly taken of right, the appellate division will sometimes grant permission to appeal sua sponte and just keep the appeal where it is. The court did that in Ploski v. Riverwood Owners Corp., 255 A.D.2d 24, 688 N.Y.S.2d 627 (2d Dep't 1999), for example, where it said that "in view of the important issue involved we treat the notice of appeal ... as an application to appeal and grant leave".

APPEALS FROM ORDERS OF REFERENCE DIRECTING A HEARING

– **Split Authority:**

– First Department: appealable
– Second and Fourth Departments: non-appealable.
– **Third Department: no appealable**, **except for one case holding otherwise**

First Department: Orders of Reference Are Appealable[5]

General Elec. Co. v. Rabin, 177 AD2d 354, 576 NYS2d 116 (1st Dept.,1991):
Plaintiff urges that the appeal from the reference to hear and report on the jurisdiction issue should be dismissed as nonappealable. This Court has consistently held that an order of reference is appealable (Grand Cent. Art Galleries v. Milstein, 89 A.D.2d 178, 454 N.Y.S.2d 839; Drew Natl. Corp. v. Goldstein, 74 A.D.2d 771, 425 N.Y.S.2d 598; Candid Prods. v. SFM Media Serv. Corp., 51 A.D.2d 943, 381 N.Y.S.2d 280). H & Y Realty Company v. Baron, 160 A.D.2d 412, 413, 554 N.Y.S.2d 111 (1st Dept.1990), since it affects a substantial right, see, CPLR 5701[a], [2], [v]), in that it would force one party or the other to submit to a lengthy expensive hearing. Grande Central Art Galleries v. Milstein, 89 A.D.2d 178, 181, 454 N.Y.S.2d 839 (1st Dept.1982).

New York State Crime Victims Bd. v. Abbott, 212 A.D.2d 22, 627 N.Y.S.2d 629 (1st Dept.,1995):
[T]his Court will not ordinarily interfere with the discretion of the trial court in referring a matter to a Special Referee to hear and report (Miller v. Albertina Realty Co., 198 App.Div. 340, 342, 190 N.Y.S. 407) and, in this case, we perceive no abuse of discretion as the court had before it five accounts and, at a minimum, eighteen potential claimants. There is even the view that no appeal lies from an order directing a reference for a referee to hear and report because it does not affect a substantial right (Warner v. Warner, 88 A.D.2d 639, 450 N.Y.S.2d 225 [2d Dept.1982]), although that is not the view in this Department (General Elec. Co. v. Rabin, 177 A.D.2d 354, 576 N.Y.S.2d 116 [1st Dept.1991]; Grand Central Art Galleries, Inc. v. Milstein, 89 A.D.2d 178, 454 N.Y.S.2d 839 [1st Dept.1982]) because "it would force one party or the other to submit to a lengthy expensive hearing"...In this case, however, no such right is affected as the hearings have been very brief.

-- Second Department: Not Appealable as of Right

[5] AMC Computer Corp. v. Geron, 38 A.D.3d 402, 832 N.Y.S.2d 38 (1st Dept.,2007); Candid Productions, Inc. v. SFM Media Service Corp., 51 A.D.2d 943, 381 N.Y.S.2d 280 (1st Dept., 1976).

Wright v. Stam, 81 A.D.3d 721, 916 N.Y.S.2d 520 (2nd Dept. 2011):[6]
No appeal lies as of right from an order directing a hearing to aid in the determination of a motion.

Kornblum v. Kornblum, 34 A.D.3d 749, 828 N.Y.S.2d 402 (2nd Dept.,2006):
An order directing a hearing to aid in the determination of a motion does not dispose of the motion and does not affect a substantial right, and therefore is not appealable as of right (CPLR 5701[a][2] [v]; Berliner v. Berliner, 294 AD2d 524, 742 N.Y.S.2d 864; Davidson-Sakuma v. Sakuma, 280 A.D.2d 577, 720 N.Y.S.2d 798; Palma v. Palma, 101 A.D.2d 812). Since leave to appeal has not been granted, we dismiss the appeals from the orders directing such hearings.

Sloboda v. Sloboda, 24 A.D.3d 533, 807 N.Y.S.2d 108 (2nd Dept.,2005):
An order directing a hearing to aid in the determination of a motion does not dispose of the motion and does not affect a substantial right, and therefore is not appealable as of right (CPLR 5701[a][2][v]...). Since leave to appeal from that branch of the order has not been granted, the appeal from so much of the order as directed a conference and thereafter, if necessary, a hearing on that branch of the cross motion which was for an award of an attorney's fee, is dismissed.

Civic Ass'n at Roslyn Country Club, Inc. v. Levitt and Sons Inc., 143 A.D.2d 385, 532 N.Y.S.2d 559 (2nd Dept.,1988):
An order of reference to hear and report is not appealable as of right, but only by permission, since it does not decide the motion and does not adversely affect a substantial right of the parties (cf., Astuto v. New York Univ. Med. Center, 97 A.D.2d 805, 468 N.Y.S.2d 671; Bagdy v. Progresso Foods Corp., 86 A.D.2d 589, 446 N.Y.S.2d 137; Liebling v. Yankwitt, 109 A.D.2d 780, 486 N.Y.S.2d 292; CPLR 5701[c]).

-- **Third Department: Not Appealable**

Civil Service Employees Association, Inc. Local 1000, AFSCME, AFL-CIO v.

[6] Rickles v. Rickles, 88 A.D.3d 780, 930 N.Y.S.2d 909 (2nd Dept.,2011; Spence v. Jones, 51 A.D.3d 771, 858 N.Y.S.2d 276 (2nd Dept.,2008); Hochhauser v. Electric Ins. Co. 46 AD3d 174, 844 NYS2d 374 (2nd Dept.,2007); Chiakpo v. Obi, 255 A.D.2d 579, 680 N.Y.S.2d 869 (2nd Dept.,1998).

Evans, 92 A.D.2d 669, 460 N.Y.S.2d 149 (3rd Dept.,1983):[7]
Since an order directing a judicial hearing to aid in the disposition of a motion does not affect a substantial right (Bagdy v. Progresso Foods Corp., 86 A.D.2d 589, 446 N.Y.S.2d 137; Alfred D. Geronimo, Inc. v. Board of Educ. of City of N.Y., 69 A.D.2d 805, 415 N.Y.S.2d 64), the orders sought to be reviewed on this appeal are not appealable as of right (CPLR 5701 [a][2][v]).

Cf. Bezio v. NY State Office of Mental Retardation and Developmental Disabilities, 95 AD2d 135, 466 NYS2d 804 (3rd Dept.,1983), rev'd [on other grounds], 62 N.Y.2d 921 (1984):[8]
An appeal may be taken to the Appellate Division as of right if the order of Supreme Court was made upon notice and affects a substantial right (CPLR 5701, subd. [a], par. 2, subpar. [v]). An order directing a hearing which will prolong resolution of the issues raised on the motion affects a substantial right (Grand Cent. Art Galleries v. Milstein, 89 A.D.2d 178, 454 N.Y.S.2d 839). Accordingly, the matter is properly before this court.

An Order Appointing a JHO
Mattice v. Kreider, 41 A.D.3d 1028, 838 N.Y.S.2d 232 (3rd Dept.,2007):
[A]n order appointing a JHO to hear and report is not appealable as of right (CPLR 5701[a][2][v]; Tornheim v. Tornheim, 28 A.D.3d 534, 816 N.Y.S.2d 87 [2006]; 1074372 Ontario, Inc. v. 200 Corbin Owners Corp., 13 A.D.3d 502, 786 N.Y.S.2d 319 [2004]), and we decline to grant leave in this regard.

-- Fourth Department: Not Appealable as of Right

[7] People by Abrams v. Maytag, 172 A.D.2d 899, 568 N.Y.S.2d 192 (3rd Dept.,1991); Axelrod v. Harley Rendezvous, Inc., 128 A.D.2d 957, 512 N.Y.S.2d 908 (3rd Dept.,1987); State v. Berchier, 124 A.D.2d 333, 508 N.Y.S.2d 110 (3rd Dept.1986)

[8] Bezio is cited in Hammerstein v. Henry Mountain Corp., 784 N.Y.S.2d 657, 11 A.D.3d 836 (3rd Dept. 2004), but for unrelated facts.

Barone v. City of Buffalo, 134 AD2d 948, 521 NYS2d 1018 (4th Dept. 1987):[9]
[T]he order directing an evidentiary hearing must be dismissed since there is no appeal as of right from such an order.

Howell v. Independent Union of Plant Protection Employees, 112 A.D.2d 754, 492 N.Y.S.2d 253 (4th Dept.,1985):
An order directing a hearing to aid in the disposition of a motion "does not decide the motion and does not affect a substantial right (CPLR 5701[a][2] [v]), and is, therefore, not appealable as of right.

-- **Order Referring Motion to Trial Court Does Not Affect Substantial Right**

Mintz v. Mintz, 266 A.D.2d 439, 698 N.Y.S.2d 889 (2nd Dept. 1999):[10]
The defendant may not appeal, as of right, from the portion of the order which referred his motion to the trial court for determination, since it merely deferred resolution of his motion until trial, where the parties' financial circumstances may be fully explored without the additional delay of an interim hearing. Under these circumstances, the challenged ruling does not affect a substantial right (see, CPLR 5701[a]; see also, Marine Midland Bank v. Rashid, 259 A.D.2d 739, 687 N.Y.S.2d 416; Walis v. Walis, 192 A.D.2d 598, 600, 596 N.Y.S.2d 167). Accordingly, the defendant's appeal from that portion of the order is dismissed.

Enzien v. Enzien, 149 A.D.2d 783, 539 N.Y.S.2d 576 (3d Dept.,1989):
the appeal should be dismissed since Supreme Court's order constituted an **exercise of ➤discretion affecting no substantial right** (CPLR 5701[a][2][v]). No decision was made by the court as to the appropriate valuation dates of the marital assets. Had the court selected dates for valuation, that order would have been appealable by the party disagreeing with the dates selected (Scheinkman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law C236B:26, at 288). Instead, [] the court essentially defer[red] the

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[9] In re Martin, 71 A.D.3d 1503, 895 N.Y.S.2d 914 (4th Dept., 2010).

[10] Samaroo v. Bogopa Service Corp., 964 N.Y.S.2d 255, 106 A.D.3d 713 (2nd Dept. 2013); Anesthesia Associates of Mount Kisco, LLP v. Northern Westchester Hosp. Center, 44 A.D.3d 975, 844 N.Y.S.2d 446 (2nd Dept. 2007); Beharry v. Guzman, 33 A.D.3d 741, 822 N.Y.S.2d 612 (2nd Dept. 2006); Weissman v. Weissman 8 A.D.3d 264, 777 N.Y.S.2d 679 (2nd Dept. 2004) (A party may not appeal, as of right, from so much of an order as merely defers disposition of a motion until trial. Accordingly, the appeal from that portion of the order which deferred until trial the resolution of that branch of the plaintiff's motion which was for reimbursement...is dismissed as leave to appeal has not been granted.)

fixing of valuation dates of the marital assets until a later point in the action. In that sense, insofar as the order basically reserved for future determination the relief sought (Sobel v. Bess, 45 A.D.2d 1049...; 7 Weinstein–Korn–Miller, NY Civ Prac ¶ 5701.16), it ➤**"may be regarded as only preliminary to a disposition of the motion on the merits"** (7 Weinstein–Korn–Miller, NY Civ Prac ¶ 5701.16) and therefore is not appealable as of right.

In matrimonial actions, the party seeking to establish a valuation date different from the customary principles must object at the time of trial and introduce evidence that supports the position or lose the right to appeal on the issue.[11]

ORDERS DIRECTING IN-CAMERA INSPECTIONS OF DOCUMENTS ARE NOT APPEALABLE AS OF RIGHT

-- All Four Departments Are Unanimous:

Patterson v. Turner Const. Co., 88 A.D.3d 617, 931 N.Y.S.2d 311 (1st Dept.,2011):[12] Appeal from order which deferred determination on defendants' motion to compel to the extent of directing plaintiff to produce his Facebook records for an in camera review, unanimously dismissed, without costs, as taken from a nonappealable paper.

Bongiorno v. Livingston, 20 A.D.3d 379, 799 N.Y.S.2d 98 (2nd Dept., 2005): No appeal lies as of right from an order directing an in camera inspection of materials claimed to be privileged in aid of determining a motion to compel discovery (see CPLR 5701[a][2][v]; Navedo v. Nichols, 233 A.D.2d 378, 650 N.Y.S.2d 15).

Solomon v. Meyer, 103 A.D.3d 1025, 962 N.Y.S.2d 401 (3rd Dept.,2013); Mahoney v. Staffa, 168 A.D.2d 809, 564 N.Y.S.2d 231 (3rd Dept.,1990): Orders directing in camera inspection of subpoenaed documents during disclosure does nothing more than "defer[ ] determination of the discovery motion [ ] until after [the] in camera inspection." Inasmuch as the order does not affect a

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[11] Finch v. Finch, 177 A.D.2d 836, 576 N.Y.S.2d 450 (3d Dep't 1991).

[12] Albino v. New York City Housing Authority, 52 A.D.3d 321, 860 N.Y.S.2d 57 (1st Dept. 2008) (No appeal lies as of right from an order deferring determination of a motion to compel discovery until after in camera review, because such an order does not affect a substantial right within the meaning of CPLR 5701 (a)(2)(v).); Damour v. Montefiore Medical Center, 32 A.D.3d 772, 820 N.Y.S.2d 884 (1st Dept. 2006).

substantial right of plaintiff, no appeal as of right lies therefrom (see CPLR 5701[a][2][v]...)

In re Will of Nugent, 26 A.D.3d 892, 808 N.Y.S.2d 876 (4th Dept.,2006):
The court abused its discretion in directing an in camera review of certain medical records of proponent, and we therefore modify the order accordingly. We note that no appeal lies as of right from an order directing an in camera review of such records because such an order "does not affect a substantial right within the meaning of CPLR 5701(a)(2)(v)"

No Appeal Lies if an Application for the Specific Relief Was Not Made

Dinoto v. Dinoto, 97 A.D.3d 529, 947 N.Y.S.2d 605 (2nd Dept.,2012):
Plaintiff's claim [for] attorney's fee is without merit, "since she never made a formal application for such an award, and submitted no supporting documentation regarding the legal services rendered" [cites omitted].

Appealability from a Demand for Relief Set Forth in Opposing Papers but Not Designated in a Formal "Cross Motion"

Fried v. Jacob Holding, Inc., 970 N.Y.S.2d 260 (2nd Dept. 2013):
[The principal issue is whether it was proper for the court to consider defendant's application when defendant had not made its request for relief in a formal notice of cross motion (CPLR 2215). Our precedent...has been inconsistent, leaving the law unsettled.**]**

Plaintiffs moved pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability. Defendant timely filed opposing papers, but did not merely oppose plaintiffs' motion; it also asked the court [in an attorney's affirmation], in effect, for leave to serve a late answer, and to compel plaintiffs to accept its untimely answer. Defendant's application for affirmative relief was not, however, set forth in a notice of cross motion duly served pursuant to CPLR 2215...

* * *

Courts retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215. Litigants, however, must be cognizant of an

important distinction between the two situations: a party in compliance with CPLR 2215 is entitled to have its cross motion considered; a party not in compliance with the statute must hope that the court opts, in the exercise of its discretion, to entertain the request. Thus, we are in agreement with our colleagues in the Appellate Division, Third Department, who, in Fox Wander W. Neighborhood Assn. v. Luther Forest Community Assn., 178 A.D.2d at 872, held that, even in the absence of an explicit notice of cross motion, the Supreme Court is not "prohibited" from entertaining the nonmoving party's request for relief.

* * *

A request for relief made in the absence of a notice of cross motion is not a "motion made upon notice" (CPLR 5701[a][2]), so an order granting or denying the request is not appealable as of right, and permission to appeal is necessary (CPLR 5701[c]; Blam v. Netcher, 17 A.D.3d 495, 496, 793 N.Y.S.2d 464). By contrast, generally, a party may appeal as of right to challenge the disposition of a motion or cross motion made on notice (see CPLR 5701[a]).

Also see:
Myung Chun v. North American Mort., 285 A.D.2d 42 716 (1st Dept. 2001);

Wechsler v. People ex rel. Com'r of Environmental Conservation of State of New York, 13 A.D.3d 941, 787 N.Y.S.2d 433 (3rd Dept. 2004); Fox Wander West Neighborhood Ass'n Inc. v. Luther Forest Community Ass'n Inc., 178 A.D.2d 871, 577 N.Y.S.2d 729 (3rd Dept. 1991).

No Appeal as of Right from Qualified Domestic Relations Order (QDRO)

Loy v. Loy, 108 A.D.3d 1201, 969 N.Y.S.2d 695 (4th Dept.,2013):
In this postjudgment matrimonial proceeding, defendant appeals from a qualified domestic relations order (QDRO) that directed the... retirement system to pay his ex-wife her marital share of defendant's pension pursuant to the Majauskas formula (Majauskas v. Majauskas, 61 N.Y.2d 481, 489–491). Although no appeal lies as of right from a QDRO...we nevertheless treat the notice of appeal as an application for leave to appeal and grant the application.[13]

[13] Piskorz v. Piskorz, 81 A.D.3d 1354, 916 N.Y.S.2d 572 (4th Dept.,2011); Cuda v. Cuda, 19 A.D.3d 1114, 796 N.Y.S.2d 821 (4th Dept.,2005), appeal and rearg. denied, 21 A.D.3d 1442, 801 N.Y.S.2d 555 (4th Dept.,2005); Weissman v. Weissman 300 A.D.2d 261, 262, 751 N.Y.S.2d 366, 367 (1st Dept.,2002) (The appeal from the QDRO must be dismissed since a QDRO is not appealable as of right, and we decline to grant leave to appeal where plaintiff signed a stipulation withdrawing his opposition to the QDRO's entry without indicating that he would be seeking such leave.); Bernstein v. Bernstein 18 A.D.3d 683, 795 N.Y.S.2d 733 (2nd Dept.,2005) (No

Irato v. Irato, 288 A.D.2d 952, 732 N.Y.S.2d 213 (4th Dept.,2001):
Although no appeal lies as of right from a QDRO, plaintiff raised timely objections prior to the entry of the QDRO and thereby preserved a record for our review. We therefore treat the notice of appeal as an application for leave to appeal, grant the application and consider the merits of plaintiff's contentions .

The Appellate Division May Not Sua Sponte Dismiss an Appeal

Melcher v. Apollo Medical Fund Management L.L.C., 18 N.Y.3d 915, 942 N.Y.S.2d 456 (2012):
In its October 2010 order...the Appellate Division sua sponte dismissed plaintiff's appeals without articulating the basis for its order. [T]he dismissal was an abuse of discretion. No grounds for dismissing the appeals appear tenable from the record. Plaintiff timely perfected his appeals under the First Department's rules, and the court did not give plaintiff adequate notice if it shortened the time period for him to perfect the appeals. On this record, the appeals could not have been properly dismissed for failure to comply with the court's orders. Accordingly, plaintiff's appeals [] should be reinstated and the case remitted to the Appellate Division to consider the merits of those appeals.

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appeal lies as of right from a Qualified Domestic Relations Order that merely implements those portions of the judgment of divorce awarding one spouse an interest in the marital portion of the other spouse's retirement pension (Gormley v. Gormley, 238 A.D.2d 545, 657 N.Y.S.2d 85).); Wojtaszek v. Wojtaszek, 64 A.D.3d 1035, 881 N.Y.S.2d 916 (3rd Dept.,2009); ➤➤Gartley v. Gartley, 15 A.D.3d 995, 789 N.Y.S.2d 559 (4th Dept.,2005) (The stipulation, which was incorporated but not merged in the judgment of divorce, provided for the distribution of the retirement benefits pursuant to the formula set forth in Majauskas v Majauskas (61 NY2d 481 [1984]) and further provided that defendant receive preretirement death benefits utilizing that formula. the stipulation also provided that plaintiff could designate a beneficiary for his share of the death benefit. Because the administrator of plaintiff's retirement plan will not accommodate that provision of the stipulation, however, the amended QDRO in appeal No. 2 was issued to comply with the requirements of the plan. The terms of the judgment of divorce differ from the amended QDRO only in that respect and thus, under the circumstances of this case, we decline to treat the notices of appeal in appeal Nos. 2 and 3 as applications for leave to appeal.)

INTERLOCUTORY ORDERS –
NO APPEALS BY RIGHT OR BY PERMISSION FROM EVIDENTIARY RULINGS

Cotgreave v. Public Adm'r of Imperial County, 91 A.D.2d 600, 456 N.Y.S.2d 432 (2nd Dept.,1982):
It is axiomatic that an evidentiary ruling made during the course of trial is not separately appealable.

Rodriguez v. Ford Motor Co., 17 A.D.3d 159, 792 N.Y.S.2d 468 (1st Dept.,2005):
An evidentiary ruling made before trial is generally reviewable only in connection with an appeal from the judgment rendered after trial.

Boeke v. Our Lady of Pompei School, 73 A.D.3d 825, 901 N.Y.S.2d 336 (2nd Dept.,2010):
The appeal from so much of the order as denied those branches of the motion...to strike the plaintiff's expert witness disclosures and to preclude reference to any claim for complex regional pain syndrome must be dismissed because it concerns an evidentiary ruling which, even when "made in advance of trial on motion papers ... is neither appealable as of right nor by permission."

Prof. David Siegel, Practice Commentaries, C5701:4,
The Paragraph 2 List of Appealable Orders.
While Not Ordinarily Appealable, Order on Motion In Limine That Has Summary Judgment Effect Is Appealable
A ruling "in limine" is generally understood to be a ruling on the admissibility of a given piece of evidence. The ruling may be made at the trial or even earlier, as at a pretrial conference. Even if reduced to an order, for appeal purposes it is still deemed a mere "ruling", and hence not independently appealable. It must await appellate review, as all trial rulings must, as part of an appeal from the final judgment that later eventuates.

* * *

Another case on the point is City of New York v. Mobil Oil Corp., 12 A.D.3d 77, 783 N.Y.S.2d 75 (2d Dep't, 2004), a condemnation proceeding in which value was the only issue. Because the "in limine" ruling excluded evidence that went to value, the court found this to be the equivalent of a partial summary judgment that strikes disputed damages demands. For that reason, the court held the order appealable, like any order on a summary judgment motion would be.

AN ORDER FROM A MOTION IN LIMINE WHICH LIMITS THE SCOPE OF ISSUES TO BE TRIED, THE MERITS, OR THE CLAIMS SUCH AS, SUMMARY JUDGMENT, IS APPEALABLE

Rott v. Negev LLC, 102 A.D.3d 522, 957 N.Y.S.2d 860 (1st Dept.,2013): Judgment...after a jury trial...bringing up for review an order...to the extent it dismissed plaintiff's claim for lost rent, unanimously affirmed.

Contrary to Negev's position, the subject ruling is appealable, as the in limine order dismissing plaintiff's claim for lost rental income did not "merely determine[] the admissibility of evidence," it "limit[ed] the scope of issues to be tried" (Parker v Mobil Oil Corp., 16 AD3d 648, 650 [2d Dept 2005], affd on other grounds 7 NY3d 434 [2006]). ➤In the absence of a proffer as to how plaintiff intended to establish lost rental income and to show that the loss was proximately caused by defendants' conduct, the trial court properly precluded plaintiff from offering evidence on this claim (see e.g. Lee Kin Chiu v City of New York, 174 Misc2d 422, 426 [App Term, 2d Dept 1997]).

O'Donnell v. Ferguson, 100 A.D.3d 1534, 954 N.Y.S.2d 356 (4th Dept.,2012): Plaintiff appeals from an order that, inter alia, granted defendants' motion in limine to preclude him from presenting further evidence on the issues whether he was a part-time employee and whether he was entitled to formal charges and a hearing prior to termination. [A]lthough the parties do not address the issue of the appealability of an order determining a motion in limine, the order in this case is appealable..."Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission"... Here, however, the order precluded the introduction of evidence on the issue whether defendants were liable for punitive damages. "[B]ecause the court's order 'has a concretely restrictive effect on the efforts of plaintiff[ ] to ... recover [punitive] damages, ... defendant[s'] motion ... [was] the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought [such] damages' "... "[A]n order that ... 'limits the legal theories of liability to be tried' or the scope of the issues at trial ... is appealable" (cites omitted).

Vaughan v. Saint Francis Hosp., 29 A.D.3d 1133, 815 N.Y.S.2d 307 (3rd Dept.,2006):[14]

"[A]n order which merely limits the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (Strait v. Arnot Ogden Med. Ctr., 246 A.D.2d 12, 675 N.Y.S.2d 457 [1998]...; Ferrara v. Kearney, 285 A.D.2d 890, 727 N.Y.S.2d 358 [2001]; Brennan v. Mabey's Moving & Stor., 226 A.D.2d 938, 640 N.Y.S.2d 686 [1996]). However, an order that limits the scope of issues to be tried, affecting the merits of the controversy or the substantial rights of a party, is appealable (Brown v. State of New York, 250 A.D.2d 314, 681 N.Y.S.2d 170 [1998]; see also Scalp & Blade v. Advest, 309 A.D.2d 219, 765 N.Y.S.2d 92 [2003]; Rondout Elec. v. Dover Union Free School Dist., 304 A.D.2d 808, 758 N.Y.S.2d 394 [2003]). Here, Supreme Court cast a broad blanket precluding the hospital from offering its own discharge instructions as well as any evidence about whether those instructions were followed. This significantly undercuts the primary theory of the hospital, i.e., that discharging the child with specific instructions to the parent fell within the acceptable standard of care. Such a ruling has a clear potential of impacting the merits and it affects a substantial right of the hospital. Indeed, in light of the opinions of plaintiff's experts, such a ruling was essentially tantamount to summary judgment for plaintiff on the issue of liability. Accordingly, we conclude that the appeals are properly before us.

City of New York v. Mobil Oil Corp., 12 A.D.3d 77, 783 N.Y.S.2d 75 (2nd Dept.,2004):

[W]hile "[i]t is correct to say that an order, made in advance of trial, which merely determines the admissibility of evidence is an unappealable advisory ruling" (Rondout Elec. v. Dover Union Free School Dist., 304 A.D.2d 808, 758 N.Y.S.2d 394; see Vesperman v. Wormser, 283 A.D.2d 637, 725 N.Y.S.2d 361), in fact, Mobil's motion to preclude sought far more than a mere evidentiary ruling. By precluding the evidence regarding diminution in value, Mobil sought to affect the amount of compensation for which the City would be liable in the condemnation proceeding. Since compensation is the only issue involved in a condemnation valuation proceeding, Mobil's "in limine" motion was the functional equivalent of a motion for summary judgment. As this court has recently stated, "[a]n order deciding such a motion clearly involves the merits of the controversy (see CPLR 5701[a][2][iv]) and affects a substantial right (CPLR 5701[a][2][v]) and thus is appealable" (Rondout Elec. v. Dover Union Free School Dist..; Marshall v. 130 N. Bedford Rd. Mount Kisco Corp., supra;

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[14] Angelicola v. Patrick Heating of Mohawk Valley, Inc., 77 A.D.3d 1322, 907 N.Y.S.2d 892 (4th Dept. 2010); Booth v. Ameriquest Mortg. Co., 63 A.D.3d 770, 882 N.Y.S.2d 142 (2nd Dept.,2009); Farmer v. Nostrand Avenue Meat and Poultry, 289 A.D.2d 439, 735 N.Y.S.2d 425 (2nd Dept. 2001); Winograd v. Price, 21 A.D.3d 956, 800 N.Y.S.2d 649 (2nd Dept., 2005); Brindle v. Soni, 41 A.D.3d 938, 836 N.Y.S.2d 744 (3rd Dept.,2007).

Campaign for Fiscal Equity v. State of New York, 271 A.D.2d 379, 707 N.Y.S.2d 94; Qian v. Dugan, 256 A.D.2d 782, 681 N.Y.S.2d 408). Therefore, the appeal should not be dismissed.

Franklin Corp. v. Prahler 91 A.D.3d 49, 932 N.Y.S.2d 610 (4th Dept.,2011):
Generally, an order [on a motion in limine], even when made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion [that] is neither appealable as of right nor by permission" (Scalp & Blade v. Advest, Inc., 309 A.D.2d 219, 765 N.Y.S.2d 92). "[A]n order that 'limits ...' the scope of the issues at trial," however, is appealable (Scalp & Blade...) Thus, because the court's order "has a concretely restrictive effect on the efforts of plaintiff[ ] to ... recover certain damages from [him] ..., defendant['s] motion ... [is] 'the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages ... in excess of the damages' that defendant[ ] believe[s] are appropriate."

Innovative Transmission & Engine Company [ITEC], LLC, v. Massaro, 63 A.D.3d 1506, 879 N.Y.S.2d 856 (4th Dept.,2009):
Plaintiffs commenced this action to recover damages for [] conversion of corporate assets of ITEC. Plaintiffs appeal from an order that [] granted what was in effect a motion in limine of defendants...seeking [] to preclude plaintiffs from offering evidence that ITEC owned the assets in question. [W]e dismiss the appeal from the order insofar as it concerned plaintiffs' cross motion in limine seeking to preclude defendants from offering evidence that ITEC's owner and principal has a criminal conviction and that part of the motion in limine of the [] defendants requesting that judicial notice be taken of that conviction. Generally, an order "ruling [on a motion in limine], even when made 'in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (Winograd v. Price, 21 A.D.3d 956, 800 N.Y.S.2d 649; Citlak v. Nassau County Med. Ctr., 37 A.D.3d 640, 828 N.Y.S.2d 912). "Inasmuch as [those parts of] the order herein 'merely adjudicate[d] the admissibility of evidence and do[ ] not affect a substantial right, no appeal lies as of right from [those parts of] the order' " (Shahram v. St. Elizabeth School, 21 A.D.3d 1377, 1378, 801 N.Y.S.2d 643).

[2] [3] That part of the order granting the [] defendants' motion in limine to the extent that it sought to preclude plaintiffs from submitting evidence that ITEC owned the assets in question [] is appealable [] because "an order which limits the scope of issues to be tried is appealable" (Parker v. Mobil Oil Corp., 16 A.D.3d 648, 793 N.Y.S.2d 434, affd. 7 N.Y.3d 434, rearg. denied 8 N.Y.3d 828; see Scalp & Blade v. Advest, Inc., 309 A.D.2d 219, 765 N.Y.S.2d 92; Rondout Elec. v. Dover Union Free School Dist., 304 A.D.2d 808, 758 N.Y.S.2d 394).

Brindle v. Soni, 41 A.D.3d 938, 836 N.Y.S.2d 744 (3rd Dept.,2007):[15]
This appeal must be dismissed since "an order which merely determines the admissibility of evidence, 'even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission'...While an order that limits the scope of the issues to be tried may be appealable (Vaughan v. Saint Francis Hosp...), the controversy here solely addresses the admissibility of evidence in advance of trial. Accordingly, a review of this ruling must await the conclusion of a trial so that "the relevance of the proffered evidence, and the effect of Supreme Court's ruling with respect thereto, can be assessed in the context of the record as a whole" (Brennan v. Mabey's Moving & Stor., 226 A.D.2d 938, 938, 640 N.Y.S.2d 686 [1996]).

Lyons v. Lyons, 86 A.D.3d 569, 926 N.Y.S.2d 834 (2nd Dept. 2011):
The appeal from [] the order as denied those branches of the motion...to preclude the testimony of a court-appointed forensic evaluator at a hearing to be held on the issue of custody and to preclude the use of that evaluator's report at the hearing must be dismissed because it concerns an evidentiary ruling, which, even when made in advance of a hearing or trial on motion papers, is not appealable as of right or by permission...Although we must dismiss this portion of the appeal, this should not be construed as an indication that there is no merit to the contentions which cannot be reviewed at this point in the proceedings.

➤**Cf. Public Adm'r of County of New York v. Frota Oceanica Brasileira, S.A., 300 A.D.2d 217, 755 N.Y.S.2d 1 (1st Dept.,2002)**:
The motion court's appealable pre-trial dispositions, granting or denying preclusion of evidence on the basis of clear discovery malfeasance by the plaintiff's counsel or other grounds, constituted proper exercises of the court's discretion.

No Appeals From Oral Rulings– Transcripts Must Be So-Ordered

Smith v. United Church of Christ, 95 A.D.3d 581, 943 N.Y.S.2d 530 (1st Dept.,2012):
Plaintiff's [] appeals from various oral rulings...must be dismissed. No appeal lies from the court's rulings in open court, as the transcripts were not "so-ordered" by the court (Sanchez de Hernandez v. Bank of Nova Scotia, 76 A.D.3d 929 [2010], lv. denied 16 N.Y.3d 705 [2011]), and a number of findings on the record were superseded by a written order from which plaintiff did not appeal.

[15] Bozzetti v. Pohlmann, 94 A.D.3d 1201, 941 N.Y.S.2d 532 (3rd Dept.,2012).

No Appeal Lies From A Decision Directing "Settle Order"

Smith v. United Church of Christ, 95 A.D.3d 581, 943 N.Y.S.2d 530 (1st Dept.,2012):[16]

"No appeal lies from a decision directing 'settle order' " (Hutchinson v. City of New York, 18 A.D.3d 370, 795 N.Y.S.2d 554 [2005]).

[16] Samaroo v. Bogopa Service Corp., 106 A.D.3d 713, 964 N.Y.S.2d 255 (2nd Dept.,2013); Beharry v. Guzman, 33 A.D.3d 741, 822 N.Y.S.2d 612 (2nd Dept.,2006); Hutchinson v. City of New York, 18 A.D.3d 370, 795 N.Y.S.2d 554 (1st Dept.,2005).

GENERALLY, NO APPEAL LIES AS OF RIGHT FROM THE DENIAL OF A MOTION TO REARGUE [17]

TWO EXCEPTIONS TO THE RULE

1. Where Partial Relief Is Granted:

Noble v. Noble 43 A.D.3d 893, 841 N.Y.S.2d 634 (2nd Dept.,2007):
Although the Supreme Court stated that the defendant's motion for leave to reargue was denied, the court, in fact, for the first time, partially granted that branch of the defendant's motion which was for the distribution from escrow of certain sale proceeds, thereby, in effect, granting reargument. Thus, the order is appealable.

2. ALTHOUGH AN ORDER STATES THAT IT DENIED REARGUMENT, IF IT REVIEWED THE MERITS AND ADHERED TO ITS DETERMINATION THE DENIAL OF REARGUMENT IS APPEALABLE

Dunham v. Hilco Const. Co., Inc., 221 A.D.2d 586, 634 N.Y.S.2d 208 (2nd Dept.,1995):[18]
Ordinarily no appeal lies from an order denying reargument. However, where [] the court denies the motion to reargue but addresses the merits of the motion, and then adheres to its original determination, the order is appealable.

Grasso v. Schenectady County Public Library, 30 A.D.3d 814, 817 N.Y.S.2d 186 (3rd Dept.,2006):
While the denial of a reargument motion is not appealable as of right (Town of Poestenkill v. New York State Dept. of Envtl. Conservation, 229 A.D.2d 650, 644 N.Y.S.2d 602 [1996]), we are of the view that Supreme Court's decision and order, which addressed the merits of defendants' motion, granted reargument and adhered to its original order, is appealable as of right to this Court (CPLR 5701 [a] [2] [viii]; also Corey v. Gorick Constr. Co., 271 A.D.2d 911 [2000]).

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[17] Cheney v. Cheney, 927 N.Y.S.2d 696 (3rd Dept.,2011); Marshall v. Bonica, 86 A.D.3d 595 (2nd Dept., 2011); Galasso, Langione & Botter, LLP v. Liotti, 81 A.D.3d 880, 917 N.Y.S.2d 664 (2nd Dept., 2011); Prof. David Siegel, McKinney's Statutes Practice Commentaries, C5701:4. The Paragraph 2 List of Appealable Orders, The 1999 Amendment Adding Subparagraph (viii) to CPLR 5701(a)(2): Appeals Involving Motions to Reargue or Renew.

[18] Retirement Accounts, Inc. v. Pacst Realty, LLC, 49 A.D.3d 846, 854 N.Y.S.2d 487 (2nd Dept.,2008); Gracchi v. Italiano 290 A.D.2d 484, 736 N.Y.S.2d 395 (2nd Dept.,2002); Sorg v. Zoning Bd. of Appeals of Village/Town of Mount Kisco 248 A.D.2d 622, 670 N.Y.S.2d 511 (2nd Dept.,1998); State v. Gruzen Partnership, 239 A.D.2d 735, 657 N.Y.S.2d 830 (3rd Dept.,1997).

Flisch ex rel. Flisch v. Walters, 42 A.D.3d 682, 839 N.Y.S.2d 602 (3rd Dept.,2007):
Although defendants' notice of appeal refers only to Supreme Court's order purporting to deny reargument and, of course, an order denying reargument is not appealable (Fitzgerald v. Adirondack Tr. Lines, 23 A.D.3d 907, 909 n. 1 [2005]), we view the decision and order as having granted the motion for leave to reargue. Despite the court's statement that it denied reargument, it nevertheless acknowledged its error...reconsidered defendants' motion for summary judgment, and then adhered to its prior decision (CPLR 2221[f]).

APPEAL FROM INTERLOCUTORY ORDER
FOLLOWING A FINAL JUDGMENT
MUST "NECESSARILY AFFECT THE FINAL JUDGMENT"

5501. Scope of review.
(a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. any non-final judgment or order **which necessarily affects the final judgment**, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;

2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;

3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;

4. any remark made by the judge to which the appellant objected; and

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

> (c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.
>
> (d) Appellate term. The appellate term shall review questions of law and questions of fact.

CPLR 5701 permits an immediate appeal from a nonfinal (interlocutory) order that "involves some part of the merits" or "affects a substantial right." Appellate review of certain nonfinal orders, however, may be deferred until the entry of a final judgment provided such nonfinal order "necessarily affects the final judgment." Specifically, CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review "any nonfinal judgment or order which necessarily affects the final judgment."[19]

Appeals of interlocutory orders to the Appellate Division are liberally permitted under CPLR 5701(a), a real benefit when an important matter needs review prior to final judgment. But it often is unnecessary to take such an appeal, because CPLR 5501 provides a broad scope of review on an appeal from a final judgment. Such an appeal will bring up for review all the prior, non-final orders in the case, so long as they "necessarily affect the final judgment," and have not been previously reviewed on appeal.[20]

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[19] The 'Necessarily Affects' Requirement of CPLR 5501, Thomas R. Newman and Steven J. Ahmuty Jr., New York Law Journal, 11-08-2012**.**

[20] Dangerous Interactions: Interlocutory Appeals and Judgments, Thomas F. Gleason, New York Law Journal, 11-19-2012**.**

Finality

➤**Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 524 (1995)**:
The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing (see generally, Cohen and Karger, Powers of the New York Court of Appeals § 9, at 39; Scheinkman, The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality, 54 St. John's L.Rev. 443). Nonetheless, a fair working definition of the concept can be stated as follows: a "final" order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters (see generally, Cohen and Karger, op. cit., §§ 10, 11).FN1 Under this definition, an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal. Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant or where the court disposes of a counterclaim or affirmative defense but leaves other causes of action between the same parties for resolution in further judicial proceedings (see, e.g., Marna Constr. Corp. v. Town of Huntington, 31 N.Y.2d 854, 340 N.Y.S.2d 167).

FN1. Of course, this definition has no bearing on the entirely separate question of when a postjudgment order may be deemed final (see e.g., Cohen and Karger, op. cit., §§ 29, 36, 43, 44).

Retta v. 160 Water Street Associates, L.P., 94 A.D.3d 623, 942 N.Y.S.2d 525 (1st Dept.,2012):
[W]hen an appeal from an intermediate order is perfected together with an appeal from a final judgment, the appeal from the intermediate order must be dismissed and any error alleged, to the extent that it affects the final judgment, may be reviewed upon the appeal from the final judgment" (Chase Manhattan Bank, N.A. v. Roberts & Roberts, 63 A.D.2d 566, 567, 404 N.Y.S.2d 608 [1978]). *[Editor's Note: see Matter of Aho,* 39 N.Y.2d 241, 383 N.Y.S.2 d 285 (1976)).

Windsearch, Inc. v. Delafrange, 90 A.D.3d 1223, 934 N.Y.S.2d 576 (3rd Dept.,2011):
To the extent that plaintiff contends that defendant cannot now raise the statute of limitations because that issue was decided in the prior order from which defendant did not appeal, an appeal from the final judgment brings up for appellate review "any non-final judgment or order which necessarily affects the final judgment" (CPLR 5501[a][1]; see Madden v. Dake, 30 A.D.3d 932, 935 n. 2 [2006]).

CPLR 5501(a)(1): Nonfinal Orders, "Necessarily Affect the Final Judgment"

***Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 20 N.Y.3d 37, 956 N.Y.S.2d 435 (2012):**

See annexed:

1. E. Scheinberg, Siegmund Strauss: CPLR 5501(a)(1), "Necessarily Affects", and CPLR 3019, NYLJ, Jan. 15, 2013.

Also see:

2. Dangerous Interactions: Interlocutory Appeals and Judgments", Thomas F. Gleason, Esq. NYLJ, 11/19/12;

3. The 'Necessarily Affects' Requirement of CPLR 5501, Thomas R. Newman and Steven J. Ahmuty Jr., NYLJ, 11/08/12; and

4. Siegel, New York State Law Digest, "Reviewing Non-Final Orders on Appeal from Final Judgment, Court of Appeals Takes More Generous View of "Necessarily Affects" Language in Statute," December 2012.

Oakes v. Patel, 20 N.Y.3d 633, 965 N.Y.S.2d 752 (2013):
Kaleida argues that its motion to amend its answer to assert a defense of release, made between the first and second trials, should have been granted. The other defendants join the argument, because a release of Kaleida would reduce their exposure to damages under General Obligations Law § 15–108. Before considering the argument, however, we must decide whether we have the power to do so. The question arises because, as we mentioned above, under CPLR 5501(a)(1) an appeal from a final judgment brings up for review a nonfinal judgment or order only when the nonfinal decision "necessarily affects the final judgment." The reviewability of the order denying Kaleida's motion to amend depends on whether it meets that description.

➤Our opinions have rarely discussed the meaning of the expression " necessarily affects" in CPLR 5501(a)(1). (Matter of Aho, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647 [1976] and Siegmund Strauss, Inc. v. East 149th Realty Corp., 20 N.Y.3d 37, 956 N.Y.S.2d 435, 980 N.E.2d 483 [2012] are exceptions.) We have never attempted, and we do not now attempt, a generally applicable definition. Various tests have been proposed, but how to apply them to particular cases is not self-evident, and our decisions in this area may not all be consistent (see generally Karger, Powers of the New York Court of Appeals § 9:5 at 304–314 [3d ed. rev. 2005]).

➤The application of the "necessarily affects" rule to orders granting or denying motions to amend pleadings has been particularly vexing. We have at times reviewed such orders, thus implicitly assuming that they necessarily affected the final judgment (see Whalen v. Kawasaki Motors Corp., U.S.A., 92 N.Y.2d 288,

293, 680 N.Y.S.2d 435, 703 N.E.2d 246 [1998]; Edenwald Contr. Co. v. City of New York, 60 N.Y.2d 957, 959, 471 N.Y.S.2d 55, 459 N.E.2d 164 [1983]). On the other hand, in Best v. Yutaka, 90 N.Y.2d 833, 834 n. 1, 660 N.Y.S.2d 547, 683 N.E.2d 12 (1997) and in Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303 n. 1, 727 N.Y.S.2d 688, 751 N.E.2d 936 (2001) we dismissed appeals insofar as they were taken from orders ruling on motions to amend pleadings. In each of these cases we said in a footnote, without further elaboration, that the order did not "necessarily affect the final determination."

We now conclude that we cannot adhere to the rule that the grant or denial of a motion to amend is always unreviewable on appeal from a final judgment. There will be times, of which this is one, when such a ruling "necessarily affects" the final judgment under any common sense understanding of those words. Here, Kaleida's motion to amend, if granted, would have added a new defense to the case—one that defendants argue, with at least colorable justification, would have significantly changed the case's result. ➤We hold that in such cases—when an order granting or denying a motion to amend relates to a proposed new pleading that contains a new cause of action or defense—the order necessarily affects the final judgment. Best and Arnav, to the extent they hold otherwise, are overruled.

Prof. David Siegel offers additional thoughts on *Siegmund*:[21]

[Appeals] ... from just about all interlocutory dispositions...at least helps avoid the prospect of an expensive trial going completely to waste because an incidental point, maybe involving only a procedural matter, involves a key one and generates a reversal of everything. An example would be an interlocutory order denying disclosure of an item later found fundamental to the loser's case.

* * *

In *Siegmund*, [The Appellate Division's] test [wa]s rejected as too narrow. Generally speaking, that's a welcome development for lawyers on the losing side of the disposition. Lawyers bent on getting it overturned but not sure whether the "necessarily affects" rule would support its review on an appeal from a later final judgment, must take the immediate appeal; they can't safely rely on any kind of serene assumption that if they lose on final judgment and appeal it, review of the interlocutory disposition can be included.

Davis v. State, New York State Office of Mental Health, 106 A.D.3d 1488, 966

[21] New York State Law Digest, "Reviewing Non-Final Orders on Appeal from Final Judgment, Court of Appeals Takes More Generous View of "Necessarily Affects" Language in Statute," December 2012.

N.Y.S.2d 300 (4th Dept.,2013):
Petitioner's appeal from the final order brings up for review the nonfinal order denying the motion for a change of venue because it "necessarily affects" the final order (CPLR 5501[a][1]).

Paul v. Cooper, 100 A.D.3d 1550, 954 N.Y.S.2d 799 (4th Dept.,2012):
Addressing first the order in appeal No. 2, we conclude that the court erred in determining that the prior nonfinal orders and related motion papers submitted by plaintiff should not be included in the record in appeal No. 1. The complete record on appeal must include "all necessary and relevant motion papers" as well as "any other reviewable order" when the appeal is from a final order or judgment (22 NYCRR 1000.4[a][2]; see generally Matter of Lavar C., 185 A.D.2d 36, 39, 592 N.Y.S.2d 535). Plaintiff is permitted to appeal from the final order entered on her default for the sole purpose of securing review, pursuant to CPLR 5501(a)(1), of any prior contested nonfinal order that necessarily affected the final order (see James v. Powell, 19 N.Y.2d 249, 256 n. 3, 279 N.Y.S.2d 10, 225 N.E.2d 741, rearg. denied 19 N.Y.2d 862, 280 N.Y.S.2d 1025, 227 N.E.2d 408). When plaintiff moved to settle the record on appeal, she sought to include the court's prior orders and related documents in the record, contending that those orders necessarily affected the final order entered on her default. Without examining the prior orders and related papers, we cannot review the propriety of the court's determination that the order entered on default was not necessarily affected by those documents. Thus, although "the notice of appeal from the [final order] does not have to recite that the appeal is also taken from the nonfinal order[s], to obtain review of the nonfinal order[s] the record submitted must contain the papers on which the order[s were] based, and the briefs may argue the validity of the order[s]" (Austrian Lance & Stewart v. Jackson, 50 A.D.2d 735, 736, 375 N.Y.S.2d 868). Consequently, we reverse the order in appeal No. 2 and grant plaintiff's motion, thereby directing that the record in appeal No. 1 be expanded to include the materials that were submitted to the court in appeal No. 2.

[3] [4] [5] With respect to appeal No. 1, having reviewed the court's prior nonfinal order relieving plaintiff's counsel, we agree with the court that the order did not necessarily affect the finding of default (CPLR 5501). Thus, that nonfinal order is not reviewable (see Siegmund Strauss, Inc. v. E. 149th Realty Corp., 81 A.D.3d 260, 265, 919 N.Y.S.2d 1, quoting Siegel, N.Y. Prac. § 530, at 910 [4th ed.], mod. on other grounds 20 N.Y.3d 37, —— N.Y.S.2d ——, —— N.E.2d ——). We further conclude, however, that the court's other prior nonfinal order dismissing plaintiff's claim for lost wages necessarily affects the final order and thus is reviewable (see Karlin v. IVF Am., 93 N.Y.2d 282, 290, 690 N.Y.S.2d 495, 712 N.E.2d 662), because dismissal of that claim "necessarily removed that legal issue from the case (i.e., there was no further opportunity during the litigation to raise the question decided by the prior [nonfinal] order)" (Siegmund Strauss, Inc., 20 N.Y.3d at ——, —— N.Y.S.2d ——, ——N.E.2d. ——). Nevertheless, we conclude that plaintiff's contentions concerning that order are without merit. The

record reflects that plaintiff refused to comply with discovery demands as late as five days before trial, and thus the court did not abuse its discretion in dismissing the claim for lost wages.

➤**Shute v. McLusky 96 A.D.3d 1362, 947 N.Y.S.2d 854 (4th Dept.,2012)**: We conclude that the order granting defendants' respective motion and cross motion for summary judgment dismissing the claims regarding the trees is reviewable on appeal as a nonfinal order from the subsequent judgment on the counterclaims (see CPLR 5501[a][1]; RPAPL 1521[1]). Because the order dismissing the claims regarding the trees "expressly contemplated**856 further nonministerial proceedings to determine civil penalties," i.e., damages for trespass regarding the stones, the order was, by its terms, nonfinal (Lake George Park Commn. v. Salvador, 72 A.D.3d 1245, 1247, 899 N.Y.S.2d 382, lv. denied 15 N.Y.3d 712, 2010 WL 4182377; see ➤Burke v. Crosson, 85 N.Y.2d 10, 17, 623 N.Y.S.2d 524, 647 N.E.2d 736; see generally Kimmel v. State of New York, 49 A.D.3d 1210, 1210, 853 N.Y.S.2d 779, lv. dismissed 11 N.Y.3d 729, 864 N.Y.S.2d 381, 894 N.E.2d 644). Furthermore, inasmuch as the claims contained in both the complaint and the counterclaims are derived from the same source, i.e., the will, the claims contained in the complaint "arise out of ... the same legal relationship as the unresolved [claims contained in the counterclaims]" (Burke, 85 N.Y.2d at 16, 623 N.Y.S.2d 524, 647 N.E.2d 736). Thus, we further conclude that the court erred in determining that the doctrine of implied severance, which is a " very limited exception to the general rule of nonfinality," applies here (id.).

Provisional Remedies to Preserve Status Quo, Injunctions

"Provisional remedies, such as, preliminary injunctions designed to retain the status quo during the pendency of the action, do not 'necessarily affect' the final judgment."[22] Such orders are "incidental order[s] which do[] 'not have any impact on the final judgment' [and are] not subject to review."[23]

Appeals from Pendente Lite Orders in Matrimonial Cases: Appeal Immediately and Hope

> **Sawdon v. Sawdon, 39 A.D.2d 883, 333 N.Y.S.2d 610 (1st Dept.,1972):**
> "After final judgment, an intermediate order is merged therein and does not survive, unless it comes up for review allowed pursuant to CPLR s 5501(a)(1). Further, an order granting temporary alimony does not affect the final judgment and cannot be reviewed on an appeal from the final judgment. Caplin v. Caplin, 33 A.D.2d 908, 307 N.Y.S.2d 486 (2nd Dept., 1970); Koziar v. Koziar, 281 App.Div. 771, 118 N.Y.S.2d 417 (2nd Dept., 1953); see generally: 7 Weinstein-Korn-Miller s 5501.05."
>
> **Samuelsen v. Samuelsen, 124 A.D.2d 650, 508 N.Y.S.2d 36 (2nd Dept.,1986):**[24]
> The appeal from the intermediate order dated January 31, 1984, has been dismissed, since the right to separately appeal therefrom was extinguished upon the entry of the judgment, dated November 21, 1984 (Matter of Aho, 39 N.Y.2d 241, 248). This order is also not reviewable pursuant to CPLR 5501 since, if it were reversed or modified, it would not affect the foundation of the judgment of divorce, or render the judgment and the trial of the action invalid and without support.
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> **Flynn v. Flynn, 128 A.D.2d 583,512 N.Y.S.2d 847 (2nd Dept.,1987)**:[25]
> "In Schapiro v. Schapiro, 27 A.D.2d 667, 276 N.Y.S.2d 678, this court held that a temporary order in a matrimonial action is superseded by the final judgment (see also, Mittman v. Mittman, 263 App.Div. 384, 33 N.Y.S.2d 211; Kellogg v. Stoddard, 89 App.Div. 137, 84 N.Y.S. 1015). This is a rule well grounded in logic. An order awarding pendente lite relief is only designed to provide temporary relief pending disposition of the matter in a final judgment. Once a

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[22] Two Guys From Harrison-NY v. S.F.R. Realty Associates, 186 A.D.2d 186 (2nd Dept.,1992).

[23] Cicardi v. Cicardi 263 A.D.2d 686 (3rd Dept.,1999), citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5501:4.

[24] Caplin v. Caplin, 33 A.D.2d 908, 307 N.Y.S.2d 486 (2nd Dept.,1970).

[25] Prasinos v. Prasinos, 283 A.D.2d 913, 725 N.Y.S.2d 258 (4th Dept. 2001).

final judgment has been entered, it stands to reason that the order granting pendente lite relief is no longer effective, and thus no longer appealable."

Kelly v. Kelly, 19 A.D.3d 1104, 797 N.Y.S.2d 666 (4th Dept.,2005):
Defendant contends that Supreme Court erred in issuing a pendente lite order requiring him to pay temporary child support and maintenance on the grounds that plaintiff did not seek that relief and the order was the result of a hearing that was held before defendant's time to appear in the divorce action had expired. "The propriety of [the pendente lite order] is not reviewable on this appeal"... [E]ven if we assume, arguendo, that the court erred...defendant is [nevertheless] not entitled to any relief as a result thereof. The judgment provided for maintenance and child support in an amount greater than that provided for in the pendente lite order, and the amount awarded in the judgment was retroactive to a date before the effective date of the pendente lite order. Thus, the pendente lite order was rendered moot by the judgment.

Batson v. Batson, 277 A.D.2d 750, 751-752, 716 N.Y.S.2d 137, 138 (3rd Dept.,2000):
"Defendant appeals, contending that Supreme Court made various errors in granting plaintiff's motion for pendente lite support, including imputing his prior annual salary of $55,000 when establishing the temporary support obligation. However, "[a]n order awarding pendente lite relief only is designed to provide temporary relief pending disposition of the matter in a final judgment" (Flynn v. Flynn, 128 A.D.2d 583, 584, 512 N.Y.S.2d 847). Thus, when Supreme Court issued the judgment of divorce incorporating the parties' opting-out agreement and settling all issues raised in their respective actions for divorce, the prior temporary order was extinguished...Accordingly, because the rights of the parties cannot be affected by the determination defendant seeks, the issue is moot and beyond this Court's review (Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713, 431 N.Y.S.2d 400; cf., Goulet v. Goulet, 97 A.D.2d 940, 468 N.Y.S.2d 736)."

CPLR 5512, APPEALABLE PAPER

Orders and Judgments Only – No Decisions, Verdicts, Reports, or Rulingss

CPLR 5512. Appealable paper; entry of order made out of court:
(a) Appealable paper. An initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is sought to be reviewed. If a timely appeal is taken from a judgment or order other than that specified in the last sentence and no prejudice results therefrom and the proper paper is furnished to the court to which the appeal is taken, the appeal shall be deemed taken from the proper judgment or order.

(b) Entry of order made out of court. Entry of an order made out of court and filing of the papers on which the order was granted may be compelled by order of the court from or to which an appeal from the order might be taken.

Prof. David Siegel, Practice Commentaries, C5512:1. Appealable Paper:
No appeal lies from a decision, verdict, report, or ruling, but as long as the judgment or order embodying the matter that is the subject of the aggrievement has been duly and timely appealed, additional "appeal" from one of the listed items will be harmless. If the disposition is not embodied in a judgment or order, however, the appeal will be dismissed. Perhaps, if a judgment or order has been duly entered, and the problem is only in the notice of appeal's reference to a "decision" or "verdict" instead of to the overlaying order or judgment, it could be excused under CPLR 5520(c). It is a careless procedure at best.

CPLR 5512(a): when appealing from an appellate determination, you do not need to reduce it to a judgment.

Hammerstein v. Henry Mountain Corp. 11 A.D.3d 836, 784 N.Y.S.2d 657 (3rd Dept.,2004):
Defendant initially contends that this appeal should be dismissed because plaintiff appealed from an unappealable decision rather than from a judgment or order (CPLR 5512[a]...). Regardless of the label employed by Supreme Court...we deem the paper a mixed decision and order. This order "affect[ed] a substantial right" of the parties, making it appealable (CPLR 5701[a][2][v]...). Thus, we will not dismiss the appeal, and will instead address its merits.

Appeal From Order Rather Than Judgment,

Treated As Appeal From Judgment

Harrington v. Harrington 300 A.D.2d 861, 752 N.Y.S.2d 430 (3rd Dept.,2002): Although the parties appealed from Supreme Court's decision and order and not the final judgment of divorce, we find that due to the lack of a showing of prejudice and the fact that the order does not differ materially from the judgment, we will exercise our discretion and, in the interest of justice, consider the appeal to have been taken from the final judgment (Matter of Troy Sand & Gravel Co. v. New York State Dept. of Transp., 277 A.D.2d 782, 783, 716 N.Y.S.2d 772, lv. denied 96 N.Y.2d 708, 725 N.Y.S.2d 638; Curtis v. Curtis, 132 A.D.2d 850, 852, 518 N.Y.S.2d 202, lv. denied 74 N.Y.2d 616, 550 N.Y.S.2d 276).

COURT MAY NOT DEPRIVE A PARTY OF THE RIGHT TO EITHER MOVE OR MAKE A RECORD

➤**"A party cannot be deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple expedient of denying him the right to make a written motion or a record, thereby foreclosing the opportunity for appellate review."**

Grisi v. Shainswit, 119 A.D.2d 418, 507 N.Y.S.2d 155 (1st Dept.,1986):
[T[he defendants served a request for a premotion conference, seeking permission to move to strike the note of issue and statement of readiness on the ground that the action was not ready for trial, alleging as the basis their entitlement to another physical examination and deposition of the plaintiff with respect to his newly asserted claim and to receipt of duly executed authorizations for the release of his employment and tax records. In response, the court scheduled a conference for July 14, 1986, at which it issued a preliminary conference order directing that the plaintiff provide the defendants with the requested authorizations. The application for a further deposition and physical examination was, however, denied. Notwithstanding the defendants' request, the justice presiding refused to enter a written order denying the application for a further deposition and physical examination. The court also refused the defendants' request that a court reporter record its determination. Efforts to have the Administrative Judge prevail upon the court to issue a written order or to permit a transcription of its denial of the defendants' application proved fruitless.

Since they wish to appeal from the denial of their application for a physical examination and further deposition, and no appeal lies from a ruling, as distinct from an order (CPLR 5512[a]; Lee v. Chemway Corp., 20 A.D.2d 266), which must be in writing (CPLR 2219; LeGlaire v. New York Life Ins. Co., 5 A.D.2d 171), the defendants, petitioners herein, thereupon commenced this proceeding

seeking a judgment in the nature of a writ of mandamus directing the court to issue a written order reflecting its denial of their application.

[5] [6] [F]undamental rights to which a litigant is entitled, including the opportunity for appellate review of certain orders, cannot be ignored, no matter how pressing the need for the expedition of cases. [T]he right to take an appeal from an intermediate order is statutory (see, generally, CPLR 5701[a][2]), as is the right to "full disclosure" of all "material and necessary" evidence (CPLR 3101 et seq.). A party cannot be deprived of his right to be heard on a substantive matter not involving a trial ruling by the simple expedient of denying him the right to make a written motion or a record, thereby foreclosing the opportunity for appellate review. At the very least, in instances where the court, in its discretion, refuses to entertain a written motion, the denial of which would be otherwise appealable had the motion been made in writing, the putative moving party should be afforded the opportunity to make a record reflecting the respective positions of the parties on the particular issue and the court's reasoning and decision, as well as a recitation of the facts and documentation that were considered in the court's determination. We note that the Uniform Civil Rules for the Supreme Court and the County Court make provision for the transcription of the court's directions at a preliminary conference and expressly state that the transcript "shall have the force and effect of an order of the court" (22 NYCRR 202.12(e)). So that there will be no question as to the appealability of such disposition, however, we would also require that where a party presents a written order embodying the court's determination spread on the transcript that such order be signed.

We are aware that on another occasion...we held that a precalendar conference order not made on notice of motion and without supporting papers was non-appealable. We then suggested that in such cases appellate review could be had, if otherwise available, if the party adversely affected by the order formally moved to vacate or modify it. The determination of that motion would then be appealable. Such a procedure...would be wasteful in an individual assignment system, the hallmarks of which are judicial flexibility and continuity of supervision.

Signed Transcript of Court Order Is Appealable

Herbert v. City of New York, 126 A.D.2d 404, 510 N.Y.S.2d 112 (1st Dept.,1987):

[A]lthough we have in the past been inclined to read CPLR 5512 strictly and so have required as appealable paper a duly entered order or judgment, we have since our recent decision in Grisi taken a less restrictive approach (Grisi, supra 119 A.D.2d 418, 422, 507 N.Y.S.2d at 158–59). As a transcript of the court's

directions at a preliminary conference is deemed to “have the force and effect of an order of the court” (22 NYCRR 202.12[e]) it may be considered an appealable paper pursuant to CPLR 5512, provided it is signed (119 A.D.2d 418, 422).

No Appeals From Oral Rulings– Transcripts Must Be So-Ordered

Smith v. United Church of Christ, 95 A.D.3d 581, 943 N.Y.S.2d 530 (1st Dept.,2012): Plaintiff's [] appeals from various oral rulings...must be dismissed. No appeal lies from the court's rulings in open court, as the transcripts were not “so-ordered” by the court (Sanchez de Hernandez v. Bank of Nova Scotia, 76 A.D.3d 929 [2010], lv. denied 16 N.Y.3d 705 [2011]), and a number of findings on the record were superseded by a written order from which plaintiff did not appeal.

CPLR 5513. Time to take appeal, cross-appeal or move for permission to appeal:
(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

(c) Additional time where adverse party takes appeal or moves for permission to appeal. A party upon whom the adverse party has served a notice of appeal or motion papers on a motion for permission to appeal may take an appeal or make a motion for permission to appeal within ten days after such service or within the time limited by subdivision (a) or (b) of this section, whichever is longer, if such appeal or motion is otherwise available to such party.

(d) Additional time where service of judgment or order and notice of entry is served by mail or overnight delivery service. Where service of the judgment or order to be appealed from and written notice of its entry is made by mail pursuant to paragraph two of subdivision (b) of rule twenty-one hundred three or by overnight delivery service pursuant to paragraph six of subdivision (b) of rule twenty-one hundred three of this chapter, the additional days provided by such paragraphs shall apply to this action, regardless of which party serves the judgment or order with notice of entry.

CPLR 5513 Is Jurisdictional, Appellant Is Held to Strict Compliance

Hecht v. City of New York 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983):
The power of an appellate court to review a judgment is subject to an appeal being timely taken (see CPLR 5513, 5515; see, also, Matter of Haverstraw Park v. Runcible Props. Corp., 33 N.Y.2d 514, 347 N.Y.S.2d 1027, 301 N.E.2d 557; Ocean Acc. & Guar. Corp. v. Otis Elevator Co., 291 N.Y. 254, 52 N.E.2d 421; Roy v. National Grange Mut. Ins. Co., 85 A.D.2d 832, 832–833, 446 N.Y.S.2d 423).

Kelly v. Sheehan 76 N.Y. 325 (1879):
There being no power in the court to relieve a party who fails to take an appeal in due time, however meritorious his excuse, the party undertaking to limit the time is held to strict practice.

France v. State 204 A.D.2d 1066, 614 N.Y.S.2d 351 (4th Dept. 1994):[26]
Motion for extension of time to file and serve notice of appeal and for other relief denied. Memorandum: The time in which to take an appeal is jurisdictional and cannot be extended unless authorized by statute (A & B Serv. Sta. v. State of New York, 50 A.D.2d 973, 974, 376 N.Y.S.2d 656, lv. denied 39 N.Y.2d 709, 386 N.Y.S.2d 1027, 352 N.E.2d 597; see also, CPLR 5513, 5514, 5520).

Steinhardt Group, Inc. v. Citicorp 303 A.D.2d 326, 757 N.Y.S.2d 537 (1st Dept.,2003):
The notice of appeal from the order, not having been filed within 30 days of service of the order with notice of its entry, was untimely and the appeal must therefore be dismissed (CPLR 5513; Hecht v. City of New York, 60 N.Y.2d 57, 61, 467 N.Y.S.2d 187; see CPLR 5514).

[26] Retta v. 160 Water Street Associates, L.P. 94 A.D.3d 623, 942 N.Y.S.2d 525 (1st Dept.,2012) (The time for filing a notice of appeal is nonwaivable and jurisdictional (Matter of Haverstraw Park v. Runcible Props. Corp., 33 N.Y.2d 637, 347 N.Y.S.2d 585 [1973]); Jones Sledzik Garneau & Nardone, LLP v. Schloss, 37 A.D.3d 417, 829 N.Y.S.2d 230 [2007]); Wei v. New York State Dept. of Motor Vehicles 56 A.D.3d 484, 865 N.Y.S.2d 920 (2nd Dept. 2008); Jones v. Coughlin 207 A.D.2d 1037, 617 N.Y.S.2d 704 (4th Dept. 1994) (Motion to extend time to take appeal denied. Memorandum: A timely notice of appeal is a jurisdictional prerequisite, and the time to take an appeal cannot be extended when the notice of appeal was neither timely filed nor served (see, CPLR 5514[c]; 5520[a]; see also, Pollak v. Port Morris Bank, 257 N.Y. 287.)

IMMATERIAL INACCURACIES IN THE NOTICE OF APPEAL

Deygoo v. Eastern Abstract Corp., 204 A.D.2d 596, 612 N.Y.S.2d 415 (2nd Dept.,1994):
[A] party seeking to limit the time of another to take an appeal is strictly held to the rules of practice, and the failure to comply therewith will not be overlooked (Good v. Daland, 119 N.Y. 153; Nagin v. Long Is. Sav. Bank, 94 A.D.2d 710, 462 N.Y.S.2d 69). However, "a mere inaccuracy in the notice which violates no rule of practice and is in itself immaterial, will not be sufficient to avoid" the time to appeal (Falker v. New York West Shore & Buffalo Ry. Co., 100 N.Y. 86). Although plaintiff failed to include the index number of the case (CPLR 2101[c]), Eastern waived its objection to any defect in the form of the notice of entry by failing to return it within two days after receiving it (CPLR 2101[f]).

-- CPLR 5513(a): Time Does NOT Begin to Run If Order and Notice of Entry Are Not Served

Mideal Homes Corp. v. L & C Concrete Work, Inc., 90 A.D.2d 789, 455 N.Y.S.2d 394 (2nd Dept.,1982):
Since a copy of the order and written notice of its entry was never served upon the appellant, the 30-day period to take an appeal as of right never began to run (CPLR 5513, subd. [a]; see Malvin v. Schwartz, 65 A.D.2d 769, 409 N.Y.S.2d 787 affd. 48 N.Y.2d 693, 422 N.Y.S.2d 58, 397 N.E.2d 748).

-- LETTER: "HERE'S THE DECISION!" ...

Reynolds v. Dustman, 1 N.Y.3d 559, 772 N.Y.S.2d 247 (2003):
It is well settled that the requirements of CPLR 5513(a) must be strictly followed (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C5513:1, at 169; CPLR C5513:2, at 171). Compliance with CPLR 5513(a) requires a notice of entry that refers to the appealable paper, and the date and place of its entry.

Although the Supreme Court paper respondents served identifies itself as both a decision and order, it can be treated as a judgment determining the proceeding, an appealable paper (CPLR 411; 5512[a]). Nevertheless, respondents' cover letter describing the enclosure as a "decision filed" was not notice of entry of a judgment or order. Consequently, the cover letter is insufficient for the notice of entry required by CPLR 5513(a). In addition, because their cover letter did not alert petitioner to the enclosure of an appealable paper, respondents cannot rely on notations on the enclosed paper itself as providing essential elements of a notice of entry. Moreover, the paper respondents enclosed was neither stamped

with the date and place of entry nor signed by the clerk, and therefore did not provide the essential elements of a notice of entry (CPLR 5016 [a]). Thus, petitioner's time to appeal never commenced running and his appeal was timely taken.

Norstar Bank of Upstate N.Y. v. Office Control Systems, Inc., 78 N.Y.2d 1110, 578 N.Y.S.2d 868 (1991):
Motion for leave to appeal dismissed as untimely. While the cover letter here stated only that the Appellate Division order was attached and did not specify that it was entered, the attached Appellate Division order was stamped entered with the date of entry and the name of the clerk of the court where the order was entered. Service of this cover letter together with the Appellate Division order constitutes service of the order with notice of entry so as to commence the running of appellant's time to move for leave to appeal. Thus, the motion for leave to appeal, made more than 35 days after service of the cover letter and the Appellate Division order, was untimely (CPLR 5513[b]; 2103[b][2]).

Lum v. YWCA, 136 A.D.2d 972, 525 N.Y.S.2d 82 (4th Dept.,1988):
The motion to dismiss the appeal for failure to serve and file the notice of appeal timely is denied. The notice of entry, dated and mailed on July 22, reciting that the order being appealed from was entered on July 23 is obviously defective. Hence, appellant's time to appeal was not limited (CPLR 5513[a]). The party seeking to limit another party's time to appeal must adhere strictly to the provisions of the statute (Kelly v. Sheehan, 76 N.Y. 325; Nagin v. Long Is. Sav. Bank, 99 A.D.2d 827, lv. denied 63 N.Y.2d 603).

<u>There are only four grounds for an extension of the 30-day time to appeal</u>:

CPLR 5514. Extension of time to take appeal or to move for permission to appeal:[27]
(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

(1) 5514(a): <u>using the wrong method to appeal</u> (see CPLR 5520➤➤(a), "Omissions; appeal by improper method")

Peters v. Newman, 67 N.Y.2d 916, 501 N.Y.S.2d 815 (1986):
"The extension of time pursuant to CPLR 5514(a) will not apply where the dismissal is for untimeliness."

Timely filing of a notice of appeal is nonwaivable and jurisdictional.[28]

Andress v. Andress, 97 A.D.3d 1151, 947 N.Y.S.2d 748 (4th Dept.,2012): The Appellate Division may treat the notice of appeal as an application for leave to appeal.

Park East Corp. v. Whalen, **38 N.Y.2d 559, 381 N.Y.S.2d 819 (1976)**:
CPLR 5514(a): "unnecessary procedural traps for the unwary"

In *Park East*, the Court of Appeals delivered unwary counsel from this trap by equalizing the time frames between these statutes: the Court interpreted 5514(a) to require service of the denial or dismissal of the procedurally incorrect method as the predicate for the fresh 30-day limitation period:

Literally and out of context, CPLR 5514 (subd. (a)) seems to require computation

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[27] Prof. David D. Siegel, Practice Commentaries C5520:1. Defects and Omissions: "The most serious and often fatal omissions in appellate practice concern the time to appeal. CPLR 5514(c) recognizes only a few bases for excusing time defects. Among the few that are recognized are those set forth in CPLR 5520."

[28] Wei v. New York State Dept. of Motor Vehicles 56 A.D.3d 484, 865 N.Y.S.2d 920 (2nd Dept. 2008); Retta v. 160 Water Street Associates, L.P. 94 A.D.3d 623, 942 N.Y.S.2d 525 (1st Dept.,2012); Jones v. Coughlin 207 A.D.2d 1037, 617 N.Y.S.2d 704 (4th Dept. 1994).

> of the time to take an alternative method of appeal to begin on the date of the denial or dismissal of the first attempted appeal. However, we interpret CPLR 5514 (subd. (a)) similarly to the provision for all other appeal time limitations, so as to require computation of the time allowed to begin upon service of a copy of the order terminating the first attempted appeal with written notice of its entry. Such interpretation evidently conforms to the intention of the Legislature and harmonizes this statute's requirements with those of CPLR 5513 where service of a copy of the order with written notice of entry was deliberately adopted upon the recommendation of the Judicial Conference CPLR Advisory Committee (see McKinney's Cons.Laws of N.Y., Book 7B, CPLR 5513, Supplementary Practice Commentary for 1970 by Donald Zimmerman, Pocket Part (1975--1976), at pp. 248--249). Moreover, this achieves a uniform rule governing commencement of time requirements affecting appeals and it eliminates unnecessary procedural traps for the unwary while simultaneously insuring notification of termination of the first appeal attempt (contra, Dayon v. Downe Communications, 42 A.D.2d 889, 347 N.Y.S.2d 460).[29]

"Thus, the time for taking the right step is to be measured from the service of the order (with notice of entry) disposing of the wrong step."[30]

> **Lazarcheck v. Christian, 58 N.Y.2d 1033, 462 N.Y.S.2d 443 (1983):**
> Motion to dismiss appeal granted...upon the ground that no appeal as of right lies, noting that petitioners-appellants have thirty days, pursuant to CPLR 5514(a), to make a motion for leave to appeal.

Inconsistent Applications of *Park East*

Park East's unequivocal holding to the contrary notwithstanding, appellate courts have not applied the decision evenly or consistently within the same departments.

The First Department

In 1979, the First Department cited *Park East*, in *American Banana Co., Inc. v. Venezolana Internacional de Aviacion S.A. (VIASA)*, 69 A.D.2d 763 (1st Dept.,1979):

> CPLR 5513(b) provides that a motion for leave to appeal must be made within thirty days of service of a copy of the order with notice of entry, but CPLR 5514 provides that if an appeal is taken and dismissed, the thirty days shall be

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[29] See Lazarcheck v. Christian 58 N.Y.2d 1033, 448 N.E.2d 1354, 1354, 462 N.Y.S.2d 443 (N.Y. 1983), which has not been cited anywhere held: "Motion to dismiss appeal granted and appeal dismissed...upon the ground that no appeal as of right lies, noting that petitioners-appellants have thirty days, pursuant to CPLR 5514(a), to make a motion for leave to appeal." it must be assumed that this holding is consistent with Park East.

[30] Prof. David D. Siegel,Practice Commentaries to CPLR 5514, "C5514:1, Mistaking Method."

computed from the dismissal. This has been interpreted to mean that computation of the time allowed begins upon service of a copy of the order terminating the first attempted appeal with written notice of its entry.

Nevertheless, in 2012, without explanantion, the First Department, in *Retamozzo v. Quinones*, 95 A.D.3d 652, 945 N.Y.S.2d 22 (1st Dept.,2012), dismissed an appeal based on a literal reading of 5514(a) rather than as interpreted in *Park East*:

> Because the order appealed from is appealable as of right (CPLR 5701[a][2]), plaintiff should have served and filed a notice of appeal instead of moving for leave to appeal. When the motion for leave to appeal was denied, in order to take advantage of the tolling provision provided in CPLR 5514(a), plaintiff should have served and filed a notice of appeal within the time set forth in CPLR 5513(a), computed from the date the motion for leave to appeal was denied. He did not and thus the appeal is untimely.

The Fourth Department

While in *Sawma v. Bane*, 197 A.D.2d 938, 604 N.Y.S.2d 844 (4th Dept. 1993), the Fourth Department, citing *Park East* and CPLR 5514(a), correctly held "Petitioner has 30 days from the service of our order with notice of entry to file and serve a notice of appeal", in no less than five other decisions, the Fourth Department has applied section 5514(a) literally rather than as interpreted by the Court of Appeals.[31] In each of these decisions the Fourth Department held: "Pursuant to CPLR 5514(a), petitioner will have 30 days from the date of our order denying this motion to file and serve a notice of appeal as of right."

There appear to be no rulings from the Second or Third Departments on this question.

References:
CPLR 5514(a): The Uncertain Limitations Period Following Appeals By Improper Method, E. Scheinberg, NYLJ, 8/15/12.

<u>CPLR 5514(a): When an incorrect method is used, Court can fix time or deny</u>:

> (a)... the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders

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[31] People ex rel. Tyler v. New York State Div. of Parole 207 A.D.2d 1039, 617 N.Y.S.2d 685 (4th Dept. 1994) (Motion for permission to appeal denied. Memorandum: Because petitioner's appeal lies as of right, petitioner has 30 days from the date of this order to file and serve a notice of appeal (see, CPLR 5514[a]; 5520 [b]).); Doggett v. Johnson, 191 A.D.2d 1049, 595 N.Y.S.2d 707 (4th Dept., 1993); Batista v. Walker 190 A.D.2d 1099, 594 N.Y.S.2d 1020 (4th Dept. 1993); People ex rel. Edwards v. Bellnier 186 A.D.2d 1092, 599 N.Y.S.2d 908 (4th Dept. 1992); People ex rel. Carr v. Mitchell 187 A.D.2d 1047, 592 N.Y.S.2d 937 (4th Dept. 1992).

otherwise.

Neuman v. Hynes, 46 N.Y.2d 833, 414 N.Y.S.2d 122 (1978):
Motion to dismiss the appeal herein granted...Pursuant to CPLR 5514(a), any motion by appellants for permission to appeal shall be made within ten days of the date hereof.

Fau T. Leung v. Department of Motor Vehicles, 65 A.D.2d 736, 410 N.Y.S.2d 616 (1st Dept. 1978):
The remand directed by the order will require further fact finding and adjudication as to which respondent is unfettered by any directive of Special Term. In that sense, the remand is not merely ministerial...Consequently, the order is a non-final one in an Article 78 proceeding from which an appeal does not lie as of right [CPLR s 5701(b)(1)]. Permission to appeal was required from the Special Term Justice or from a Justice of this Court [CPLR s 5701(c)]. No such permission was obtained. Accordingly, the appeal must be dismissed. Cirasole v. Simins, 48 A.D.2d 795, 369 N.Y.S.2d 423...Finally, we accompany our dismissal with a directive that no further time be afforded respondent within which to move for permission to appeal. CPLR s 5514(a).

(2) <u>CPLR 5514(b): disability of attorney</u>
(b) Disability of attorney. If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or <u>otherwise</u> disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

– death, disbarment, suspension

– physically, mentally, or <u>otherwise</u> disabled (**<u>also, CPLR 321(c)</u>**);

– the appeal may be taken or the motion for permission to appeal may be served within 60 days from the disability

– **<u>doesn't apply to voluntary discharge.</u>**

– **Siegel v. Obes, 112 A.D.2d 930, 492 N.Y.S.2d 447 (2nd Dept.,1985)**:
[CPLR 5514(b)] doesn't apply to general instances of substitution of counsel...[or]...to the voluntary discharge of an attorney by his client (cites omitted).

(3) & (4): <u>CPLR 1022 (substitution of parties)</u>:

CPLR 5514(c): Other extensions of time; substitutions or omissions.
No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, § 1022, or § 5520.

CPLR 1022: Unless the court orders otherwise, if the time for taking an appeal has not expired... before the occurrence of an event permitting substitution of a party, the period is extended as to all parties until 15 days after substitution is made or, in case of dismissal of the action under CPLR 1021, is extended as to all parties until 15 days after the dismissal.

(4) <u>Timely Service, Party Forgot to File a Notice of Appeal Within 30 Days</u>

-- CPLR 5520: "Omissions; appeal by improper method"

➤McGinn v. Board of Education of the City of New York, 43 N.Y.2d 880, 403 N.Y.S.2d 497 (1978):
Motion for leave to appeal dismissed upon the ground that the prior motion for leave to appeal, made to the Appellate Division, was untimely (CPLR 5513(c); cf. CPLR 5514(a); Cohen & Karger, Powers of the New York Court of Appeals, s 101, p. 429; see, e. g., Schwartz v. National Computer Corp., 38 N.Y.2d 800, 381 N.Y.S.2d 872). 57 A.D.2d 868, 393 N.Y.S.2d 1020.

Rubeo v. National Grange Mut. Ins. Co., 93 N.Y.2d 750, 697 N.Y.S.2d 866 (1999):

The core question before us is a practice issue that has recurred in varying forms: what is the consequence of abandoning an appeal and then, later in the litigation, filing a second appeal presenting the same issue? Consistent with our precedents, we conclude that the Appellate Division, in the circumstances presented, correctly dismissed the second appeal.

Plaintiff filed a notice of appeal and simultaneously sought reargument in Supreme Court...

Plaintiff, however, failed to perfect his first appeal within six months, as required by the Appellate Division, Second Department (see, 22 NYCRR 670.8 [e]). Consequently, pursuant to 22 NYCRR 670.8(h), the Appellate Division included the appeal in a published list of cases that would be dismissed as abandoned unless a motion to extend the time to perfect were made within 10 days. Plaintiff did not seek an enlargement of time, and on February 18, 1998, the Appellate Division dismissed the appeal for failure to prosecute.

On February 27, 1998, plaintiff perfected his second appeal, but the Appellate Division dismissed it as well, citing Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803, 342 N.E.2d 575. The court held that "plaintiff is barred from raising the issue of the timeliness of the insurance carrier's disclaimer of coverage on this appeal. The issue could have been raised in the prior appeal from the order dated May 15, 1997, which was dismissed as abandoned." (255 A.D.2d 306, 678 N.Y.S.2d 790.) We affirm.

In Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803, this Court held that, if an appeal has been dismissed for failure to prosecute, any subsequent appeal raising an issue presented by the earlier appeal is subject to dismissal. There, the trial court dismissed plaintiff's personal injury claim, arising out of a car accident, on the ground that the Ontario guest statute applied. The Appellate Division reversed, and this Court granted defendant leave to appeal. Defendant, however, failed to perfect his appeal, and we later dismissed it for want of prosecution. After a jury verdict for plaintiff, defendant appealed directly to this Court pursuant to CPLR 5601(d), arguing again that the Ontario guest statute applied.

This Court dismissed defendant's second appeal on the ground that "a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal" (Bray v. Cox, supra, 38 N.Y.2d, at 353, 379 N.Y.S.2d 803). As we noted, if no penalty were imposed for failing to prosecute an earlier appeal, litigants could use the appellate process as a

means of “delaying enforcement of judgments and the inevitable payment of just debts and obligations” (id., at 353, 379 N.Y.S.2d 803). Further, we concluded that, as a prudential matter, an appellant should not “have two opportunities to appeal to this [C]ourt on identical issues” (id., at 353, 379 N.Y.S.2d 803; see also, Siegel, N.Y. Prac. § 542, at 898 [3d ed.]).

People v. Corley, 67 N.Y.2d 105, 500 N.Y.S.2d 633, 491 N.E.2d 1090, applied those same principles in a criminal case. Citing Bray, we reasoned that after an appeal has been dismissed for failure to prosecute, permitting a subsequent appeal on the same issue would “encourage laxity” as well as “foster disrespect and indifference toward our rules and orders” (id., at 109, 500 N.Y.S.2d 633).

We were unwilling to abide those consequences in Corley, and we remain unwilling to do so here. Plaintiff raised the same issue on his appeal from the original May 15, 1997 order that he raised on appeal from the subsequent August 22, 1997 order. However, he chose to ignore the first appeal, requiring the Appellate Division to take steps to dismiss the matter. As we stated in Corley, that sort of laxity and disrespect toward court procedures should not be condoned.

Plaintiff tries to distance himself from Bray and Corley by arguing that his first appeal, according to CPLR 5517(a)(1), remained viable even after Supreme Court granted reargument, and thus he had the right to file both appeals. The issue before us, however, is not whether plaintiff had the right to file both appeals-no one disputes that he did (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C5517:1, at 209; Siegel, N.Y. Prac, op. cit., § 532, at 879; see also, CPLR 5701[a][2] [viii] [eff. July 20, 1999] [explicitly authorizing appeal from an order granting leave to reargue]). In Bray as well, appellant unquestionably had the right to file his second appeal pursuant to CPLR 5601 (d) (Bray v. Cox, supra, 38 N.Y.2d, at 353, 379 N.Y.S.2d 803). Rather, the issue here, as in Bray, is whether, having decided to file both appeals, plaintiff had the right to pursue the second appeal after allowing the first to die on the vine. Clearly, he did not.

[2] CPLR 5517 does not mandate a contrary result. That section, derived from Civil Practice Act § 562-a, was enacted in order to ensure that an appeal remains viable where the trial court grants reargument of the order appealed from, and then on reargument adheres to its original decision. The statute was designed to reverse a string of court cases holding to the contrary (17th Ann. Report of N.Y. Jud. Council, at 207-211 [1951]; see also, 12 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 5517.01). CPLR 5517 was not intended, however, to permit litigants to engage in the dilatory practice of allowing an appeal to be dismissed for want of prosecution and then later pursuing a second appeal on the same issue.

Notably, plaintiff could have avoided his present predicament in several ways. He

could have timely perfected his original appeal. He could have moved the Appellate Division for an extension of time to perfect that appeal (22 NYCRR 670.8[d]-[h]). If plaintiff knew that he could not perfect the first appeal in a timely manner, he could have withdrawn it, sparing the Appellate Division the burden of carrying, monitoring and ultimately dismissing it. After withdrawing the first appeal, plaintiff could have continued to pursue the second appeal, if he so desired (see, e.g., People v. Green, 56 N.Y.2d 427, 452 N.Y.S.2d 389, where defendant withdrew his interlocutory appeal [53 N.Y.2d 704] and court later addressed the merits). Plaintiff, however, simply chose to abandon his first appeal, showing complete indifference toward the court system. We cannot say that, in these circumstances, dismissal of plaintiff's second appeal was erroneous as a matter of law.

Nor does the result we reach conflict with Aridas v. Caserta, 41 N.Y.2d 1059, 396 N.Y.S.2d 170, as plaintiff contends. In Aridas, the Appellate Division dismissed defendants' first appeal for failure to prosecute, and then decided defendants' second appeal-though based on the same issue-on the merits. Recognizing that the Appellate Division retained “continuing jurisdiction” to reconsider its prior determination, we concluded that the Appellate Division's discretionary decision to hear the second appeal was not error as a matter of law (id., at 1061, 396 N.Y.S.2d 170; see also, Faricelli v. TSS Seedman's, 94 N.Y.2d 772, 698N.Y.S.2d 588, 1999 WL 818714 [decided today]). Aridas recognizes the Appellate Division's discretion to entertain an appeal after dismissal of a prior appeal for failure to prosecute, but it does not require the Appellate Division to do so. Moreover, we have no doubt that the Appellate Division was well aware that it had the discretion to entertain plaintiff's appeal if it wished (see, e.g., Brosnan v. Behette, 243 A.D.2d 524, 664 N.Y.S.2d 560, another Second Department case). Thus, there is no need to remit this case to the Appellate Division for an exercise of discretion.

Finally, plaintiff argues that in other cases where appeals have been filed from the original order as well as from the order on reargument adhering to the original decision, the Appellate Division has dismissed the appeal from the original order as academic or superseded, and then considered the second appeal on the merits. However, even if the Appellate Division has, on occasion, exercised its discretion to hear a subsequent appeal, it certainly was not required to do so in the case at hand. Moreover, there is no indication in the cases cited by plaintiff that the first appeal was not timely perfected (see, e.g., Bents v. City of New York, 257 A.D.2d 372, 683 N.Y.S.2d 48 [1st Dept.]; Andrews v. LaRuffa, 257 A.D.2d 553, 682 N.Y.S.2d 891 [2nd Dept.]; Ryan v. McLean, 209 A.D.2d 913, 619 N.Y.S.2d 196 [3d Dept.]; Public Serv. Truck Renting v. Ambassador Ins. Co., 136 A.D.2d 911, 525 N.Y.S.2d 85 [4th Dept.]). Where, as here, the first appeal has been dismissed for failure to perfect in a timely fashion, the Appellate Division has held that dismissal of the second appeal is appropriate (see, Tepper v. Furino,

239 A.D.2d 405, 405-406, 659 N.Y.S.2d 43, lv. dismissed 91 N.Y.2d 866).

Plaintiff points to Dennis v. Stout, 24 A.D.2d 461, 260 N.Y.S.2d 325, where the Appellate Division held that the appellant "properly abandoned" his appeal from the original order after the trial court issued an order, on reargument, adhering to its original decision, from which a new notice of appeal was filed (id., at 461-462, 260 N.Y.S.2d 325). Dennis, however, was decided in 1965-11 years before our holding in Bray that the abandonment of a prior appeal justifies dismissal of a second appeal.

In short, the message is clear and consistent: the filing of an appeal is not inconsequential. An appeal left untended may be dismissed as abandoned, and appellant may be precluded from later appealing the same issue.

Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803 (1976):
On June 17, 1964 while returning from a trip to Buffalo, New York, plaintiff was injured and defendant's decedent was killed when the automobile the latter was operating collided with a utility pole. Both plaintiff and the deceased were citizens and residents of the Province of Ontario, Canada, and the vehicle in which they were traveling was registered and insured there.

In 1967, plaintiff commenced this action in the Supreme Court, Erie County, to recover for his personal injuries. Defendant pleaded the Ontario guest statute and Supreme Court, Erie County, holding that the law of Ontario was applicable, dismissed the complaint upon stipulated facts. The Appellate Division taking a contrary view of the choice-of-laws issue, reversed and reinstated the complaint. Thereafter, defendant moved for leave to appeal on a certified question and, on September 14, 1972, the Appellate Division granted the motion.

More than one year later, and some time after plaintiff had served defendant with a demand that he file and serve his papers on appeal (see 22 NYCRR 500.6(b)), the appeal was dismissed for failure to comply with the Rules of Practice of the Court of Appeals which provide that '(a)n appeal must be argued or submitted within nine months after the appeal is taken. If it not so argued or submitted a summary order of dismissal shall be entered' (22 NYCRR 500.6(a)). A subsequent motion to vacate the dismissal and reinstate the appeal was denied (33 N.Y.2d 789, 350 N.Y.S.2d 653).

A trial of the action followed, the jury rendering a verdict in favor of plaintiff and judgment being entered thereon. Defendant now appeals directly to this court pursuant to CPLR 5601 (subd. (d)) and, for a second time, seeks review of the same order of the Appellate Division and, of course, on concededly identical issues.

[1] [2] The appeal should be dismissed. We conclude that the rule to be followed is that a prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal. There is sound logic and reason for such a holding. Certain it is that a party should have his day in court, and that day should conclude the matter. Were the rule otherwise, the party who obtained judgment below could be deprived of the benefit of that judgment until a later time by the act of the losing party in appealing and disregarding the appeal (see, e.g., Anderson v. Richards, 173 Ohio St. 50, 179 N.E.2d 918); and conversely, the securing of leave to appeal might become a strategem for appellants, to be utilized for the purpose of delaying enforcement of judgments and the inevitable payment of just debts and obligations. Furthermore, since the dismissal of an appeal from a final judgment under 22 NYCRR 500.6(a) is with prejudice such as occurred in Crane v. State of New York, 35 N.Y.2d 945, 365 N.Y.S.2d 169, it would be anomalous to vary the result simply because the order appealed from is nonfinal, particularly where the issues presented on both appeals were exactly the same. When leave to appeal was granted by the Appellate Division, appellant was then in the same stance as an appellant here as a matter of right, and he ought not in these circumstances have two opportunities to appeal to this court on identical issues.

The conclusion finds strong support in cases from other jurisdictions which posited their determinations, as we do here, on common-law principles and precedent. In Carlberg v. Fields, 33 S.D. 410, 413, 146 N.W. 560, 561 the court said that it was settled 'that a second appeal will not be allowed from an order or judgment where the first appeal has been dismissed for want of prosecution'. It was likewise held in Schmeer v. Schmeer, 16 Or. 243, 17 P. 864 that '(w)hen a party perfects an appeal, and then abandons it, is right of appeal is exhausted', and so it should be. Brill v. Meeks, 20 Mo. 358, 359 reaches the same result and states that '(w)hen appeal has once been granted, the power over the subject is Functus officio and cannot be exercised a second time'. Similarly, after carefully and exhaustively analyzing the treatment of writs of error in the common-law courts of England, the New Jersey Supreme Court held in Welsh v. Brown, 42 N.J.L. 323 that where a writ of error directed to a lower court was dismissed for want of prosecution, the plaintiff in error could not sue out such a writ. Anderson v. Richards, 173 Ohio St. 50, 179 N.E.2d 918, Supra, reaches precisely the same conclusion, also on the basis of common-law precepts (cf. United States v. Fremont, 18 How. (59 U.S.) 30, 15 L.Ed. 241). In fact, the courts of at least two other States have apparently thought the conclusion we reach to be so clear and sound as to enact court-made rules of practice to govern such cases (Chamberlian v. Reid, 16 Cal. 208; Karth v. Light, 15 Cal. 324; Merrill v. Hunt, 52 Miss. 774.) FN* Interestingly, none of these cases were decided on the basis of statutory authority enacted by the legislative branch of government.

FN* (Contra Sanders v. Moore, 52 Ark. 376, 12 S.W. 783; Harris v. Ferris, 18 Fla. 81; Reed v. Kimsey, 98 Ill.App. 364; Helm v. Boone, 29 Ky. 351; Marshall v. Milwaukee & St. Paul R.R. Co., 20 Wis. 644.)

... We hold only that a dismissal for want of prosecution bars litigation of the issues which could have been raised on the prior appeal. Indeed, the appellant in the case before us was not required to appeal the judgment after trial directly to this court, but, rather, could have obtained full review of that judgment in the Appellate Division and then in this court, save, of course, the issues which could have been presented on the prior dismissed appeal.

This court must have the wherewithal to control its calendar. The rules of this court have been widely publicized and reported, and the Bar has been adequately advised and forewarned that these rules will be enforced. Appeals are not hastily dismissed. Indeed, appellant has no cause to complain of the dismissal, for timely demand was made to have him serve and file his papers, which proved fruitless. In fact, had the rules not been enforced, the original appeal might still be on our docket. (See Crane v. State of New York, 35 N.Y.2d 945, 365 N.Y.S.2d 169, supra, where an appeal was permitted to lie fallow for over six years before it was dismissed under the new practice.)

That CPLR 5601(d) permits an appeal as a matter of right is of no moment in the posture in which this appeal reaches this court for the issues now raised have been foreclosed by the dismissal of the prior appeal and are not reviewable.

Thus, we hold the dismissal of an appeal for want of prosecution to be on the merits of all claims which could have been litigated had the appeal been timely argued or submitted.

Bray **and** ***Rubeo*** **Notwithstanding, Courts May Grant Relief To Hear The Appeal**

Scala v. Wilkens, 69 A.D.3d 948, 893 N.Y.S.2d 269 (2d Dept.,2010):
The mother correctly asserts that a previous appeal by the father from the underlying order was dismissed by this Court for lack of prosecution. Ordinarily, the dismissal of that appeal would be ground for the dismissal of the instant appeal from the money judgment entered upon that order, since the dismissal constituted an adjudication of the merits of any issue which properly could have been raised on that prior appeal (Rubeo v. National Grange Mut. Ins. Co., 93 N.Y.2d 750, 697 N.Y.S.2d 866; Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803; Cardo v. Board of Mgrs., 67 A.D.3d 945, 891 N.Y.S.2d 97; Graziano v. Graziano, 66 A.D.3d 835, 886 N.Y.S.2d 616; Catalano v. City of New York, 63 A.D.3d 979,

880 N.Y.S.2d 549). [W]e exercise our discretion to review the issue raised by the father on this appeal.

Neuburger v. Sidoruk, 60 A.D.3d 650, 875 N.Y.S.2d 144 (2d Dept.,2009):[32]
As a general rule, we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so (Rubeo v. National Grange Mut. Ins. Co...; Bray v. Cox...)...Meanwhile, the earlier appeal was dismissed by decision and order on motion of this Court...for failure to perfect in accordance with the rules of this Court (22 NYCRR 670.8[h]). While the better practice would have been for the plaintiffs to withdraw the prior appeal, rather than abandon it, nonetheless, we exercise our discretion to review the issues raised on the appeal from so much of the order dated September 26, 2007, as was made upon reargument.

Catalanotto v. Abraham, 94 A.D.3d 937, 942 N.Y.S.2d 600 (2nd Dept.,2012):
Generally, we do not consider an issue on a subsequent appeal which was raised or could have been raised in an earlier appeal which was dismissed for lack of prosecution, although we have inherent jurisdiction to do so (Rubeo v. National Grange Mut. Ins. Co...; Bray v. Cox...; Madison v. Tahir, 45 A.D.3d 744, 744–745, 846 N.Y.S.2d 313). Here, Kirschenbaum has not demonstrated any basis for the exercise of such discretion.

While there are ample instances of such kindness by the court, counsel should neither expect nor rely upon it. When asking for relief from a ***Bray-Rubeo*** consequence, counsel should be extremely humble.

Perfected Appeal from Order where Judgment Is Not Appealed

Molinaro v. Bedke, 281 A.D.2d 242, 721 N.Y.S.2d 534 (1st Dept. 2001):
The appeal should be considered on the merits even though plaintiffs have not appealed the judgment that ministerially implemented the order they did appeal (CPLR 5501[c]; see, Morris & Partners v. Alfin, Inc., 234 A.D.2d 56, 650 N.Y.S.2d 201, Neuman v. Otto, 114 A.D.2d 791, 495 N.Y.S.2d 43).

[32] Franco v. Breceus, 70 A.D.3d 767, 895 N.Y.S.2d 152 (2nd Dept.,2010).

CPLR 5515(1) IS JURISDICTIONAL

An Appeal from Only a Part of a Judgment/Order
Is a Waiver of the Right to Appeal from the Remainder Thereof,
It Is Deemed Abandoned

Levitt v. Levitt, 97 A.D.3d 543, 948 N.Y.S.2d 108 (2nd Dept.,2012):
"CPLR 5515(1) requires that a notice of appeal designate the judgment or order, or specific part of the judgment or order, from which the appeal is taken. This requirement is jurisdictional. By taking an appeal from only a part of a judgment or order, a party waives its right to appeal from the remainder thereof"...The defendant's amended notice of cross appeal specifically limits her cross appeal to the portions of the judgment "which directed the plaintiff to pay the defendant $7,500 per month in maintenance and denied the defendant's request for an award of counsel fees." As the scope of the defendant's amended notice of cross appeal is limited, her contentions that the award of $15,000 per month of maintenance for 10 years after the marital home is sold is inadequate both in amount and duration, and that the Supreme Court should have granted her request for expert's fees, are not properly before this Court.

Failure to File a Preargument Statement Is Not Jurisdictional

Kubiszyn v. Terex Div. of Terex Corp., 201 A.D.2d 974, 607 N.Y.S.2d 832 (4th Dept.,1994):
Appellant timely served a notice of appeal, but its attempt at filing the notice of appeal was rejected by the County Clerk on the ground that no preargument statement was included with the notice of appeal. The County Clerk erred in rejecting the notice of appeal inasmuch as the filing of a preargument statement is not a jurisdictional prerequisite to taking an appeal (CPLR 5513, 5514[c]), and the penalty for failure to file a preargument statement is left to the discretion of this Court (22 NYCRR 1000.12[h]). Thus, appellant's failure to file timely is excusable and the motion to extend the time to take the appeal [] is granted.

Notice of Appeal May Not Be Amended

Owl Homes of Fredonia, Inc. v. Murphy, 199 A.D.2d 1077, 608 N.Y.S.2d 896 (4th Dept. 1993):
Because a notice of appeal constitutes a jurisdictional prerequisite for an appeal, the notice cannot be amended to add parties after the time to serve and file the notice has elapsed (cites omitted; see CPLR 5514[c]).

CPLR 5517, SUBSEQUENT ORDERS

(a) Appeal not affected by certain subsequent orders. An appeal shall not be affected by:

1. the granting of a motion for reargument or the granting of an order upon reargument making the same or substantially the same determination as is made in the order appealed from; or

2. the granting of a motion for resettlement of the order appealed from; or

3. the denial of a motion, based on new or additional facts, for the same or substantially the same relief applied for in the motion on which the order appealed from was made.

(b) Review of subsequent orders. A court reviewing an order may also review any subsequent order made upon a motion specified in subdivision (a), if the subsequent order is appealable as of right.

Smith v. Field 302 A.D.2d 585, 756 N.Y.S.2d 83 (2nd Dept.,2003):[33]

[T]he appeal from the judgment is dismissed, as that judgment was superseded by the resettled judgment.

Weinschneider v. Weinschneider, 40 A.D.3d 1077, 837 N.Y.S.2d 255 (2nd Dept.,2007):

The appeal from the first order must be dismissed because the right of direct appeal therefrom terminated with the entry of the resettled judgment (Matter of Aho, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285). The issues raised on the appeal from the first order are brought up for review and have been considered on the appeal from the resettled judgment (CPLR 5501[c]).

AN AMENDED ORDER OR JUDGMENT THAT ONLY CLARIFIES THE DECISION,

[33] Jersey Partners, Inc. v. McCully, 46 A.D.3d 256, 847 N.Y.S.2d 170 (1st Dept.,2007); Matter of Eric D. 162 A.D.2d 1051, 559 N.Y.S.2d 156 (4th Dept. 1990).

NEW NOTICE OF APPEAL NOT NEEDED

North Syracuse Cent. School Dist. v. New York State Div. of Human Rights, 83 A.D.3d 1472, 920 N.Y.S.2d 564 (4th Dept.,2011):[34]
[A]lthough respondent appealed only from the original judgment, we may nevertheless review the resettled judgment in the absence of a new notice of appeal inasmuch as the resettled judgment "simply clarif[ies] the original ... judgment for the purpose of correctly expressing the decision of" the court.

NO APPEAL LIES FROM A JUDGMENT THAT HAS BEEN AMENDED, THE FIRST JUDGMENT IS SUPERSEDED BY THE AMENDED JUDGMENT

Elda Development Corp. v. Wall, 101 A.D.2d 1000, 476 N.Y.S.2d 690 (4th Dept.,1984):
Plaintiff's motion to dismiss the appeal because the order and judgment appealed from were superseded by an amended order and judgment which were not appealed is denied. The amended order and judgment simply clarifies the original order and judgment for the purpose of correctly expressing the decision of Special Term. This act of resettlement does not affect the appeal taken from the original order and judgment and we may review the amended order and judgment without a new notice of appeal having been filed (CPLR 5517, subd. [b]; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5701.25).

Chabica v. Schneider 213 A.D.2d 579, 624 N.Y.S.2d 271 (2d Dept.,1995):
[D]efendant appeals from (1) a judgment dated September 4, 1992, which, upon a jury verdict, is in favor of the plaintiff and against him awarding damages, and (2) an amended judgment of the same court, dated January 13, 1993, which, inter alia, is in favor of the plaintiff and against him awarding damages.

The judgment dated September 4, 1992, was superseded by the amended judgment dated January 13, 1993. No appeal lies from a judgment that has been superseded by an amended judgment, and accordingly, the defendant's appeal from the judgment dated September 4, 1992, is dismissed (Van Scooter v. 450 Trabold Road, 206 A.D.2d 867, 616 N.Y.S.2d 281).

In re Estate of Collins 36 A.D.3d 1191, 828 N.Y.S.2d 689 (3rd Dept.,2007):
When respondent supplied a revised accounting, petitioner objected to that as well. Surrogate's Court directed respondent to reply to only one of petitioner's allegations. After that reply was received, the court issued a January 13, 2006 order finding that respondent's calculation of commissions was reasonable, but

[34] In re Ashlie B. 37 A.D.3d 997, 830 N.Y.S.2d 809 (3rd Dept.,2007), citing CPLR 5517(b).

requiring respondent to pay a surcharge of $25,824.45 for the invasion of trust principal in 14 separate years. Both parties appealed from the January 2006 order. Respondent then moved in Surrogate's Court to renew and reargue, claiming that it was not afforded a chance to respond to petitioner's allegations concerning invasion of principal. The court granted the motion and issued an amended order on April 11, 2006, adhering to its prior order except by amending the finding of principal invasion to only four separate years, thereby reducing the surcharge to $16,014.90. As a result of the amended order, respondent did not move forward with its appeal, but petitioner did.FN1

➤➤FN1. Pursuant to CPLR 5517, the April 2006 amended order can be considered on this appeal (Wood v. Maggie's Tavern, 257 A.D.2d 733, 735, 683 N.Y.S.2d 353 [1999]; Stock v. Ostrander, 233 A.D.2d 816, 817, 650 N.Y.S.2d 416 [1996]; Elda Dev. Corp. v. Wall, 101 A.D.2d 1000, 1001, 476 N.Y.S.2d 690 [1984], appeal dismissed 63 N.Y.2d 952 [1984]).

NO APPEAL LIES FROM AN ORDER DENYING A MOTION TO RESETTLE WHICH SEEKS ONLY TO MODIFY OR CHANGE THE SUBSTANTIVE RELIEF GRANTED BY THE ORIGINAL ORDER;

APPEAL FROM DENIAL OF RESTTLEMENT MAY BE HAD WHERE RESETTLEMENT SEEKS TO PROPERLY REFLECT THE INTENT OF DECISION

Traister v. Russo, 154 A.D.2d 455, 546 N.Y.S.2d 22 (2nd Dept.,1989):
No appeal lies from an order which denies resettlement of the decretal paragraphs of a judgment.[35]

Torpey v. Town of Colonie, 107 A.D.3d 1124, 968 N.Y.S.2d 615 (3rd Dept.,2013):
Under established precedent, no appeal lies from the " 'denial of a motion to resettle [or clarify] a substantive portion of an order' " (Biasutto v. Biasutto, 75 A.D.3d 671, 672, 904 N.Y.S.2d 548 [2010], quoting Tidball v. Tidball, 108 A.D.2d at 958, 484 N.Y.S.2d 945; cf. Stevenson v. Lazzari, 16 A.D.3d 576, 578, 793 N.Y.S.2d 428 [2005] [order denying motion for resettlement is appealable because the motion merely sought to amend the judgment to reflect the

[35] Kubick v. Kubick, 261 A.D.2d 300, 691 N.Y.S.2d 407 (1st Dept., 1999); Hale v. Hale 16 A.D.3d 231, 792 N.Y.S.2d 27 (1st Dept.,2005) (The order denying his motion to resettle the decretal paragraphs of the judgment with respect to his separate property contribution to the New York co-op is not appealable.); Reynolds v. Spanakos, 196 A.D.2d 798, 602 N.Y.S.2d 21 (2nd Dept.,1993); Hatsis v. Hatsis 122 A.D.2d 111, 504 N.Y.S.2d 508 (2nd Dept.,1986); Murphy v. Wack 186 A.D.2d 427, 588 N.Y.S.2d 555 (1st Dept.,1992); Cox v. Cox 228 A.D.2d 773, 644 N.Y.S.2d 77 (3rd Dept.,1996).

undisputed fact that all claims had been dismissed]; Bullion v. Metropolitan Transp. Auth., 161 A.D.2d 168, 168, 554 N.Y.S.2d 878 [1990] [denial of motion to resettle which does not modify any substantive portion of judgment is appealable]).

Petitioner's motion was one to resettle and/or clarify Supreme Court's prior judgment regarding back pay. Such a motion is designed "not for substantive changes [in, or to amplify a prior decision of, the court], but to correct errors or omissions in form, for clarification or to make the [judgment] conform more accurately to the decision" (Simon v. Mehryari, 16 A.D.3d 664, 666, 792 N.Y.S.2d 543 [2005]; see Elson v. Defren, 283 A.D.2d 109, 113, 726 N.Y.S.2d 407 [2001]; Gannon v. Johnson Scale Co., 189 A.D.2d 1052, 1052, 592 N.Y.S.2d 881 [1993]; see also). Such motions rest on the inherent power of courts to " 'cure mistakes, defects and irregularities that do not affect substantial rights of [the] parties' " (Bennett v. Bennett, 99 A.D.3d 1129, 1129, 953 N.Y.S.2d 322 [2012], quoting Kiker v. Nassau County, 85 N.Y.2d 879, 881, 626 N.Y.S.2d 55, 649 N.E.2d 1199 [1995]; see Matter of Owens v. Stuart, 292 A.D.2d 677, 739 N.Y.S.2d 473 [2002]).

Miller v. Lanzisera, 273 A.D.2d 866, 709 N.Y.S.2d 286 (4th Dept.,2000), appeal dismissed 95 N.Y.2d 887, 715 N.Y.S.2d 378 [2000]:
We reject the contention of defendant that his then attorney was precluded from perfecting the appeal from the 1990 order due to the court's failure to decide the motion to resettle that order. "The purpose of resettlement is to revise an order to reflect the court's decision * * *. Resettlement is not to be used to effect a substantive change in or to amplify the decision of the court" (Barretta v. Webb Corp., 181 A.D.2d 1018, 581 N.Y.S.2d 508, lv. dismissed 80 N.Y.2d 892, 587 N.Y.S.2d 909). It does not appear from the record that, in seeking resettlement, defendant contended that the 1990 order did not substantively reflect the court's decision, and thus "the time to appeal [was] measured from the original order" (Matter of Kolasz v. Levitt, 63 A.D.2d 777, 779, 404 N.Y.S.2d 914).

Ambassador Realty Co. v. Nicolay, 1 A.D.2d 972, 151 N.Y.S.2d 28 (2nd Dept.,1956):
No appeal lies from an order denying a motion for resettlement which seeks only to modify or change the relief granted by the original order. Paliotto v. Hartman, 285 App.Div. 1188, 143 N.Y.S.2d 605; 8 Carmody-Wait, p. 521; Bergin v. Anderson, 216 App.Div.

Schanback v. Schanback, 159 A.D.2d 498, 552 N.Y.S.2d 370 (2nd Dept.,1990):
In an action for a divorce and ancillary relief, (1) the parties cross-appeal from stated portions of a judgment of the Supreme Court, entered September 19, 1988, which determined the financial issues presented, and (2) the defendant husband appeals from so much of an order of the same court, dated November 9, 1988, as denied that branch of his motion which was to resettle the judgment to "omit the compounding of the interest on the distributive award".

The appeal from the order [November 9, 1988] is dismissed, as no appeal lies from an order denying resettlement of the decretal paragraphs of a prior judgment. However, the issue raised on that motion may be reviewed upon the defendant's appeal from the judgment.

Bullion v. Metropolitan Transp. Authority, 161 A.D.2d 168, 554 N.Y.S.2d 878 (1st Dept.,1990):
[A]n order [] denying a motion to resettle which does not modify any 'substantive or decretal portion of the judgment' is appealable...Manifestly, the Authorities are entitled to the entry of a resettled judgment which is in conformity with the record.

Stevenson v. Lazzari, 16 A.D.3d 576, 793 N.Y.S.2d 428 (2nd Dept.,2005):
Since the appellants' motion merely sought to amend the judgment by adding language to reflect the undisputed fact that all claims against the respondents had been dismissed, the denial of the motion is appealable (4 N.Y. Jur.2d, Appellate Review § 57).

Lewin v. New York City Conciliation and Appeals Bd., 88 A.D.2d 516, 450 N.Y.S.2d 1 (1st Dept.,1982), aff'd 57 N.Y.2d 760, 454 N.Y.S.2d 990:
Unmodified, the judgment gives the tenant an unwarranted windfall and is not consistent with the Memorandum Decision. ➤Since respondent's motion to resettle does not seek to modify the substantive or decretal portion of the judgment so as to obtain a ruling not adjudicated on the original application or to modify the decision which has been made, but is being used because the judgment improperly reflects the decision, an appeal lies from its denial (Bergin v. Anderson, 216 App.Div. 844, 215 N.Y.S. 800 [2nd Dept. 1926]; Weinstein-Korn-Miller: New York Civil Practice § 5701.25).

Bergin v. Anderson, 216 A.D. 844, 215 N.Y.S. 800 (2nd Dept.1926):
[The] order, in so far as it denies a motion to resettle an order, so as to recite all papers used upon the original motion, reversed upon the law and the facts...Decisions holding that an order denying a motion for resettlement is not appealable relate to motions made to modify or change the relief granted by the original order.

Smith v. Field, 302 A.D.2d 585, 756 N.Y.S.2d 83 (2nd Dept.,2003):[36]
[T]he appeal from the judgment is dismissed, [where] judgment was superseded by the resettled judgment. The issues raised on the appeal and cross appeal from the order are brought up for review and have been considered on the appeal and

[36] Olympia Estates, Inc. v. New York City Dept. of Environmental Protection 275 A.D.2d 325, 712 N.Y.S.2d 412 (2nd Dept. 2000).

cross appeal from the resettled judgment (CPLR 5501[a][1]).

Fitzgerald v. Fitzgerald, 302 A.D.2d 356, 754 N.Y.S.2d 666 (2nd Dept.,2003): The preferred remedy when a party alleges that a judgment does not accurately incorporate the terms of a stipulation is by motion in the trial court for resettlement or vacatur of the judgment, rather than by appeal" (Pizzuto v. Pizzuto, 162 A.D.2d 443, 556 N.Y.S.2d 390, citing CPLR 5019 [a]...) However, CPLR 5019(a) gives this court the discretion to cure the mistake...

Reisman v. Coleman, 226 A.D.2d 693, 641 N.Y.S.2d 690 (2nd Dept.,1996): ➤It is well settled that a trial court has no revisory or appellate jurisdiction to vacate, sua sponte, its own order (CPLR 5019; see Osamwonyi v. Grigorian, 220 A.D.2d 400, 631 N.Y.S.2d 906). [T]he parties agree that the Supreme Court exceeded its authority by, sua sponte, recalling and vacating its [] order...The respondent contends, nevertheless, that the [] order is reviewable on appeal pursuant to CPLR 5501. We disagree. Under CPLR 5501(a)(1), an appeal from a final judgment brings up for review "any non-final judgment or order which necessarily affects the final judgment * * * provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken" (CPLR 5501[a][1]). [T]he [] order was final and, thus, cannot be brought up for review on appeal from the later order (Crystal v. Manes, 130 A.D.2d 979, 516 N.Y.S.2d 823; Acres v. Hitchcock, 77 A.D.2d 744, 431 N.Y.S.2d 188, lv. denied 53 N.Y.2d 601; cf., Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 524). ORDERED...the order dated September 26, 1994, is reinstated.

Bennett v. Bennett, 99 A.D.3d 1129, 953 N.Y.S.2d 322 (3rd Dept.,2012): We are unpersuaded by defendant's contention that Supreme Court did not have the authority to issue the second amended judgment. It is well settled that a trial court may "cure mistakes, defects and irregularities that do not affect substantial rights of [the] parties" (Kiker v. Nassau County, 85 N.Y.2d 879, 881, 626 N.Y.S.2d 55 [1995]; see CPLR 5019 [a]...). This authority includes " 'amend[ing] a judgment to make it reflect what the court's holding ... clearly intended' " (Matter of Glazier v. Brightly, 81 A.D.3d at 1199, 917 N.Y.S.2d 728, quoting Matter of Owens v. Stuart, 292 A.D.2d 677, 678, 739 N.Y.S.2d 473 [2002]...). Here, the original amended judgment provided that the sums owed for the pension payments "may be off-set against" plaintiff's child support arrears, reflecting language in the court's prior decision and order. When defendant objected to plaintiff's attempt to claim the offset, Supreme Court issued the second amended judgement to provide that plaintiff "shall be entitled" to the offset, as well. In our view, the second amended judgment appropriately clarified the intent of the court's original holding (CPLR 5019[a]; Matter of Glazier v. Brightly, supra...). In doing so, Supreme Court did not affect the amount of child support owed by plaintiff or the amount of defendant's pension to which plaintiff was entitled and, thus, did not alter any substantial rights of the parties (Follender v. Maxim, 44 A.D.3d at 1228–1229, 845 N.Y.S.2d 484; Gerenstein v. Gerenstein,

188 A.D.2d 868, 870, 591 N.Y.S.2d 269 [1992]).

Jointa Lime Co. v. Canonie Environmental Services Corp., 198 A.D.2d 659, 603 N.Y.S.2d 605 (3rd Dept.,1993):
Plaintiff did not appeal the judgment or attempt to resettle it and has now lost its right to appeal the judgment or to seek damages other than what it was granted.

➤**Marothy v. Marothy, 222 A.D.2d 417, 634 N.Y.S.2d 535 (2nd Dept.,1995):**
The defendant failed to appeal from the judgment of divorce...which is in favor of the plaintiff in the principal sum of $425,000, with interest, nor did he move to resettle or vacate the provisions of those judgments...Therefore, the defendant's contention that those judgments do not accurately reflect the terms of the parties' stipulation is not properly before this court.

Regional Gravel Products, Inc. v. Stanton, 132 A.D.2d 1008, 518 N.Y.S.2d 254 (4th Dept.,1987):
➤No appeal lies from an order granted by default (CPLR 5511). Defendant moved to resettle the order appealed from to show that it was not granted by default, but that defendant had appeared by counsel. The motion to resettle was denied and defendant also appealed from the order denying the motion to resettle. If the motion to resettle is granted, defendant's appeal will lie from the resettled order, not from the original order.

Salamone v. Wincaf Properties, Inc., 9 A.D.3d 127, 777 N.Y.S.2d 37 (1st Dept.,2004):
Before turning to the CPLR article 16 issue presented by this appeal, we note that this substantive issue was inappropriately raised for the first time...and inappropriately considered for the first time by the IAS court, on a motion to resettle a judgment that had already been entered in [defendant's] favor. CPLR 5019(a), which provides authority for the correction of a "mistake, defect or irregularity" in a judgment, does not authorize resettlement to amend an aspect of a judgment that affects a substantial right of a party. ➤Rather, consideration of an alleged substantive error in a judgment, other than one clearly inconsistent with the intentions of the court and the parties as demonstrated by the record...should be obtained either through an appeal from that judgment, or, if grounds for vacatur exist...through a motion to vacate pursuant to CPLR 5015(a) (Herpe v. Herpe, 225 N.Y. 323 [1919]; Garrick Aug Assocs. Store Leasing v. Scali, 278 A.D.2d 23, 23, 718 N.Y.S.2d 281 [2000]; Siegel, N.Y. Prac. § 420, at 683–684 [3d ed.]; 10 Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 5019.04).

Rowley v. Amrhein, 64 A.D.3d 469, 883 N.Y.S.2d 214 (1st Dept.,2009):[37]
Defendant's challenge to the judgment on the ground that it inaccurately reflects

[37] See, Sholes v. Meagher, 100 N.Y.2d 333, 794 N.E.2d 664, 763 N.Y.S.2d 522 (2003).

the stipulation of settlement by including terms that are inconsistent therewith is not preserved for appellate review since there is no record that defendant raised any objection to plaintiff's proposed judgment, as required by 22 NYCRR 202.48(c)(2). ➤Defendant's claim that he had no opportunity to object to plaintiff's proposed judgment because he was not served with a copy thereof is directed to Supreme Court in a motion to vacate the judgment pursuant to CPLR 5015(a)(1), not to this Court on appeal (McCue v. McCue, 225 A.D.2d 975, 976, 639 N.Y.S.2d 551 [1996]; Levy v. Blue Cross & Blue Shield of Greater N.Y., 124 A.D.2d 900, 901, 508 N.Y.S.2d 660 [1986]).

CPLR 5520. Omissions; appeal by improper method

CPLR 5520(a):
If an appellant either serves or files a timely notice of appeal or notice of motion for permission to appeal, but neglects through mistake or excusable neglect to do another required act within the required time, the court from or to which the appeal is taken or the court of original instance may grant an extension of time for curing the omission.

Failure to include a preargument statement with a notice of appeal may result in the clerk's office refusing to accept the notice of appeal for filing.

– mistakes as to form and content of the notice may well be excused.
– CPLR 5520 and 5512(a).

CPLR 5520(b):
Appeal by permission instead of as of right. An appeal taken by permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the motion for permission was made within the time limited for taking the appeal.

-- **CPLR 5520(b) overlaps CPLR 5014(a).**

CPLR 5520(c). Defects in form.
Where:
[1] a notice of appeal is premature
or
[2] contains an inaccurate description of the judgment or order appealed from, the appellate court, in its discretion, when the interests of justice so demand, may treat such a notice as valid

-- See, **CPLR 104 and 2001.**

Boone v. Hopkins, 288 A.D.2d 916, 732 N.Y.S.2d 820 (4th Dept.,2001):[38]

[38] Leonard v. Leonard, 109 A.D.3d 126, 968 N.Y.S.2d 762 (4th Dept.,2013) (Defendant wife appeals from an order issued by the Judicial Hearing Officer (JHO). Defendant attributes multiple errors to the JHO, whose order was later subsumed in a judgment of divorce entered in Supreme Court. Although no appeal lies from the order, "we exercise our discretion to treat the notice of appeal as valid and deem the appeal [as] taken from the judgment."); Hughes v. Hughes, 84 A.D.3d 1745, 922 N.Y.S.2d 839 (4th Dept. 2011); Chin v. Kaplan, 280 A.D.2d 892, 720 N.Y.S.2d 862 (4th Dept.,2001)

Although the order appealed from was subsumed within the final judgment (CPLR 5501[a]), in the exercise of our discretion we treat the appeal as taken from the judgment (see, CPLR 5520[c]; Chin v. Kaplan, 280 A.D.2d 892, 720 N.Y.S.2d 862).

References

– Newman & Ahmuty, "Taking an Appeal," 5/5/99 N.Y.L.J. 3, col. 1;

– See, generally, Practice Commentaries 5512:1, 5514:1 through 5514:3, and 5520:1 under CPLR 5512, 5514, and 5520; Siegel, New York Practice § 534 (2d ed.); and

– Newman & Ahmuty, "Strict Time Limitations," 12/21/89 N.Y.L.J. 3, col. 1.

TIMELY OBJECTIONS

GENERAL v. SPECIFIC OBJECTIONS

Tooley v. Bacon, 70 N.Y. 34 (1877):[39]
[1] When evidence is excluded upon a mere general objection, the ruling will be upheld, if any ground in fact existed for the exclusion. It will be assumed, in the absence of any request by the opposing party or the court to make the objection definite, that it was understood, and that the ruling was placed upon the right ground.

[2] If in such a case a ground of objection be specified, the ruling must be sustained upon that ground unless the evidence excluded was in no aspect of the case competent, or could not be made so.

[3] But where there is a general objection to evidence and it is overruled, and the evidence is received, the ruling will not be held erroneous unless there be some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature be incompetent. (Levin v. Russell, 42 N. Y., 251; Williams v. Sargeant, 46 N. Y., 481.)

Jones v. Stinson, 94 F.Supp.2d 370 (E.D.N.Y.,2000)
Under New York evidentiary law, if testimony is excluded pursuant to a specific objection, then a reviewing court may uphold the ruling in two circumstances: (1) if the specific objection was correctly sustained, or (2) if " 'the evidence excluded was in no aspect of the case competent, or could not be made so.' "

Wightman v. Campbell, 217 N.Y. 479 (1916):
The rule is well settled that when evidence is received under a general objection, the ruling will not be held erroneous, unless there is some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature is incompetent. Tooley v. Bacon, 70 N. Y. 34.

People v. Vidal, 26 N.Y.2d 249, 309 N.Y.S.2d 336 (1970):
A general objection is to no avail when overruled if not followed by a specific objection directing the court, and the adversary, to the particular infirmity of the evidence (Bergmann v. Jones, 94 N.Y. 51, 58). ➤➤To this there is the general exception, that if the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient (Richardson, Op. cit., supra, s 543).

[39] Bloodgood v. Lynch, 293 N.Y. 308 (1944).

[7] The function of the specific objection is not only to cure formal defects. The requirement of the specific objection is also intended to serve and serves judicial economy by eliminating the need for new trials where a proper objection would have alerted the Judge or even elicited a concession from opposing counsel by withdrawal of the offending matter (cf. Turner v. City of Newburgh, 109 N.Y. 301, 308; Ward v. Kilpatrick, 85 N.Y. 413, 417; Fountain v. Pettee, 38 N.Y. 184). Hence, the additional factor required to support a general objection without a following specification, is that it appear from the record that the offending material is inadmissible and that nothing could cure the inadmissibility.

People v. Gallo, 12 N.Y.2d 12, 234 N.Y.S.2d 193 (1962):
The objection was a bare one without specification of the grounds and it is the general (court-made not statutory, see Code of Criminal Procedure, s 420-a) rule that grounds for an objection should be stated. But the rule has limitations (People v. Murphy, 135 N.Y. 450, 455; Wightman v. Campbell, 217 N.Y. 479, 482; People v. Coffey, 11 N.Y.2d 142, 227 N.Y.S.2d 412; People v. O'Neill, 11 N.Y.2d 148, 227 N.Y.S.2d 416; Richardson, Evidence (7th ed.), s 612).

Verrilli v. Verrilli, 172 A.D.2d 990, 568 N.Y.S.2d 495 (3rd Dept.,1991):[40]
Defendant failed to introduce evidence of valuation on the date that he now contends was controlling and failed to object on this ground to the evidence relied upon by the court.

WHERE A SPECIFIC OBJECTION MADE AND SUSTAINED
Bloodgood v. Lynch, 293 N.Y. 308 (1944):
Where a specific objection is made on one ground, other possible grounds cannot be considered on appeal. Adams v. Saratoga & W. R. Co., 10 N.Y. 328:...'When the offer was made 'the defendants' counsel objected on the ground that the record was conclusive evidence of the facts stated therein;' and the court sustained the objection and excluded the evidence. We think that we are not at liberty to regard the objections as sustained on a different ground from that taken by the counsel.'

Respondents rely upon Beste v. Burger, 110 N.Y. 644. There it was held that where an objection was made that the evidence offered was incompetent, it was not error to sustain the objection even though the evidence was competent as against some of the defendants. We do not think that case is applicable, since the

[40] Finch v. Finch, 177 A.D.2d 836, 576 N.Y.S.2d 450 (3rd Dept.,1991).

objection here was not a general one as to incompetency of the evidence but specifically related to section 270-b of the Penal Law. Counsel for plaintiff was thus not apprised that the objection might relate to the competency of the evidence as against Henrietta Lynch. In the Beste case, if counsel did not understand the objection, he could have requested the reason for it. In the instant case the reason was apparently given by defendants' counsel and plaintiff's counsel could not be fairly required to ask any further reason for the objection. He did give the court his understanding of the ruling and the court said that that understanding was correct.

People v. Regina, 19 N.Y.2d 65, 277 N.Y.S.2d 683 (1966):
[T]he objection made on erroneous grounds at the trial and overruled may only be considered on appeal as to the ground specified (Richardson, Evidence, § 543) since it was properly admissible if limited to use as impeaching testimony. And, of course, it is still necessary that an exception be taken to the court's charge or failure to charge (Code Crim.Proc. s 420-a).

People v. Keough, 51 A.D.2d 808, 380 N.Y.S.2d 267 (2nd Dept.,1976):
[1] [T]he trial court erred in failing to explain to defense counsel the reason for sustaining the prosecutor's objections to certain testimony from the two female defense witnesses. In New York, ‘an admission against penal interest will be received where material and where the person making the admission is dead, beyond the jurisdiction and thus not available; or where he is in court and refuses to testify as to the fact of the admission on the ground of self incrimination’ (People v. Brown, 26 N.Y.2d 88, 94, 308 N.Y.S.2d 825, 829).

At bar, Leary took the stand and denied that he or appellant had left the car in question at any time prior to its being stopped by the police, but he was never asked whether he had admitted to anyone that he committed the crimes for which appellant stands convicted, and thus never invoked his privilege against self-incrimination. Accordingly, the proper foundation was never laid and the hearsay objection was never overcome; thus, the testimony of the two female defense witnesses was properly excluded. The trial court never explained to defense counsel that it was technically necessary for him to ask certain questions of Leary first, and refused, although requested to do so, to explain its reasons for sustaining the People's objection. Such an explanation would have afforded defense counsel the opportunity to cure the prosecutor's objections. At the Wade hearing, one of the aforementioned female witnesses testified as to Leary's admission of guilt; the Trial Judge knew exactly what information defense counsel was trying to elicit and its importance to appellant's case.

WHEN A GENERAL OBJECTION IS OVERRULED:

People v. Murphy, 135 N.Y. 450 (1892):
The genuine specimens were received in evidence, and the expert witnesses called and permitted to make the comparison and give their opinion upon the subject, without any intimation from the defendant that such proof was inadmissible. The defendant himself even called two expert witnesses, and had the benefit of an opinion from them, after a comparison of the letters with the genuine specimens, to the effect that at least one of the letters was not written by the same person as the concededly genuine exhibits. When the letters were offered in evidence there was no objection to their reception, on the ground that the proof of their genuineness was insufficient, but they were objected to solely on the ground that the letters themselves were incompetent and improper as evidence,-an objection which pertains to the subject-matter of the proof offered, and not to the method of its presentation, or to any of the preliminary steps to be observed in its introduction. If the defendant had seasonably objected to the evidence of comparison of handwriting, and the objection had been sustained, the prosecution might have been able to have furnished sufficient common-law proof of the genuineness of the letters to have authorized their admission as evidence; for one of the expert witnesses was a bank officer, who had seen the defendant write, and who might have testified from his personal knowledge of the defendant's handwriting that, in his opinion, he wrote the letters in question; and other like testimony might have been produced. The evidence objected to was not in its essential nature incompetent, and therefore all grounds of objection which might have been obviated, if they had been specifically stated, must be deemed to have been waived. Turner v. City of Newburgh, 109 N. Y. 30; Bergmann v. Jones, 94 N. Y. 51.

People v. Liccione, 50 N.Y.2d 850, 430 N.Y.S.2d 36 (1980):
Defendant has been convicted of second degree murder relating to the killing of his wife. The most substantial issue raised on this appeal is whether certain statements made by the individual who fatally assaulted defendant's wife, which were admitted as a part of the wife's dying declarations, constituted inadmissible hearsay. The assailant's statements, as communicated by the victim before she died, implicated defendant in a plot to kill his wife, and were received in evidence on the theory that defendant and the assailant were coconspirators. Defendant now argues, inter alia, that the statements were not made in furtherance of the conspiracy and thus should not have been admitted under the coconspirator exception to the hearsay rule.

Whatever the merits of this contention, the issue is not preserved for review. For, although defendant specifically objected to the admissibility of the dying declaration qua dying declaration, and also specifically objected to the alleged failure of the prosecution to establish a prima facie case of conspiracy, no question was raised as to whether the assailant's statements were made in

furtherance of the conspiracy. These objections in this instance preserved only the grounds specified (see, generally, Richardson, Evidence (10th ed. Prince), s 538) and thus the precise issue argued is beyond our power of review.

In re Budziejko's Will, 277 A.D. 829, 97 N.Y.S.2d 307 (4th Dept.1950):
In this will contest the attending physician was asked for his opinion as to whether the testatrix possessed sufficient mental capacity to make a will. A mere objection without statement of grounds therefor was made. The Court asked upon what ground counsel objected and counsel said it was upon the ground that the witness was not competent to testify as a physician. He then conducted a preliminary examination as to the qualifications of the witness after which he renewed his objection stating no further ground. The objection was overruled and after the opinion was stated counsel proceeded to cross-examine upon it. There was no objection to the form of the question or as to the testimony itself being incompetent, nor was any exception taken nor motion to strike out made. Having restricted the objection to the competency of the witness to testify as an expert and give an opinion, the appellant may not, on appeal, rely on the claimed incompetency of the testimony itself as no such objection was raised at the trial. ➤➤Had such objection been made, the respondent would have had the opportunity to reframe the question so that it would not have been objectionable...Moreover, there was sufficient other evidence to justify the finding of the jury as to incompetency of the testatrix.

People v. Ross, 21 N.Y.2d 258, 287 N.Y.S.2d 376 (1967):
[D]efendant points to section 813-f of the Code of Criminal Procedure which provides: 'In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel.' He argues that the statements made to Patrolman Zilinske were admissions; therefore, reversible error was committed by allowing Zilinske to testify as to them since no notice of intention to offer such admissions was given to him by the District Attorney, pursuant to the mandate of the above statute.

[2] [3] [B]y failing to object to Zilinske's testimony on the ground that the statute had not been complied with, the defendant waived his right. It is significant also that he did not object on the ground that the statements were involuntary, for the obvious purpose of the statute is to give a defendant adequate time to prepare his case for questioning the voluntariness of a confession or admission (People v. Herman, 50 Misc.2d 644, 270 N.Y.S.2d 809; cf. People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838; People v. Lee, 27 A.D.2d 700, 277 N.Y.S.2d 79). The defendant did not request a Huntley hearing, and in no way demonstrated that he was prejudiced by the failure to comply with the statute. Indeed, even on this appeal, the defendant does not seek to move this court by urging the involuntariness of his statements.

➤[4] It would also seem that defendant has not saved the question for review. His first two objections to Zilinske's testimony were general objections ‘to conversations'. It is well settled that, when a general objection is overruled, ‘all grounds of objection which might have been obviated, if they had been specifically stated, must be deemed (on appeal) to have been waived’ (People v. Murphy, 135 N.Y. 450, 455; Richardson, Evidence (Prince, 9th ed.), s 543). A specific objection addressed to the failure to comply with the statute might well have obviated the ground of objection. The court could have postponed the trial pending the outcome of a Huntley type hearing if the defendant intended to controvert the voluntariness of the ‘admissions'.

[5] ➤The defendant's other objection to the testimony was on the specific ground of hearsay, and only that ground can be considered on appeal unless there is no purpose for which the evidence was admissible. Defendant, however, makes no argument on this appeal as to hearsay.

Schiaroli v. Village of Ellenville, 111 A.D.2d 947, 490 N.Y.S.2d 43 (3rd Dept.,1985):
Defendant's [] arguments concern evidentiary rulings made during the trial, most important of which was the admission of a portion of testimony by Demerest in which she told the jury of a conversation between Doyle and Schiaroli... as follows: “Well, I heard * * * [Schiaroli] ask * * * [Doyle], you know, ‘Should we help?’ and * * * [Doyle] said, ‘Yes, Norm [Green] asked us to help him’.” The trial court denied defendant's objection grounded on irrelevancy and admitted the testimony under the res gestae exception to the hearsay.

➤FN [D]efendant contends that the evidence is inadmissible as hearsay. However, this new ground for objection cannot be offered for the first time upon appeal unless there is no viable purpose for which the evidence was admissible (... J. Prince, Richardson on Evidence § 538, at 531 [10th ed 1973]).

In re New York City Asbestos Litigation, 188 A.D.2d 214, 593 N.Y.S.2d 43 (1st Dept.,1993):
Defendant [] at trial, argued against admission of a ...[r]eport ... on the ground that the report was irrelevant to it. Only now does [defendant] argue that the report is hearsay, an objection that cannot be raised for the first time on appeal.

Matter of Juanita Katerina M., 205 A.D.2d 474, 614 N.Y.S.2d 501 (1st Dept.,1994):
The mother did not object to the admission of certain “progress notes” as hearsay during the fact finding hearing, and cannot now raise the issue for the first time (Matter of New York City Asbestos Litigation, 188 A.D.2d 214, 593 N.Y.S.2d

43, affd.,82 N.Y.2d 821).

Gonzalez v. State Liquor Authority, 30 N.Y.2d 108, 331 N.Y.S.2d 6 (1972):
[1] [2] In this case [] no specific objection was taken on constitutional grounds to the introduction of the allegedly illegally obtained evidence. The rule is, that in order to preserve on appeal '[t]he constitutional and legal issue on admissibility of evidence', a specific objection on constitutional and legal grounds must be made during the trial or hearing. (Matter of Leogrande v. State Liq. Auth., 19 N.Y.2d 418, 425, 280 N.Y.S.2d 381, 384; People v. Gates, 24 N.Y.2d 666, 670, 301 N.Y.S.2d 597, 600.) Where, as here, no specific objection on constitutional grounds to the receipt of the subsequently suppressed evidence was made during the hearing, the issue of admissibility of evidence is not available on judicial review. (Matter of Sowa v. Looney, 23 N.Y.2d 329, 333, 296 N.Y.S.2d 760, ; 2 Am.Jur.2d, Administrative Law, s 425; cf. United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 111, 47 S.Ct. 302; cf. Ann., 36 A.L.R.3d 30-31.) Petitioner's general objection is, of course, to no avail since it was not followed by the requisite specific objection, nor does it appear from the record that the hearing officer could 'infer from anything said by licensee's counsel that there was any objection on constitutional grounds to the admission of this evidence.' (cf. Finn's Liq. Shop v. State Liq. Auth., 24 N.Y.2d, Supra, at p. 657, n. 2, 301 N.Y.S.2d at p. 590.)

➤**People v. Tevaha, 84 N.Y.2d 879, 620 N.Y.S.2d 786 (1994)**:
Defendant's sole claim of error-that he was denied a fair trial when the court permitted testimony by the arresting officer regarding the general practices of drug sellers-has not been preserved for our review. Defense counsel simply made a general objection when the testimony was proffered, and failed to advise the trial court that the present claimed error was the basis for his objection. The word "objection" alone was insufficient to preserve the issue for our review (People v. Fleming, 70 N.Y.2d 947, 948, 524 N.Y.S.2d 670; People v. West, 56 N.Y.2d 662, 663, 451 N.Y.S.2d 711).

➤**People v. Everson, 100 N.Y.2d 609, 767 N.Y.S.2d 389 (2003)**:[41]
A party's failure to specify the basis for its general objection renders its argument unpreserved for this Court's review.

People v. Escobar, 79 A.D.3d 469, 912 N.Y.S.2d 202 (1st Dept.,2010):
Defendant did not preserve any of his arguments for appellate review. ➤It is well established that "[t]he word 'objection' alone [is] insufficient to preserve [an] issue" for review as a question of law. Defendant argues that this principle should

[41] People v. Wilkins 73 A.D.3d 467, 899 N.Y.S.2d 616 (1st Dept. 2010); People v. Hernandez 276 A.D.2d 274, 713 N.Y.S.2d 875 (1st Dept. 2000).

not apply because the trial court prohibited “speaking objections” and instructed counsel to make unelaborated objections. However, defense counsel made no effort to make a record, at any point in the trial, of the grounds for his objections. Moreover, the court specifically invited counsel to make such a record at the first recess following an objection, and offered to reconsider its rulings and take curative actions where appropriate.

CONTINUING OBJECTIONS

People v. Santarelli, 49 N.Y.2d 241, 425 N.Y.S.2d 77 (1980):
[I]n view of the unpredictability of live testimony, we note that it is sometimes almost impossible for a Trial Judge to ascertain in advance whether the evidence offered through a witness regarding a defendant's past crimes would be sufficiently relevant to justify its admission at trial.

[13] It is for this reason that we disapprove of defense counsel's decision in this case to rely upon a “continuing objection” to the District Attorney's entire line of proof. While defense counsel's anticipatory “continuing objection” may have served the technical function of preserving a “question of law” for appellate review (see CPL 470.05, subd. 2), it did not provide the Trial Judge with an opportunity to consider the specific relevance of each fact as it was being presented through testimony. Had individual objection been taken each time prejudicial information was elicited, the Trial Judge might have been moved to require the prosecutor to articulate his theory of relevancy with more specificity, and the defects in the instant proceeding might have been avoided (cf. People v. Michael, 48 N.Y.2d 1, 6, 420 N.Y.S.2d 371, 373). In light of the difficulties encountered in this case, we find that the trial court's acceptance of defendant's “continuing objection” was ill-advised and that the interests of all parties would have been better served had individual objection been required.

Wightman v. Campbell, 217 N.Y. 479 (1916):
When an objection is taken after the testimony is given a motion to strike out should be made (Link v. Sheldon, 136 N. Y. 1, 9), and it is urged that defendant's failure to make such motion deprived him of the benefit of his exception. But the objection here was to further reference to the field notes by Ogden in giving his testimony, and the ruling clearly implied that the court would receive such evidence over defendant's objection and exception. The answer already given was in itself unimportant. A motion to strike out was therefore unnecessary, and the failure to make such motion was inconsequential. The objection pointed out generally that defendant objected to all of Ogden's testimony based on the notes, and it was sufficient to give defendant the benefit of his exception, if the general objection was good and sufficiently definite.

[2] ➤The rule is well settled that when evidence is received under a general objection, the ruling will not be held erroneous, unless there is some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature is incompetent. Tooley v. Bacon, 70 N. Y. 34. The evidence of Ogden was clearly open to the specific objection that it was hearsay, for which no proper foundation had been laid. He knew nothing of the location of the lines he was testifying about, except as he was informed by the memoranda of another. But if the objection had been made in this form, it could have been, or at least it might have been, obviated by laying a proper foundation for the introduction in evidence of the Arnold notes.

FAILURE TO OBJECT TO A PROPOSED JUDGMENT RENDERS THE OBJECTION UNPRESERVED

Altmann v. Finger, 46 A.D.3d 720, 848 N.Y.S.2d 698 (2nd Dept.,2007):
Finger contends that the judgment [] inaccurately reflects the parties' agreement insofar as it directed them to discuss the establishment of a nonbinding trust agreement to provide for their children's future college and medical expenses. Her contention is unpreserved for appellate review [] since she failed to object to that portion of the proposed judgment submitted by Altmann.

Mora v. Mora, 39 A.D.3d 829, 835 N.Y.S.2d 626 (2nd Dept.,2007):
The judgment of the Supreme Court directed distribution of the husband's pension according to the equitable distribution formula articulated in Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, pursuant to the parties' stipulation, which was placed on the record in open court. To the extent the husband contends that the judgment inaccurately reflects the [stipulation], his objection is not preserved for appellate review since he failed either to submit a proposed judgment within 60 days of the order directing settlement, or to object to the portion of the proposed judgment submitted by the wife (22 NYCRR 202.48; Salamone v. Wincaf Props., 9 A.D.3d 127, 777 N.Y.S.2d 37; cf. Rouleau v. La Pointe, 11 A.D.3d 773, 774, 784 N.Y.S.2d 162).

OBJECTION MUST BE CLEAR TO APPRISE THE COURT OF THE NATURE OF THE OBJECTION

Hochhauser v. Electric Ins. Co., 46 A.D.3d 174, 844 N.Y.S.2d 374 (2nd Dept.,2007):[42]
"[A]n objection must be clear enough to apprise the court of the nature of the objection" (Gallegos v. Elite Model Mgt. Corp., 28 A.D.3d 50, 59, 807 N.Y.S.2d 44). Here, the plaintiff lodged a general objection based on hearsay prior to Quinn's testimony but did not object to Quinn's specific testimony that constituted the hearsay. Since the general objection to both the testimony and the business record apprised the Judicial Hearing Officer that the plaintiff objected on the grounds of hearsay, the plaintiff preserved the issue for appellate review (see CPLR 4107; Gallegos v. Elite Model Mgt. Corp., id.).

See:
Evidence in New York State and Federal Courts, Barker and Alexander.

[42] Gallegos v. Elite Model Management Corp., 28 A.D.3d 50, 807 N.Y.S.2d 44 (1st Dept.,2005).

REBUTTING EVIDENCE ADMITTED OVER OBJECTION;

REBUTTING EVIDENCE AGAINST OBJECTED TO EVIDENCE DOES NOT CONSTITUTE A WAIVER OF THE OBJECTION

Mance v. Hossington, 205 N.Y. 33 (1912):
Where evidence is admitted subject to objections the party against whom the testimony is received is entitled to produce testimony of the same general character without waiving his objections to the evidence received because he must try the case in view of the evidence admitted therein even although it is taken subject to his objections to its receipt.

OFFER OF PROOF

– **When A Court Sustains An Objection To Exclude Evidence**

– Must Be Clear And Unambiguous

When a trial court sustains an objection to exclude evidence, the party seeking to admit the evidence must make a clear and unambiguous offer of proof to preserve the point for appeal.[43]

People v. Williams, 6 N.Y.2d 18, 159 N.E.2d 549, 187 N.Y.S.2d 750 (1959), cert. denied, 361 U.S. 920, 80 S.Ct. 266, 4 L.Ed.2d 188 (1959):
It is a cardinal and well-settled principle that offers of proof must be made clearly and unambiguously. 'Before a party excepts on account of the rejection of evidence, he should make the offer in such plain and unequivocal terms as to leave no room for debate about what was intended. If he fails to do so, and leaves the offer fairly open to two constructions, he has no right to insist, in a court of review, upon that construction which is most favorable to himself, unless it appears that it was so understood by the court which rejected the evidence.'...And the eloquence of appellate counsel must bend to the weight of the record whether it be favorable or unfavorable to his argument.

Marine Midland Bank v. John E. Russo Produce Co., Inc., 50 N.Y.2d 31, 405 N.E.2d 205, 427 N.Y.S.2d 961 (1980):
Similarly unavailing to Marine Midland is its assertion that the court should have instructed the jury on the theory of money paid out by mistake. No retreat from

[43] People v. Williams, 6 N.Y.2d 18, 159 N.E.2d 549, 187 N.Y.S.2d 750 (1959), cert. denied, 361 U.S. 920, 80 S.Ct. 266, 4 L.Ed.2d 188 (1959).

the policy of liberality in allowing pleadings to be conformed to proof....is sounded by our insistence that such a request and any objection to its denial be sufficiently focused to permit the Trial Judge and opposing parties to do more than guess at the precise nature of the change to be effected. In the case before us, plaintiff neither specified in what manner the proof varied from the pleadings nor suggested the alternative theories in its favor to which the defendants would now need to be alert. Rather, silence reigned supreme until the requests to charge were submitted, and very few decibels were registered when, after the jury had been instructed, plaintiff summarily and uninformatively asked that the court "charge in the language of what we (sic) requested and those requests which are not charged". Surely, a court need not reroute the course of an entire trial without being given a chance to take a look at the pig in a poke it is being asked to buy. And, since there is to be a new trial, we add that the legal merits of such a cause of action will, we assume, be delved into at nisi prius on a motion to amend made anew by the plaintiff, if it be so advised, in the context of whatever proof or offer of proof it then relies on.

People v. Breheny, 270 A.D.2d 926, 705 N.Y.S.2d 160 (4th Dept.,2000):[44]
"[O]ffers of proof must be made clearly and unambiguously." We conclude that defendant failed to provide the court with an adequate factual basis for his proposed line of questioning.

WHEN AND HOW OFFER OF PROOF MADE

The offer of proof is properly made after witnesses, jurors, and parties are asked to leave the courtroom. "By following such procedure, a free discussion can be had without fear of anything being said by counsel or the court which will prejudice either party with the jury."[45]

[44] People v. Mason 186 A.D.2d 984, 590 N.Y.S.2d 811 (4th Dept. 1992).

[45] Schabel v. Onseyga Realty Co., 233 A.D. 208, 251 N.Y.S. 280 (4th Dept.,1931).

ARGUMENTS AND ISSUES RAISED FOR FIRST TIME ON APPEAL

ISSUE: Was it a contention that could have been "obviated or cured by factual showings or legal countersteps"?

> **Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342 (1955):**[46]
> It is quite true that an appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.

> **Telaro v. Telaro, 25 N.Y.2d 433, 306 N.Y.S.2d 920 (1969):**[47]
> It should [] be noted that the general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: 'if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.' (Cohen v. Karger, op. cit. Supra, pp. 627-628.) Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time. There are some exceptions to this liberalizing rule, none relevant to this case: they include concessions made by counsel, new questions on motions for reargument, and most constitutional questions. (See,

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[46] Orellano v. Samples Tire Equipment and Supply Corp. 110 A.D.2d 757, 488 N.Y.S.2d 211 (2nd Dept.,1985).

[47] Ta-Chotani v. Doubleclick, Inc., 276 A.D.2d 313 (1st Dept., 2000) (Where an issue might have been obviated by the submission of documentary evidence, it may not be raised for the first time on appeal.); Altshuler Shaham Provident Funds, Ltd. v. GML Tower LLC, 83 A.D.3d 1563, 921 N.Y.S.2d 601 (4th Dept., 2011), leave to appeal denied, 86 A.D.3d 934 (4th Dept., 2011), leave to appeal denied, 18 N.Y.3d 892 (2012) (We do not address plaintiff's contention...That contention is raised for the first time on appeal and 'could have been obviated or cured by factual showings or legal countersteps' in Supreme Court.); Dipizio v. Dipizio, 81 A.D.3d 1369, 1370, 916 N.Y.S.2d 449 (4th Dept.,2011) (Defendant's contention, that the postnuptial agreement was unenforceable because her signature was not acknowledged, was raised for the first time in her reply papers and thus was not properly before Supreme Court.); Smith v. Besanceney, 61 A.D.3d 1336, 877 N.Y.S.2d 538 (4th Dept.,2009) (Defendant's contention concerning the failure of plaintiffs to allege in their bill of particulars that plaintiff suffered a serious injury under the permanent consequential limitation of use category is not properly before us. Defendant failed to challenge the sufficiency of the bill of particulars, and "[a]n issue may not be raised for the first time on appeal ... where it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court"...Here, plaintiffs could have cured that alleged deficiency by moving for leave to amend the bill of particulars.)

generally, Cohen & Karger, op. cit. Supra, ch. 17, Review of New Questions on Appeal, pp. 624-643.)

American Sugar Refining Co. of New York v. Waterfront Commission of New York Harbor, 55 N.Y.2d 11, 447 N.Y.S.2d 685 (1982):[48]
Were the former argument a new one, it would nonetheless be proper for us to consider it because it is not a contention that could have been "obviated or cured by factual showings or legal countersteps" (Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920), turning as it does on legislative intent. Moreover, the issue being legislative intent, the rule requiring strict construction of tax statutes yields to the explicit declaration of that intent in the statute itself.

Richardson v. Fiedler Roofing, Inc., 67 N.Y.2d 246, 502 N.Y.S.2d 125 (1986):
[A]ppellants do not now challenge the Appellate Division's finding that there was substantial evidence to support the award. They contend...for the first time, that a claimant is excluded from compensation benefits, as a matter of law, if he is engaged in an illegal activity at the time of the accident. Normally, they would not be permitted to raise the issue when they challenged only the factual basis[49] of the Administrative Law Judge's finding that decedent had not deviated from the scope of his employment before the Board (Matter of Middleton v. Coxsackie Correctional Facility, 38 N.Y.2d 130, 132-133, 379 N.Y.S.2d 3; Workers' Compensation Law § 23). The argument raises solely a question of statutory interpretation, however, which we may address even though it was not presented below (Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920; Cohen and Karger, Powers of the New York Court of Appeals, at 627-628 [rev ed]).

Schnupp v. Capizzi, 272 A.D.2d 464, 707 N.Y.S.2d 677 (2nd Dept.,2000):[50]
The plaintiffs argue for the first time on appeal that the doctrine of res ipsa loquitur applies to this case, precluding an award of summary judgment. This court will not consider that issue, as proof might have been offered to refute or overcome the application of the doctrine had it been presented to the court of first

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[48] Rivera v. Smith 63 N.Y.2d 501, 483 N.Y.S.2d 187 (1984).

[49] McCormick v. Favreau, 82 A.D.3d 1537, 919 N.Y.S.2d 572 (3rd Dept. 2011) (Plaintiff[s] cannot raise for the first time on appeal new facts on which to base the accrual of [their] causes of action in order to avoid the time restraints of the applicable [s]tatute of [l]imitations" (Velaire v. City of Schenectady, 235 A.D.2d 647 (3rd Dept.,1997), lv. denied 89 N.Y.2d 816 (1997)); Provident Bank v. Giannasca, 55 A.D.3d 812, 866 N.Y.S.2d 289 (2nd Dept.,2008); Vogel v. Blade Contracting, Inc., 293 A.D.2d 376, 714 N.Y.S.2d 34 (1st Dept. 2002) (Defendants' contention that Beal failed expressly to state that he 'saw' the events that he described was not presented to the motion court, and will not be considered for the first time on appeal since the issue could have been obviated by a supplemental submission by plaintiff in the motion court.)

[50] In re Cohn, 46 A.D.3d 680, 849 N.Y.S.2d 271 (2nd Dept.,2007).

instance.

Hoke v. Hoke, 27 A.D.3d 1055, 811 N.Y.S.2d 528 (4th Dept.,2006):
We note at the outset that, although no appeal lies as of right from a qualified domestic relations order (QDRO), we treat plaintiff's notice of appeal from the amended QDRO herein as an application for leave to appeal and grant leave to appeal...).[51] [P]laintiff contends for the first time on appeal that Supreme Court erred insofar as it directed plaintiff to execute documents "irrevocably designat[ing]" defendant, plaintiff's former husband, as the beneficiary of preretirement death benefits from the NYS Teachers' Retirement System in accordance with the formula set forth in Majauskas v. Majauskas, 61 N.Y.2d 481. We nevertheless address the contention...despite her failure to preserve it for [] review because "the issue [raised therein] is one of law appearing on the face of the record that [defendant] could not have countered had it been raised in the court of first instance."

Allegany County Dept. of Social Services ex rel. Jennifer L.H. v. Thomas T., 273 A.D.2d 916, 710 N.Y.S.2d 745 (4th Dept,2000):
[T]he amount of child support set by the Hearing Examiner was illegal. Respondent's income [] consisting solely of SSI benefits, was below the poverty level; therefore, it was error to require respondent to pay the amount of $25 per week...We reject the conclusion of Family Court, set forth in its decision underlying the order denying respondent's objections, that respondent consented to the amount of child support. The consent of respondent was obtained in violation of his right to counsel. We further note that the Hearing Examiner's order also violates the nonwaivable provision of Family Court Act § 413(1)(h) requiring that an order incorporating the parties' agreement to deviate from the basic child support obligation must contain the court's reasons for approving the deviation (Michelle W. v. Forrest James P., 218 A.D.2d 175, 178). Although that issue is raised for the first time in respondent's brief, it is nevertheless properly before us; the issue is one of law appearing on the face of the record that petitioner could not have countered had it been raised in the court of first instance (Oram v. Capone, 206 A.D.2d 839, 840).

Fish King Enterprises v. Countrywide Ins. Co., 88 A.D.3d 639, 930 N.Y.S.2d 256 (2nd Dept.,2011):
[P]laintiffs are correct that the relied-upon employee exclusion, which excluded coverage for "[b]odily injury to any employee of the insured arising out of and in the course of his or her employment by the insured," did not exclude coverage for third-party claims for contribution and indemnity related to such injury...While

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[51] Page v. Page, 31 A.D.3d 1172, 817 N.Y.S.2d 551 (4th Dept. 2006):
[A]lthough no appeal lies as of right from a qualified domestic relations order and plaintiff has not sought leave to appeal, we nevertheless treat the notice of appeal in appeal No. 3 as an application for leave to appeal and grant leave to appeal.

plaintiffs failed to raise this contention before the Supreme Court, it may be reached by this Court as it is an issue of law that appears on the face of the record which, had it been brought to the attention of the Supreme Court, could not have been avoided (Lischinskaya v. Carnival Corp., 56 A.D.3d 116; Romain v. Grant, 60 A.D.3d 838; Matter of Besedina v. New York City Tr. Auth., 47 A.D.3d 924).

Matter of Baby Girl, 206 A.D.2d 932, 615 N.Y.S.2d 800 (4th Dept.,1994):
The father's contention that section 308 of the Military Law and its Federal counterpart (50 U.S.C., Appendix § 501 et seq.) toll the six-month period in which he can "claim his parental rights" is raised for the first time on appeal. We nonetheless consider it because it could not have been " 'obviated or cured by factual showings or legal countersteps' in the trial court" (Oram v. Capone, 206 A.D.2d 839, 840, 615 N.Y.S.2d 799 [decided herewith], quoting Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, 255 N.E.2d 158, rearg. denied 26 N.Y.2d 751, 309 N.Y.S.2d 1031, 257 N.E.2d 296). The statutes protect members of the armed services who are unable to commence timely actions or proceedings in judicial or quasi-judicial tribunals as a result of their military obligations.

1. EVEN IF AN ARGUMENT IS NOT SPECIFICALLY ARTICULATED, BUT IT CAN BE INFERRED/INTUITED THAT AN ISSUE WAS PRESERVED IN THE COURT BELOW "WHERE THE ARGUMENT WAS EVIDENT":

2. JUST BECAUSE A COURT DOES NOT REACH AN ARGUMENT DOES NOT MAKE IT UNPRESERVED

Galetta v. Galetta, 21 N.Y.3d 186, 991 N.E.2d 684, 969 N.Y.S.2d 826 (2013):
The wife argues that this issue was not preserved in the motion court but we agree with the Appellate Division majority that such an argument was evident from the husband's submission of the notary public affidavit in response to the wife's motion for summary judgment, a submission that was cited by Supreme Court in the oral decision denying summary judgment. Since the parties admitted in Supreme Court that their signatures were authentic and made no claims of fraud or duress, there was only one reason for the husband to proffer the notary public affidavit—to cure the purported deficiency in the certificate of acknowledgment.

The fact that Supreme Court did not reach the "cure" argument because it concluded (incorrectly) that the acknowledgment was not defective does not render the issue unpreserved for review.

ARGUMENTS FIRST RAISED TO THE COURT OF APPEALS,

WHILE NOT RAISED TO THE APPELLATE DIVISION BUT WERE RAISED AT THE TRIAL LEVEL

Telaro v. Telaro, 25 N.Y.2d 433, 306 N.Y.S.2d 920 (1969):
[A]part from the law of the case, it is well established that questions raised in the trial court or in the record, even if not argued in the intermediate appellate court, are nevertheless available in the Court of Appeals. Thus, it has been stated in the definitive treatise on the jurisdiction and practice of this court, that 'If the question is properly presented in the court of first instance, it is available in the Court of Appeals even though not suggested in the Appellate Division' (Cohen and Karger, Powers of the New York Court of Appeals, n. 1, at p. 624).

The rule was best stated in Cohn v. Goldman, 76 N.Y. 284, 287: 'It is, indeed, a rule, that questions not raised at the trial court, which might have been obviated by the action of the court then, or by that of the other party, will not be heard on appeal as ground of error...But we know of no rule which prevents counsel from urging, in an appellate court, a point distinctly made and preserved at the trial court, because it has not been made to an intermediate appellate court. If the exception presents clear error, and one of materiality, which may have influenced the fate of the trial, an appellant may be indulged in bringing it to notice on his final appeal.'

More recently, in discussing the effect of waiver in the Appellate Division upon a party's right to present an argument on appeal to the Court of Appeals, this court, in Ross v. Caywood, 162 N.Y. 259, 264, said: 'In thus discussing the question of waiver upon the theory of the respondent, we do not wish to be understood as holding by implication that a waiver may be implied from the failure to raise the point upon the intermediate appeal.'

Seitelman v. Lavine, 36 N.Y.2d 165, 366 N.Y.S.2d 101 (1975):[52]
This court will consider a question that has been raised in the tribunal of original jurisdiction even though it may not have been argued in the Appellate Division (Persky v. Bank of Amer. Nat. Assn., 261 N.Y. 212; Cohen and Karger, Powers of the New York Court of Appeals, s 161). However, as noted in the discussion that follows, the converse does not obtain.

[52] People ex rel. Matthews v. New York State Div. of Parole, 95 N.Y.2d 640, 744 N.E.2d 1149, 722 N.Y.S.2d 213 (2001).

Oneida Bank v. Ontario Bank, 21 N.Y. 490 (1860):[53]
It may well be true, as we were told on the argument, that the plaintiff's counsel, both at the trial and in the Supreme Court, failed to urge the particular reasons which, we think, entitled the plaintiff to recover. There is nothing in the record to show that such was the fact, and there is no law or rule of practice which required the points on either side to be stated. Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such a judgment as they ought to have given.

[53] Persky v. Bank of America Nat. Ass'n, 261 N.Y. 212 (1933).

POST DECISION EVENTS IN CUSTODY CASES RAISED FOR THE FIRST TIME ON APPEAL WHICH INDICATE THAT "THE RECORD IS NO LONGER SUFFICIENT" TO MAKE A PROPER DETERMINATION

Matter of Michael B., 80 N.Y.2d 299, 590 N.Y.S.2d 60 (1992):
The Court has been informed that, during the pendency of the appeal, appellant was charged with—and admitted—neglect of the children in his custody (not Michael), and that those children have been removed from his home and are again in the custody of the Commissioner of the Social Services. The neglect petitions allege that appellant abused alcohol and controlled substances including cocaine, and physically abused the children. Orders of fact finding have been entered by Family Court recognizing appellant's admission in open court to "substance abuse, alcohol and cocaine abuse." Moreover, an Order of Protection was entered prohibiting appellant from visiting the children while under the influence of drugs or alcohol.

➤Appellant's request that we ignore these new developments and simply grant him custody, because matters outside the record cannot be considered by an appellate court, would exalt the procedural rule—important though it is—to a point of absurdity, and "reflect no credit on the judicial process." (Cohen and Karger, Powers of the New York Court of Appeals § 168, at 640.) Indeed, changed circumstances may have particular significance in child custody matters (Braiman v. Braiman, 44 N.Y.2d 584, 587, 407 N.Y.S.2d 449; Matter of Angela D., 175 A.D.2d 244; Matter of Kelly Ann M., 40 A.D.2d 546). This Court would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues. Pending the hearing, Michael should physically remain with his current foster parents, but legal custody should be returned to the foster care agency.

Chow v. Holmes, 63 A.D.3d 925, 883 N.Y.S.2d 221 (2nd Dept.,2009):
New facts and allegations which this Court may properly consider, including that the father is awaiting sentencing for attempted assault, indicate that the record before us is no longer sufficient to determine which custodial arrangement is in the child's best interests (Matter of Michael B...) Accordingly, the matter must be remitted to the Family Court...for a re-opened hearing and a new custody determination thereafter. We express no opinion as to the appropriate determination.

Gatke v. Johnson, 50 A.D.3d 798, 854 N.Y.S.2d 660 (2nd Dept. 2008):
The attorney for the child on this appeal has raised significant issues regarding developments that have arisen since the date of the order on appeal that preclude us from determining which custodial arrangement is in the child's best interests.

NEW CONTENTION FIRST MADE IN REPLY PAPERS –
NOT PROPERLY BEFORE APPELLATE COURT

Jacobson v. Leemilts Petroleum, Inc., 101 A.D.3d 1599, 956 N.Y.S.2d 714 (4th Dept.,2012):[54]
It is well settled that contentions raised for the first time in reply papers are not properly before the court.

Azzopardi v. American Blower Corp., 192 A.D.2d 453, 596 N.Y.S.2d 404 (1st Dept.,1993):
Contrary to the Supreme Court's conclusion that plaintiffs' papers did not properly make out a request for renewal, their motion did advance new facts not previously available (see Martin v. Triborough Bridge & Tunnel Authority, 180 A.D.2d 596, 182 A.D.2d 545, 580 N.Y.S.2d 305). In that regard, the new facts included the admission contained in defendant's answer, the expiration of the statute of limitations and the sequence of events on the prior motion. Plaintiffs' failure to present these matters in connection with the original motion was clearly justified since they had not had an opportunity to respond to a claim raised for the first time in the reply papers. Indeed, the court should never even have considered arguments making their initial appearance in reply papers (Dannasch v. Bifulco, 184 A.D.2d 415, 585 N.Y.S.2d 360; Ritt v. Lenox Hill Hospital, 182 A.D.2d 560, 582 N.Y.S.2d 712). As this court explained in Dannasch v. Bifulco, supra, "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (184 A.D.2d at 417, 585 N.Y.S.2d 360). Defendant herein has been permitted to engage in precisely the sort of maneuvers specifically rejected in Ritt v. Lenox Hill Hospital, supra, wherein we observed (182 A.D.2d at 562, 582 N.Y.S.2d 712):

> As we view it, the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion (see, Lazar v. Nico Indus., 128 AD2d 408, 409–410 [, 512 N.Y.S.2d 693]). Nor does it avail defendant to shift to plaintiff, by way of a reply affidavit, the burden to demonstrate a material issue of fact at a time when plaintiff has neither the obligation nor opportunity to respond absent express leave of court (CPLR 2214[c]; Lazar v. Nico Indus., supra). We perceive no reason to protract a procedure designed "to expedite the disposition of civil cases where no issue of material fact is

[54] Miller v. Icon Group LLC, 107 A.D.3d 585, 968 N.Y.S.2d 53 (1st Dept. 2013); Sedita v. Sacha 99 A.D.3d 1259, 951 N.Y.S.2d 459 (4th Dept. 2012); Gartner v. Unified Windows, Doors and Siding, Inc., 68 A.D.3d 815, 890 N.Y.S.2d 608 (2nd Dept.,2009); Huang v. Sy, 62 A.D.3d 660, 878 N.Y.S.2d 398 (2nd Dept.,2009).

> presented to justify a trial" (Di Sabato v. Soffes, 9 AD2d 297, 299 [, 193 N.Y.S.2d 184]) by encouraging submission of yet another set of papers, an unnecessary and unauthorized elaboration of motion practice. If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be submitted.

Dipizio v. Dipizio, 81 A.D.3d 1369, 916 N.Y.S.2d 449 (4th Dept.,2011):
Defendant appealed from a judgment granting the relief requested in an amended complaint insofar as that judgment brought up for review a 2008-order which denied defendant's motion to dismiss the amended complaint to enforce the terms of the parties' postnuptial agreement. Defendant's contention, that the postnuptial agreement was unenforceable because her signature was not acknowledged, was raised for the first time in her reply papers and thus was not properly before Supreme Court. Supreme Court did not address that contention in its 2008 order.

Cf., Wells Fargo Bank, N.A. v. Marchione, 69 A.D.3d 204, 887 N.Y.S.2d 615 (2nd Dept.,2009)
The defendants' argument that the plaintiff lacked standing was in response to the plaintiff's submission of the assignment, presented for the first time in the papers the plaintiff submitted in opposition to the motion. Accordingly, the Supreme Court, in the exercise of its discretion, properly considered the response to the new evidence offered for the first time in the reply

Cf., Citibank, N.A. v. Herrera, 64 A.D.3d 536, 881 N.Y.S.2d 334 (2nd Dept.,2009):
Herrera waived any challenge to the plaintiff's standing by raising this argument for the first time only in opposition to the plaintiff's summary judgment motion, and not in his answer or in a pre-answer motion to dismiss

Subject Matter Jurisdiction, Ripeness, Mootness, Standing, Public Policy

-- Subject Matter Jurisdiction

Subject matter jurisdiction concerns a court's competence to entertain a particular kind of application[55] – it is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it.[56] Jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action.[57]

It is blackletter law that a judgment rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived.[58] A challenge to subject matter jurisdiction may be raised at any time,[59] and may not be waived,[60] whether *sua sponte*, by the court on its own motion,[61] or even for the first time on appeal.[62]

Family Court is a statutory court which lacks equity jurisdiction,[63] and may not reform, vacate, or in any way modify or set aside any provisions of separation agreement not merged into

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[55] H.M. v. E.T., 65 A.D.3d 119, 881 N.Y.S.2d 113 (2nd Dept., 2009).

[56] Fry v. Village of Tarrytown, 89 N.Y.2d 714, 658 N.Y.S.2d 205 (1997).

[57] Hunt v. Hunt, 72 N.Y. 217 (1878).

[58] Lacks v. Lacks, 41 N.Y.2d 71, 390 N.Y.S.2d 875 (1976).

[59] Fry v. Village of Tarrytown, 89 N.Y.2d 714, 658 N.Y.S.2d 205 (1997); Newham v. Chile Exploration Co., 232 N.Y. 37 (1921); In re Exterior Street, Borough of Bronx, City of New York, 293 N.Y. 1 (1944).

[60] Montella v. Bratton, 93 N.Y.2d 424, 691 N.Y.S.2d 372 (1999); Editorial Photocolor Archives, Inc. v. Granger Collection, 61 N.Y.2d 517, 474 N.Y.S.2d 964 (1984).

[61] Commonwealth Elec. Inspection Services, Inc. v. Town of Clarence, 6 A.D.3d 1185, 776 N.Y.S.2d 687 (4th Dept., 2004); Shea v. Export S.S. Corp., 253 N.Y. 17 (1930); Patrone v. M.P. Howlett, Inc., 237 N.Y. 394 (1924).

[62] Marine Midland Bank, N.A. v. Bowker, 89 A.D.2d 194, 456 N.Y.S.2d 243 (3rd Dept., 1982); Harris v. Hirsh, 196 A.D.2d 425, 601 N.Y.S.2d 275 (1st Dept., 1993).

[63] Brescia v. Fitts, 56 N.Y.2d 132, 451 N.Y.S.2d 68 (1982); In re E.M., 7 Misc.3d 1005(A), 801 N.Y.S.2d 233 (Fam.Ct. Nassau Co. 2005) (Family Court is a statutory court and equity is irrelevant (with a few exceptions, such as the equitable estoppel doctrine in a paternity matter)); Matter of Lawrence T., 165 Misc.2d 1008, 630 N.Y.S.2d 910 (Fam.Ct. Oneida Co.1995) (Family Court, which is a statutory court whose jurisdiction and powers are derived from and limited by statute.)

a judgment,[64] as such, it cannot entertain issues of fraud and breach of contract;[65] nor does it have subject matter jurisdiction to enforce or interpret a separation agreement which stands as an independent contract.[66]

Actions instituted to enforce a separation agreement, as opposed to those actions seeking support within the meaning of the jurisdictional statutes or constitutional provisions pertaining to the Family Court (N.Y. Const, Art. VI, §§ 13, 19; Family Ct. Act, §§ 411, 466), do not fall within the court's limited jurisdiction.[67]

Kleila v. Kleila[68] presented a method of circumventing the interdiction against impermissibly conferring jurisdiction on a court while still obtaining the intended result. Even though Family Court cannot modify an agreement, parties may, however, voluntarily agree that any modification of its order will also serve as a modification of the agreement.

-- <u>Ripeness and Mootness</u>

Judicial jurisdiction extends only to live controversies.[69] An appeal presents a live controversy where the rights of the parties will be directly affected by the determination and where the judgment has "immediate consequence" for them.[70] In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment.[71]

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[64] Kleila v. Kleila, 50 N.Y.2d 277, 428 N.Y.S.2d 896 (1980); Johna M.S. v. Russell E.S., 10 N.Y.3d 364, 859 N.Y.S.2d 594 (2008); Brescia v. Fitts, 56 N.Y.2d 132, 451 N.Y.S.2d 68 (1982); Gottlieb v. Gottlieb, 294 A.D.2d 537, 742 N.Y.S.2d 873 (2nd Dept., 2002); Zenz v. Zenz 260 A.D.2d 494, 688 N.Y.S.2d 201 (2nd Dept.,1999) (The Family Court properly declined to declare the stipulation of settlement invalid as it lacked jurisdiction to do so.)

[65] Sparacio v. Sparacio, 283 A.D.2d 481, 724 N.Y.S.2d 204 (2nd Dept., 2001); Clune v. Clune, 57 A.D.2d 256, 394 N.Y.S.2d 556 (3rd Dept., 1977).

[66] Hiser v. Hiser, 175 A.D.2d 353, 572 N.Y.S.2d 431 (3rd Dept., 1991).

[67] Handa v. Handa, 103 A.D.2d 794, 477 N.Y.S.2d 670 (2nd Dept.,1984).

[68] Kleila v. Kleila, 50 N.Y.2d 277, 428 N.Y.S.2d 896 (1980).

[69] Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654 (2003).

[70] Coleman ex rel. Coleman v. Daines, 19 N.Y.3d 1087, 955 N.Y.S.2d 831 (2012); City of New York v. Maul, 14 N.Y.3d 499, 903 N.Y.S.2d 304 (2010); Saratoga County Chamber of Commerce, Inc. v. Pataki 100 N.Y.2d 801, 766 N.Y.S.2d 654 (2003), citing Johnson v. Pataki, 91 N.Y.2d 214, 222, 668 N.Y.S.2d 978 [1997].

[71] Hearst Corp. v. Clyne 50 N.Y.2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400 (1980).

Mootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court sua sponte.[72] The fundamental principle that a court's power to declare the law is limited to determining actual controversies in pending cases is subject to an exception that permits the courts to preserve particular issues which are recurring (is likely to recur, either between the parties or other members of the public[73]), substantial and novel, and typically evade review.[74]

Ripeness is a matter pertaining to subject matter jurisdiction which may be raised at any time, including sua sponte.[75]

-- Ripeness

Hearst Corp. v. Clyne, 50 N.Y.2d 707, 431 N.Y.S.2d 400 (1980):

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[72] Matter of Grand Jury Subpoenas for Locals 17, 135, 257 and 608 of the United Broth. of Carpenters and Joiners of America, AFL-CIO 72 N.Y.2d 307, 1197, 532 N.Y.S.2d 722 (1988); State v. Daniel OO., 88 A.D.3d 212, 928 N.Y.S.2d 787 (3rd Dept.,2011).

[73] Coleman ex rel. Coleman v. Daines, 19 N.Y.3d 1087, 955 N.Y.S.2d 831 (2012).

[74] Matter of David C. 69 N.Y.2d 796, 513 N.Y.S.2d 377 (1987); Hearst Corp. v. Clyne 50 N.Y.2d 707, 431 N.Y.S.2d 400 (1980), amplified the exceptions:

> "(N)ovel and important question of statutory construction" (Le Drugstore Etats Unis v. New York, State Bd. of Pharmacy, 33 N.Y.2d 298, 301, 352 N.Y.S.2d 188, 190); "of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well" (East Meadow Community Concerts Ass'n. v. Board of Educ., 18 N.Y.2d 129, 135, 272 N.Y.S.2d 341, 346); "only exceptional cases, where the urgency of establishing a rule of future conduct is imperative and manifest will justify a departure from our general practice" (Matter of Lyon Co. v. Morris, 261 N.Y. 497, 499); question of "importance and interest and because of the likeliness that they will recur" (Matter of Jones v. Berman, 37 N.Y.2d 42, 57, 371 N.Y.S.2d 422, 433); "question of general interest and substantial public importance is likely to recur" (People ex rel. Guggenheim v. Mucci, 32 N.Y.2d 307, 310, 344 N.Y.S.2d 944, 946); question "of major importance and (that) will arise again and again" (Matter of Rosenbluth v. Finkelstein, 300 N.Y. 402, 404); questions of "general interest, substantial public importance and likely to arise with frequency" (Matter of Gold v. Lomenzo, 29 N.Y.2d 468, 476, 329 N.Y.S.2d 805, 810); "importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" (Matter of Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 437, 423 N.Y.S.2d 630; "crystalizes a recurring and delicate issue of concrete significance" (Matter of Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376, 401 N.Y.S.2d 756, 759.)

[75] Agoglia v. Benepe, 84 A.D.3d 1072, 924 N.Y.S.2d 428 (2nd Dept.,2011).

It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal ...(Matter of State Ind. Comm., 224 N.Y. 13, 16; California v. San Pablo & Tulare R.R., 149 U.S. 308, 314, 13 S.Ct. 876, 878). This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary.

Gonzalez v. Gonzalez, 57 A.D.3d 896, 870 N.Y.S.2d 410 (2nd Dept.,2008):
"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713, 431 N.Y.S.2d 400, 409 N.E.2d 876). Courts are prohibited from rendering advisory opinions and "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (id. at 714, 431 N.Y.S.2d 400, 409 N.E.2d 876; see Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 810, 766 N.Y.S.2d 654, 798 N.E.2d 1047; Matter of Jimin J., 46 A.D.3d 826, 847 N.Y.S.2d 475; Becher v. Becher, 245 A.D.2d 408, 667 N.Y.S.2d 50).

Watson v. Aetna Cas. & Sur. Co., 246 A.D.2d 57, 675 N.Y.S.2d 367 (2nd Dept.,1998):
CPLR 3001 states that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed". A declaratory judgment action " requires an actual controversy between genuine disputants with a stake in the outcome [and may not be used as a] vehicle for an advisory opinion" (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3001:3, at 433). In addition to the requirement that the controversy be genuine or ripe, the declaratory judgment may be used only for a "justiciable" controversy. If the court has jurisdiction over the subject matter, and if the dispute is genuine, and not academic, "the dispute will be deemed 'justiciable' and CPLR 3001 will in that regard be satisfied" (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3001:4, at 434).

Mootness

– <u>Enduring Consequences</u>

Dubois v. Piazza, 107 A.D.3d 1587, 968 N.Y.S.2d 291 (4th Dept.,2013):
To the extent that the father contends on appeal that a jail term was improperly imposed upon his violation of the child support order, we conclude that such contention is moot inasmuch as that part of the order has expired by its own terms (see Matter of Cattaraugus County Dept. of Social Servs. v. Gore, 101 A.D.3d 1739, 1740, 955 N.Y.S.2d 910; Matter of Alex A.C. [Maria A.P.], 83 A.D.3d 1537, 1538, 921 N.Y.S.2d 759). We further conclude, however, that the court erred in confirming the Support Magistrate's finding that the father had willfully violated the existing support order before counsel appeared before the Support Magistrate on the father's behalf (see Family Ct. Act § 262[a][vi]; see generally Matter of Kissel v. Kissel, 59 A.D.2d 1036, 1036–1037, 399 N.Y.S.2d 781). We therefore modify the order accordingly. Given the enduring consequences flowing from the finding of a willful violation of a Family Court order, we note that the father's challenge to the Support Magistrate's finding of willfulness is not rendered moot because the jail sentence has been served (see Matter of Telsa Z. [Rickey Z.], 75 A.D.3d 776, 777 n., 904 N.Y.S.2d 813). Inasmuch as the court's bench decision reflects that the court's determination that the father violated his probation is independent of the Support Magistrate's finding of a willful violation of an existing child support order, we decline to disturb the part of the order determining that the father violated the terms of his probation. To the extent that the order reflects that the father was found to have violated his probation due to a willful breach of an existing child support order, we note that the court's bench decision rendered following the hearing includes no such finding as to willfulness and, “where ‘an order and decision conflict, the decision controls' ” (Matter of Triplett v. Scott, 94 A.D.3d 1421, 1421, 942 N.Y.S.2d 303).

Hefley v. Favors, 106 A.D.3d 909, 965 N.Y.S.2d 177 (2nd Dept.,2013):
Although the order of protection expired by its own terms on February 24, 2013, in light of the enduring consequences which may potentially flow from a finding that the appellant committed a family offense, the appeal has not been rendered academic (see e.g. Matter of Wallace v. Wallace, 45 A.D.3d 599, 844 N.Y.S.2d 711; Matter of DeSouza–Brown v. Brown, 38 A.D.3d 888, 831 N.Y.S.2d 332; Matter of Rochester v. Rochester, 26 A.D.3d 387, 388, 809 N.Y.S.2d 178; Matter of Kravitz v. Kravitz, 18 A.D.3d 874, 796 N.Y.S.2d 376).

Marquardt v. Marquardt, 97 A.D.3d 1112, 948 N.Y.S.2d 484 (4th Dept.,2012):
Respondent wife appeals from an “Order of Fact–Finding and Disposition” in which Family Court concluded that she committed acts constituting the family offense of harassment in the first or second degree against petitioner husband... Initially, we note that the order of protection issued in conjunction with the order on appeal has expired, and we thus generally would dismiss the appeal as moot (Matter of Kristine Z. v. Anthony C., 43 A.D.3d 1284, 1284–1285, lv. denied 10 N.Y.3d 705). Here, however, respondent challenges only Family Court's finding

that she committed a family offense and, " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense,' the appeal from so much of the order ... as made that adjudication is not academic" (Matter of Hunt v. Hunt, 51 A.D.3d 924, 925).

-- Recurring Issues, Likelihood of Repetition

Coleman ex rel. Coleman v. Daines, 19 N.Y.3d 1087, 955 N.Y.S.2d 831 (2012): It is clear that the claim asserted by Coleman under former section 133 is not capable of repetition, nor will it evade review, because the amended Social Services Law § 133 addresses applicants who are in "immediate need" of "emergency needs assistance or care" who may be entitled to a "monetary grant." The distinctions between the two provisions may be significant. Under the former section 133, Coleman's situation arguably did not need to rise to the level of an emergency, whereas under the new section, it must necessarily rise to that level if an applicant is to meet the "immediate need" requirement. Moreover, former section 133 called for the provision of "temporary assistance or care" for qualifying individuals, whereas the current section 133 states that notice shall be provided concerning "the availability of a monetary grant adequate to meet emergency needs assistance or care" (emphasis supplied). On the other hand, future claimants may rely on the newly-added words "under this chapter" as support for their argument that section 133 applies to all benefits available under the Social Services Law—to Medicaid payments as well as to payments for food and shelter. So the claims asserted by Coleman under former section 133 cannot recur in light of this change in the law. Interpretation of a defunct statute under which Coleman is admittedly receiving benefits is of little value to future claimants who must now proceed under the current section 133, and, because Coleman's section 1983 claim is premised on that defunct statute, that claim is similarly moot. I would therefore answer the certified question in the negative.

-- Kendra's Law, Repetition

➤➤In re Gail R., 67 A.D.3d 808, 891 N.Y.S.2d 411 (2nd Dept.,2009): Mental Hygiene Law § 9.60, commonly known as Kendra's Law, was enacted to provide "a system of assisted outpatient treatment (AOT) pursuant to which psychiatric patients unlikely to survive safely in the community without supervision may avoid hospitalization by complying with court-ordered mental health treatment" (Matter of K.L., 1 N.Y.3d 362, 366, 774 N.Y.S.2d 472, 806 N.E.2d 480). The statute sets forth who may file a petition for an assisted outpatient treatment (hereinafter AOT) order, the requirements for the petition, and the procedures for a hearing on the petition (see Mental Hygiene Law § 9.60[e][1]-[3]; [h][1]).

* * *

In the instant matter, the order and judgment dated January 22, 2009, expired by its own terms on July 22, 2009. Although the appeal from the order and judgment generally would be moot, the issues raised on appeal fit within the mootness exception. Due to the truncated nature of the hearing, there are issues as to whether Gail R.'s due process rights were sufficiently *811 protected, whether the Supreme Court exceeded its authority by issuing the AOT order without the type of testimony described in the statute, and whether the petition and supporting physician's affirmation, in the absence of substantive testimony from that physician, constitute clear and convincing evidence to authorize AOT. These issues have a likelihood of repetition, either between Gail R. and the petitioner due to her chronic mental illness, or other patients who may be the subject of AOT proceedings. In addition, these issues would typically evade appellate review, as AOT orders have a maximum duration of six months unless extended by a subsequent court order (Mental Hygiene Law § 9.60[j][2], [k]). Moreover, the issues raised on appeal have not been the subject of prior appellate review and are substantial and novel (see Mental Hygiene Legal Servs. v. Ford, 92 N.Y.2d 500, 505–506, 683 N.Y.S.2d 150, 705 N.E.2d 1191; Matter of Hearst Corp. v. Clyne, 50 N.Y.2d at 714–715, 431 N.Y.S.2d 400, 409 N.E.2d 876; Matter of William C., 64 A.D.3d 277, 880 N.Y.S.2d 317; Matter of Manhattan Psychiatric Ctr., 285 A.D.2d 189, 191, 728 N.Y.S.2d 37). Consequently, Gail R.'s appeal will not be dismissed as moot.

In re Anthony H., 82 A.D.3d 1240, 919 N.Y.S.2d 214 (2nd Dept.,2011):[76] Generally, an appeal "will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714; Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 810–811, cert. denied 540 U.S. 1017, 124 S.Ct. 570). But an exception to the mootness doctrine permits courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable (Matter of M.B., 6 N.Y.3d 437, 447, 813 N.Y.S.2d 349).

Here, the resettled order and judgment dated... has already expired by its own terms. Although the appeal from the resettled order and judgment generally would be academic, the issues raised on appeal fit within the mootness exception. There is an issue as to whether the diagnoses in Anthony H.'s medical records, stating that his hospitalizations resulted from his failure to take his medication, constituted admissible evidence in support of an AOT order. This issue has a likelihood of repetition, either between the petitioner and Anthony H. due to his chronic mental illness, or between the petitioner and other patients who may be the subject of AOT proceedings. In addition, this issue would typically evade

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appellate review, as AOT orders have a maximum duration of six months unless extended by a subsequent court order (Mental Hygiene Law § 9.60[j][2]; § 9.60[k]). ➤➤Further, the issue raised on appeal has not been the subject of prior appellate review and is substantial and novel (Mental Hygiene Legal Servs. v. Ford, 92 N.Y.2d 500, 505–506, 683 N.Y.S.2d 150; Matter of Gail R. [Barron], 67 A.D.3d 808, 811, 891 N.Y.S.2d 411).

Cf. Yajaira J.L. v. Robert Bruce Scott L., 953 N.Y.S.2d 14 (1st Dept.,2012):
Because the order of protection has expired, this appeal is moot.

--- ➤Appeal Is Not Moot Notwithstanding Modification when the Appellant Has Not Relinquished the Right to Appeal and the Issue in the Underlying Order/Judgment Remains the Same

Chittick v. Farver, 279 A.D.2d 673, 719 N.Y.S.2d 305 (3rd Dept.,2001):
While th[e] appeal was pending respondent brought a[visitation] enforcement proceeding... The parties reached a settlement...culminating in [an] order of Family Court which provided for a change in the visitation schedule...but otherwise reaffirmed the custody and visitation provisions of Supreme Court's judgment of divorce. Respondent argue[d, inter alia,] that the parties' resolution of the enforcement proceeding render[ed] th[e] appeal moot.

[1] Since neither the transcript of the [] proceeding nor the [] order establishes that petitioner unequivocally relinquished her right to continue to press this appeal, we do not find her appeal to be moot.

Poremba v. Poremba, 93 A.D.3d 1115, 940 N.Y.S.2d 707 (3rd Dept.,2012):
Pursuant to a consent-order, the [parties] had joint legal custody of the child, with the mother having physical custody. The parties filed several modification petitions with Family Court which, following a hearing, awarded the father sole legal and physical custody, with visitation to the mother. The mother appealed. The father moved to dismiss the appeal as moot.

We reject the father's argument that this appeal is moot. After the appealed-from order was issued, the parties resolved all outstanding issues in their divorce action by stipulation, including those related to custody. While the parties did agree to modify the terms of Family Court's order in some respects, it was left intact in relevant part and incorporated but not merged into the judgment of divorce. The mother inquired about the stipulation's impact upon the present appeal, and was assured on the record that the stipulation did not affect her right to appeal the order at issue. Inasmuch as the appeal is not moot under these circumstances, the father's motion to dismiss is denied.

Claflin v. Giamporcaro, 75 A.D.3d 778, 904 N.Y.S.2d 580 (3rd Dept.,2010), lv. denied, 15 N.Y.3d 710 (2010):
[The parents divorced in 2005.] The judgment incorporated a stipulation that they share joint custody of their son, [which] included a schedule in which the parents had substantially equal time with the child, but did not address, [inter alia,] schooling. When the child reached school age, the father filed a petition seeking an order of primary physical custody so the child could attend school in the district where the father resided. The mother filed a petition seeking sole custody. In December 2008, Family Court granted the mother's petition. The father appeals.

Initially, this matter is not moot. In the order on appeal, Family Court specifically noted that the parties' schedules were likely to change within a short time and that either party could petition the court for a new visitation schedule. In March 2010, the parties consented to entry of an order setting forth a specific visitation schedule and not otherwise superceding any prior orders. The stipulation noted that the father did not waive his right to continue the present appeal. Considering the reservations in the December-2008 order and the provision in the March 2010 stipulation that the new order would only supercede prior orders with respect to visitation, the appeal from the December 2008 order is not moot.

Siler v. Wright, 64 A.D.3d 926, 882 N.Y.S.2d 574 (3rd Dept.,2009):
Family Court granted sole custody to the father and visitation to the mother. The mother appealed. Th[e] appeal [w]as not rendered moot by a subsequent order of Family Court. While this appeal was pending, the parties appeared before the court concerning a petition to modify visitation brought by the father and a violation petition filed by the mother. At that time, the parties agreed to withdraw their petitions and stipulated to an order which made minor adjustments to the visitation schedule but otherwise left unchanged the custody provision. This order was engendered solely as a result of petitions dealing with visitation issues and, in the absence of the transcript of the proceeding before Family Court, does not establish that the mother relinquished her right to pursue this custody appeal Chittick v. Farver, 279 A.D.2d 673 [2001]; Rush v. Rush, 201 A.D.2d 836 [1994].

Hughes v. Gallup-Hughes, 90 A.D.3d 1087, 935 N.Y.S.2d 149 (3rd Dept.,2011):
Supreme Court awarded the father sole legal custody and continued the parenting schedule provided in the temporary order, with additional provisions relating to holidays and birthdays. The mother appealed. The Appellate Division affirmed.

Initially, the [mother's] appeal [was not] rendered moot by a subsequent Family Court order which resolved custody enforcement and family offense petitions filed by the parties. That order was issued upon stipulation and clarified existing provisions of the order appealed from concerning communication and notice, while leaving intact the provisions of the order on appeal with respect to legal custody and parenting time. Accordingly, there is no basis to conclude that the

mother relinquished her right to pursue this appeal.

-- Public Policy

"[C]ertain issues which impact public policy may be reviewed by this Court despite being raised for the first time on appeal."[77]

"So strong is public policy that where a contract provision is arguably void as against public policy, that issue may even be raised for the first time at the appellate level by a party, or by the court on its own motion."[78]

-- Where public policy is found

Glaser v. Glaser, 276 N.Y. 296 (1938)[79] :
What is the public policy of a state and where do we look to find it? The decision of this court have given it a limited legal meaning, for in People v. Hawkins, 157 N.Y. 1, at page 12 this court said: 'The term 'public policy' is frequently used in a very vague, loose or inaccurate sense. The courts have often found it necessary to define its juridical meaning, and have held that a state can have no public policy except what is to be found in its Constitution and laws. (Vidal v. Girard's Ex'rs, 2 How. [U.S.] 127 [11 L.Ed. 205]; Hollis v. Drew Theological Seminary, 95 N.Y. 166; Cross v. United States Trust Co., 131 N.Y. [330]]; Dammert v. Osborn, 140 N.Y. [30].) Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes or judicial records.'

Ungar v. Matarazzo Blumberg & Associates, P.C., 260 A.D.2d 485, 688 N.Y.S.2d 588 (2nd Dept.,1999):
Upon our review of the terms of the parties' agreement, we conclude that it is an agreement between a nonlawyer and attorneys to split legal fees which is prohibited by Judiciary Law § 491 (Gorman v. Grodensky, 130 Misc.2d 837, 498 N.Y.S.2d 249; Stern, Henry & Co. v. McDermott, 38 Misc.2d 50, 236 N.Y.S.2d

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[77] People v. Knowles 88 N.Y.2d 763, 650 N.Y.S.2d 617 (1996).

[78] Niagara Wheatfield Adm'rs Ass'n v. Niagara Wheatfield Cent. School Dist., 44 N.Y.2d 68, 404 N.Y.S.2d 82 (1978); People v. Knowles, 88 N.Y.2d 763, 650 N.Y.S.2d 617 (1996); Holland v. Ryan, 307 A.D.2d 723, 762 N.Y.S.2d 740 (4th Dept., 2003) (Defendants did not raise the issue of unclean hands in opposition to the motion or on appeal, this Court is not precluded from raising the issue sua sponte for the first time on appeal ... This is done "not to favor defendant[s], but as a matter of public policy.); Janke v. Janke, 47 A.D.2d 445, 366 N.Y.S.2d 910 (4th Dept., 1975), aff'd, 39 N.Y.2d 786, 385 N.Y.S.2d 286 (1976).

[79] People v. Hawkins, 157 N.Y. 1 (1898); In re Rhinelander's Estate 290 N.Y. 31 (1943); Godfrey v. Spano, 15 Misc.3d 809, 836 N.Y.S.2d 813 (Sup.Ct. Westchester Co. 2007).

778, affd. 19 A.D.2d 864, 245 N.Y.S.2d 348; Code of Professional Responsibility DR 3–102 [22 NYCRR 1200.1]). While this issue was not raised by the parties, we may consider it sua sponte (see, Matter of Niagara Wheatfield Administrators Assn. [Niagara Wheatfield Cent. School Dist.], 44 N.Y.2d 68, 72, 404 N.Y.S.2d 82, 375 N.E.2d 37; Matter of Town of Greenburgh [Police Assn. of Town of Greenburgh], 94 A.D.2d 771, 772, 462 N.Y.S.2d 718; Muscarella v. Muscarella, 93 A.D.2d 993, 994, 461 N.Y.S.2d 621).

-- **Necessary Parties: May Be Added at Any Time, Even on Appeal, Sua Sponte**

Lezette v. Board of Ed., Hudson City School Dist., 35 N.Y.2d 272, 319 N.E.2d 189, 360 N.Y.S.2d 869 (1974):[80]
The court may at any stage of a case and on its own motion determine whether there is a nonjoinder of necessary parties.

City of New York v. Long Island Airports Limousine Service Corp., 48 N.Y.2d 469, 423 N.Y.S.2d 651 (1979):
A court may always consider whether there has been a failure to join a necessary party (First Nat. Bank v. Shuler, 153 N.Y. 163, 170; Matter of Lezette v. Board of Educ., 35 N.Y.2d 272, 282, 360 N.Y.S.2d 869, 876). Necessary parties are defined as "(p)ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR 1001, subd. (a)). An action is subject to dismissal if there has been a failure to join a necessary party (CPLR 1003). The rule serves judicial economy by preventing a multiplicity of suits. It also insures fairness to third parties who ought not to be prejudiced or "embarrassed by judgments purporting to bind their rights or interest where they have had no opportunity to be heard" (First Nat. Bank v. Shuler, supra, 153 N.Y. p. 170; see 2 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 1001.01).

Olney v. Areiter, 104 A.D.3d 1100, 962 N.Y.S.2d 489 (3rd Dept.,2013):
This Court has previously held that a court may not, on its own initiative, add or direct the addition of a party (see LaSalle Bank Natl. Assn. v. Ahearn, 59 A.D.3d 911, 912, 875 N.Y.S.2d 595 [2009]; New Medico Assoc. v. Empire Blue Cross & Blue Shield, 267 A.D.2d 757, 758–759, 701 N.Y.S.2d 142 [1999]). That said, "[a] court may always consider whether there has been a failure to join a necessary party," including on its own motion, and for the first time on appeal.

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[80] Town of Amherst v. Hilger, 106 A.D.3d 120, 962 N.Y.S.2d 837 (4th Dept.,2013); Rumman v. Reade, 64 A.D.3d 715, 881 N.Y.S.2d 905 (2nd Dept.,2009); Jim Ludtka Sporting Goods, Inc. v. City of Buffalo School Dist., 48 A.D.3d 1103, 850 N.Y.S.2d 319 (4th Dept., 2008), rearg. denied , 52 A.D.3d 1293, 858 N.Y.S.2d 646 (4th Dept.,2008), leave to appeal denied, 11 N.Y.3d 704, 864 N.Y.S.2d 808 (2008).

Censi v. Cove Landings, Inc., 65 A.D.3d 1066, 885 N.Y.S.2d 359 (2nd Dept.,2009):
Necessary parties are persons "who might be inequitably affected by a judgment in the action" and must be made plaintiffs or defendants (CPLR 1001[a]). CPLR 1001(b) requires the court to order such persons summoned, where they are subject to the court's jurisdiction. If jurisdiction over such necessary parties can be obtained only by their consent or appearance, the court is to determine, in accordance with CPLR 1001(b), whether justice requires that the action proceed in their absence (see CPLR 1001[b]). The nonjoinder of necessary parties may be raised at any stage of the proceedings, by any party or by the court on its own motion, including for the first time on appeal (City of New York v. Long Is. Airports Limousine Serv. Corp., 48 N.Y.2d 469, 475, 423 N.Y.S.2d 651).

In re Ramon H.-T., 87 A.D.3d 1141, 930 N.Y.S.2d 49 (2nd Dept.,2011):
As a general rule, "points which were not raised at trial may not be considered for the first time on appeal" (People v. Thomas, 50 N.Y.2d 467, 471, 429 N.Y.S.2d 584, 407 N.E.2d 430). A narrow exception to this rule exists where a court issues an unauthorized or unlawful sentence.

Cf., In re Bobak (AIG Claims Services, Inc.), 97 A.D.3d 1103, 948 N.Y.S.2d 780 (4th Dept.,2012):
Petitioner's contention that the court erred in failing to join Travelers and the Ohio Insurance Guaranty Association (OIGA) as necessary parties is raised for the first time on appeal and thus is not properly before us.

Levi v. Levi 46 A.D.3d 519, 848 N.Y.S.2d 228 (2nd Dept.,2007):
Since the defendant's claim that the Supreme Court should have joined him as a necessary party in a related matrimonial action between the plaintiff and her husband...is raised for the first time on appeal, it is not properly before this Court.

-- <u>Standing, Obviated</u>?

-- <u>Appropriate</u>
Fleischer v. New York State Liquor Authority, 103 A.D.3d 581, 960 N.Y.S.2d 395 (1st Dept.,2013):
While the issue of standing was raised by the SLA for the first time on appeal, it may nevertheless be entertained at this juncture since it poses a question of law ➤that could not have been avoided had it been raised before the motion court.[81]

Delgado v. New York City Bd. of Educ., 272 A.D.2d 207, 708 N.Y.S.2d 292

[81] Matter of Jared 225 A.D.2d 1049, 639 N.Y.S.2d 773 (4th Dept. 1996).

(1st Dept. 2000), lv. denied 95 N.Y.2d 768 (2000), cert. denied, 532 U.S. 982, 121 S.Ct. 1624 (2001):
Petitioner lacks standing to bring the instant petition since he was represented by the union at the arbitration (Sampson v. Board of Educ., 191 A.D.2d 283, 594 N.Y.S.2d 264), and we affirm the dismissal of the petition for that reason. Although the issue of standing is first raised on appeal, ➤it poses a question of law that could not have been avoided had it been raised before the IAS court, and therefore may be entertained at this juncture (Chateau D'If Corp. v. City of New York, 219 A.D.2d 205, 209, 641 N.Y.S.2d 252, lv. denied, 88 N.Y.2d 811).

➤-- Standing, <u>Improper for first time on appeal</u>
People v. Stith, 69 N.Y.2d 313, 514 N.Y.S.2d 201 (1987):
The People's argument that defendants lacked standing to contest the lawfulness of the seizure was raised for the first time at the Appellate Division and thus is not preserved for our review.

Matter of Jared, 225 A.D.2d 1049, 639 N.Y.S.2d 773 (4th Dept. 1996):[82]
The issue of respondent's standing (Domestic Relations Law § 111[1][a]) may not be raised for the first time on appeal because ➤it "could have been obviated or cured by factual showings or legal countersteps"[83] in the trial court (Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, rearg. denied, 26 N.Y.2d 751, 309 N.Y.S.2d 1031; see, Oram v. Capone, 206 A.D.2d 839, 840, 615 N.Y.S.2d 799; cf., Matter of Baby Girl, 206 A.D.2d 932, 933, 615 N.Y.S.2d 800).

Georgius v. Village of Morrisville, 83 A.D.3d 1158, 920 N.Y.S.2d 475 (3rd Dept.,2011):
Hughes' argument now that defendant did not have standing to seek disqualification, raised for the first time on appeal, will not be considered.

-- <u>Unclean Hands</u>
"Although neither party raised the issue of unclean hands or illegality, this court is not precluded from raising the issue sua sponte for the first time on appeal."[84]

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[82] In re Estate of Dessauer, 96 A.D.3d 1560, 946 N.Y.S.2d 760 (4th Dept.,2012).

[83] Cf., Fleischer v. New York State Liquor Authority, 103 A.D.3d 581, 960 N.Y.S.2d 395 (1st Dept.,2013).

[84] Muscarella v. Muscarella , 93 A.D.2d 993, 461 N.Y.S.2d 621 (4th Dept.,1983); Holland v. Ryan, 307 A.D.2d 723, 762 N.Y.S.2d 740 (4th Dept.,2003); Will of Alpert, 234 A.D.2d 150, 651 N.Y.S.2d 451 (1st Dept.,1996); Janke v. Janke, 47 A.D.2d 445, 366 N.Y.S.2d 910 (4th Dept.,1975), aff'd, 39 N.Y.2d 786, 385 N.Y.S.2d 286 (1976).

-- **Illegality**

Ungar v. Matarazzo Blumberg & Associates, P.C., 260 A.D.2d 485, 688 N.Y.S.2d 588 (2nd Dept.,1999):
Upon our review of the terms of the parties' agreement, we conclude that it is an agreement between a nonlawyer and attorneys to split legal fees which is prohibited by Judiciary Law § 491...While this issue was not raised by the parties, we may consider it sua sponte (Niagara Wheatfield Administrators Assn. [Niagara Wheatfield Cent. School Dist.], 44 N.Y.2d 68, 404 N.Y.S.2d 82; Town of Greenburgh [Police Assn. of Town of Greenburgh], 94 A.D.2d 771).

➤-- **Prejudgment Interest, May Not Be Raised First Time on Appeal**

-- **May Not Be Raised First Time**

Coppola v. Coppola, 291 A.D.2d 477, 738 N.Y.S.2d 220 (2nd Dept. 2002):
The defendant's claim that the Supreme Court erred in awarding prejudgment interest is not properly before this court, as it was raised for the first time in a reply brief on appeal.

Paganuzzi v. Primrose Management Co., 268 A.D.2d 213, 701 N.Y.S.2d 350 (1st Dept.,2000):
The same implied breach of lease entitles the tenant to prejudgment interest under CPLR 5001(a) (Solow v. Wellner, 86 N.Y.2d 582, 589–590, 635 N.Y.S.2d 132, 658 N.E.2d 1005). The tenant's claim that interest should have been computed from the date the landlord first began charging excess rent, rather than from the date of the District Rent Administrator's order establishing the amount of overcharge, is improperly raised for the first time on appeal, and indeed it appears that the motion court used the date specifically urged by the tenant.

Martin v. Martin 256 A.D.2d 390, 681 N.Y.S.2d 587 (2nd Dept.,1998):
The father's contention that pre-judgment interest on the arrears was improperly awarded as he was not in willful violation of the support provisions of the divorce judgment is not properly before this court, having been raised for the first time on appeal.

cf. DKS Associates v. Tampa Pipeline Corp., 217 A.D.2d 928, 629 N.Y.S.2d 892 (4th Dept.,1995):
We decline to address the argument of TPC, made for the first time on appeal, that it is entitled to prejudgment interest on any indemnification award. *[Editor's note*: The Appellate Division did not state that the issue was unpreserved – it appears to read that the court declined to do so as a matter of discretion.*]*

-- **Some Exceptions to First Time Rule in Criminal Matters**

People v. Thomas, 50 N.Y.2d 467, 407 N.E.2d 430, 429 N.Y.S.2d 584 (1980): As a general rule points which were not raised at trial may not be considered for the first time on appeal (CPL 470.05, subd. 2; People v. Robinson, 36 N.Y.2d 224, 367 N.Y.S.2d 208; People v. Gurley, 42 N.Y.2d 1086, 399 N.Y.S.2d 650; People v. Kibbe, 35 N.Y.2d 407, 413-414, 362 N.Y.S.2d 848; affd. sub nom. Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730). There is, however, one very narrow exception as we noted in People v. Patterson (supra). In that case we said that no objection is necessary to preserve a point of law for appellate review when the procedure followed at trial was at basic variance with the mandate of law prescribed by Constitution or statute (People v. Patterson, supra, 39 N.Y.2d at pp. 295-296, 383 N.Y.S.2d 573; see, also, People v. Michael, 48 N.Y.2d 1, 420 N.Y.S.2d 371). It is to be noted that in Patterson the defendant challenged the constitutionality of section 125.25 (subd. 1, par. (a)) of the Penal Law which places upon the defendant the burden of proving extreme emotional disturbance as an affirmative defense to murder. We held that this argument could be raised for the first time on appeal. It was noted (39 N.Y.2d at p. 296) that if "the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial." We also recognized that the defendant's failure to object was excusable because the statutory practice had previously been deemed valid and had only been called into question by an intervening Supreme Court decision.

People v. Autry, 75 N.Y.2d 836, 552 N.E.2d 156, 552 N.Y.S.2d 908 (1990): Contrary to defendants' contentions, the error, if there was any error, in the instructions does not fall within the narrow exception to the rule enunciated in People v. McLucas, 15 N.Y.2d 167, 256 N.Y.S.2d 799 that objections to the charge must be made at trial. An objection is required to preserve a point of law for appellate review except in a very small class of cases where the error results in a trial "at basic variance with the mandate of law prescribed by Constitution or statute". (People v. Thomas, 50 N.Y.2d 467, 429 N.Y.S.2d 584.) In the case of a charge error implicating defendant's right against self-incrimination, the exception to the preservation requirement may be invoked only where the language of the charge expressly or at least unambiguously conveys to the jury that the defendant should have testified (People v. Thomas, 50 N.Y.2d, at 472; People v. McLucas, 15 N.Y.2d 167; cf., People v. Burke, 72 N.Y.2d 833, 530 N.Y.S.2d 543).

AN APPELLATE COURT MAY AFFIRM
FOR REASONS DIFFERENT THAN THOSE OF NISI PRIUS

Tydings v. Greenfield, Stein & Senior, LLP, 43 A.D.3d 680, 843 N.Y.S.2d 538 (1st Dept.,2007):
An affirmance...does not necessarily constitute a ratification of the legal reasoning in the order appealed from, when the affirmance explicitly uses different reasoning from that employed by the court of first instance to reach the same result. Moreover, while it might be appropriate to give preclusive effect to factual findings made by a trial court which are not disturbed on appeal, different considerations come into play where the trial court's ruling, for which preclusive effect is sought, is purely one of law (O'Connor v. G & R Packing Co., 53 N.Y.2d 278, 282–283, 440 N.Y.S.2d 920 [1981]), especially when that reasoning was, at least implicitly, disturbed on appeal. The basis for giving preclusive effect to an alternative ground for a decision is that the issue was "actually litigated, squarely addressed, and specifically decided" (Atl. Mut. Ins. Co. v. Lauria, 291 A.D.2d 492, 493, 739 N.Y.S.2d 394 [2002]);

Here, once the reasoning of the Surrogate's Court was replaced by the reasoning of this Court in its order on appeal, the legal reasoning used by the Surrogate's Court, even though not explicitly disapproved, could not then continue to stand as a viable statement of the law: the issue was neither "squarely addressed" nor "specifically decided" by this Court in Matter of Singer.

State v. Peerless Ins. Co., 117 A.D.2d 370, 503 N.Y.S.2d 448 (3rd Dept.,1986):[85]
[T]his court may affirm on a theory different from the one previously argued or relied upon by Special Term (Sega v. State of New York, 60 N.Y.2d 183, 190, n. 2, 469 N.Y.S.2d 51; Matter of Trustees of Union Coll. v. Board of Assessment Review of City of Schenectady, 91 A.D.2d 713, 714-715, 457 N.Y.S.2d 970).

Gartley v. Gartley, 15 A.D.3d 995, 789 N.Y.S.2d 559 (4th Dept.,2005):
Supreme Court properly denied plaintiff's motion seeking "a revision of the terms and provisions of the Judgment [of divorce] so as to provide equitable . . . relief," but our reasoning differs from that of the court. The judgment of divorce incorporated but did not merge the parties' stipulation. The court properly

[85] Bell v. Xanthopoulos, 202 A.D.2d 910, 609 N.Y.S.2d 428 (3d Dept.1994); Busy Bee Food Stores v. WCC Tank Lining Technology, Inc., 202 A.D.2d 898, 609 N.Y.S.2d 118 (3d Dept., 1994), leave to appeal dismissed, 83 N.Y.2d 953, 639 N.E.2d 418, 615 N.Y.S.2d 877 (1994); Sanders v. Grenadier Realty, Inc. 102 A.D.3d 460, 958 N.Y.S.2d 120 (1st Dept.,2013) (Plaintiffs' state law claims were properly dismissed, but not for the reason stated by the motion court, i.e., res judicata. Here, those claims were barred by the principle of collateral estoppel, since in dismissing plaintiffs' federal claims, the Federal District Court addressed issues identical to those raised by plaintiffs' state claims, despite having declined to exercise jurisdiction over the state claims.)

characterized the motion as, inter alia, seeking to revise the parties' stipulation and thus, instead of denying the motion on the merits, the court should have denied the motion on the ground that "a motion is not the proper vehicle for challenging a [stipulation] incorporated but not merged in[ ] a divorce judgment. Rather, [plaintiff] should have commenced a plenary action seeking [recission] or reformation of the [stipulation]" (Spataro v Spataro, 268 AD2d 467, 468 [2000]; see also Christian v Christian, 42 NY2d 63, 72 [1977]). We therefore do not consider the merits of plaintiff's motion.

The Tipsy-Coachman Rule

Strohm v. State, 84 So.3d 1181 (Fla.App. 4 Dist., 2012) :
Under the "tipsy coachman" rule, "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."

Lee v. Porter, 63 Ga. 345 (Ga. 1879):
It not infrequently happens that a judgment is affirmed upon a theory of the case which did not occur to the court that rendered it, or which did occur and was expressly repudiated. The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it.

"[T]he pupil of impulse, it forc'd him along, His conduct still right, with his argument wrong; Still aiming at honor, yet fearing to roam The coachman was tipsy, the chariot drove home."

JUDICIAL NOTICE

CPLR 4511:

Prince, Richardson on Evidence (11th Edition, Farrell), § 2-209;

Cooper v. Morin, 91 Misc.2d 302, 398 N.Y.S.2d 36 (N.Y.Sup. 1977), aff'd and modified 64 A.D.2d 130, 409 N.Y.S.2d 30, modified, 49 N.Y.2d 69, 424 N.Y.S.2d 168, rearg. denied 49 N.Y.2d 801, 426 N.Y.S.2d 1029, cert. denied 100 S.Ct. 2965, 446 U.S. 984:
Judicial notice may be taken by any court at any stage of the litigation, even on appeal.

Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2nd Dept.,2009):
Judicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability. Thus, the concept has been applied to census data (cites omitted) ... certificates of corporate dissolution maintained by the Secretary of State (cites omitted)...the resignation of public officials (cites omitted)...legislative proceedings (cites omitted)... legislative journals (cites omitted)...the consumer price index (cites omitted)...the location of real property recorded with a clerk (cites omitted)...death certificates maintained by the Department of Health (cites omitted)...and undisputed court records and files (cites omitted). Even material derived from official government websites may be the subject of judicial notice (cites omitted).

[5] White Plains Hospital argues that the code key available on the HHS website does not qualify for judicial notice, by relying upon the language of this Court ➤in Ptasznik v. Schultz, 247 A.D.2d 197, 679 N.Y.S.2d 665... [which] defined the test for judicial notice as "whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven" (id. at 198, 679 N.Y.S.2d 665, citing Hunter v. New York, Ontario & W.R.R. Co., 116 N.Y. 615). White Plains Hospital maintains that code numbers which require deciphering do not constitute general information widely accepted by the average lay person. However, Ptasznik discusses specifically, and the universe of case law recognizes generally, two disjunctive circumstances where information may be judicially noticed. The first is when information "rests upon knowledge [that is] widely accepted" (Ptasznik v. Schultz, 247 A.D.2d at 198, 679 N.Y.S.2d 665 [emphasis added]) such as calendar dates, geographical locations, and sunrise times (id. at 198, 679 N.Y.S.2d 665). The second "rests upon ... sources [that are] widely accepted and unimpeachable" (id. [emphasis added]), such as reliable uncontested governmental records.

Here, the diagnosis and procedure codes key maintained by the United States Government on its HHS website is of sufficient authenticity and reliability that it may be given judicial notice. The accuracy of the codes key is not contested by White Plains Hospital, and is not subject to courtroom factfinding (Affronti v. Crosson, 95 N.Y.2d at 720, 723 N.Y.S.2d 757). ➤The fact that the code system might not be readily understood by the lay public is of no significance, as the information is proffered for judicial notice not on the basis of being generally understood by the public, but rather, on the basis of its reliable source.

We hold, therefore, that the diagnosis and procedure codes key published by the United States Government on its HHS website may properly be given judicial notice (see CPLR 4511[b]), as the key is reliably sourced and its accuracy not contested.

Pishotti v. New York State Thruway Authority, 38 A.D.3d 1122, 833 N.Y.S.2d 675 (3rd Dept.,2007):
Petitioner's resignation was properly accepted by respondent's director of personnel. Public Authorities Law § 352(3) provides that respondent "may delegate to one or more of its members or its officers, agents and employees such powers and duties as it may deem proper." Here, respondent's bylaws authorize respondent's chair to delegate the power to appoint and remove employees. In September 2002, respondent's chair delegated the power to appoint and effect probationary terminations to department heads and division directors within their respective areas of employment. Acceptance of a resignation in lieu of disciplinary removal is a logical extension of that delegated authority. Although [] the bylaws contained in the record were not in effect at the time of the delegation, the appropriate bylaws have been submitted by respondent to the court and may properly be considered, even though dehors the record (State of New York v. Peerless Ins. Co., 117 A.D.2d 370, 374, 503 N.Y.S.2d 448 [1986]).

Khatibi v. Weill, 8 A.D.3d 485, 778 N.Y.S.2d 511 (2nd Dept.,2004):
Contrary to the petitioner's contention, this court may take judicial notice of undisputed court records and files (Allen v. Strough, 301 A.D.2d 11, 752 N.Y.S.2d 339; Ptasznik v. Schultz...).

Sangirardi v. State, 205 A.D.2d 603, 613 N.Y.S.2d 224 (2nd Dept.,1994):
[T]he Court of Claims correctly concluded that the State could not be held liable for its failure to remove or lower the median curb, even if such reconstruction could have prevented the accident. The Court of Claims properly took judicial notice of Trautman v. State of New York, 179 A.D.2d 635, 578 N.Y.S.2d 245, a case previously litigated before it, as evidence to support its conclusion that while the State had a duty to redesign and reconstruct the parkway in the vicinity of the accident site by removing or lowering the median curb, the delay in doing so was not unreasonable in light of the scope of the reconstruction project, the availability of funding and other priorities (Friedman v. State of New York, 67

N.Y.2d 271, 502 N.Y.S.2d 669; see also, Sam & Mary Housing Corp. v. Jo/Sal Market Corp., 100 A.D.2d 901, 474 N.Y.S.2d 786). Trautman which was decided by the same Judge in December of 1989, resolved a liability issue similar to that presented herein, primarily on the basis that the State was experiencing severe fiscal crises in the early 1970's, which prevented it from implementing numerous highway construction projects. Since the claimants in the present actions repeatedly cited to Trautman v. State of New York (supra) in their post-trial brief, they cannot, now, claim surprise and prejudice as a result of the judge taking judicial notice of the fiscal crises, of which the claimant was well aware, and of which the Judge clearly had personal knowledge...

Reed v. Wolff, 242 A.D.2d 375, 661 N.Y.S.2d 996 (2nd Dept. 1997):
The court properly dismissed Cohen's affirmative defenses and counterclaims on the basis of a lack of standing. Although this issue was not addressed by the parties in this action, it was an issue in the companion case (Cohen v. Estate of Simon Cohen, 242 A.D.2d 358, 661 N.Y.S.2d 1002 [decided herewith]). We take judicial notice of the arguments in that case and the decision therein.

Chateau Rive Corp. v. Enclave Development Associates, 22 A.D.3 445, 802 N.Y.S.2d 366 (2nd Dept. 2005):[86]
"In New York, courts may take judicial notice of a record in the same court of either the pending matter or of some other action" (Sam & Mary Hous. Corp. v. Jo/Sal Mkt. Corp., 100 A.D.2d 901, 903, 474 N.Y.S.2d 786, affd. 64 N.Y.2d 1107, 490 N.Y.S.2d 185; see Matter of Allen v. Strough, 301 A.D.2d 11, 18, 752 N.Y.S.2d 339; Matter of Currier [Woodlawn Cemetery], 300 N.Y. 162; Matter of Ordway, 196 N.Y. 95; Matter of Wesley R., 307 A.D.2d 360, 763 N.Y.S.2d 76; New York State Dam Ltd. Partnership v. Niagara Mohawk Power Corp., 222 A.D.2d 792, 634 N.Y.S.2d 830; Schmidt v. Magnetic Head Corp., 97 A.D.2d 151, 158 n. 3, 468 N.Y.S.2d 649; Rossbach v. Rosenblum, 260 App.Div. 206, 20 N.Y.S.2d 725, affd. 284 N.Y. 745; [Prince, Richardson on Evidence § 30, at 18 [10th ed.]]).

<u>Incontrovertible Documents to Affirm or Sustain Judgments</u>:

➤Brandes Meat Corp. v. Cromer, 146 A.D.2d 666, 537 N.Y.S.2d 177 (2nd Dept.,1989):
In concluding that no material issue of fact exists in the present case, we have considered the certificate issued by the Secretary of State, dated January 6, 1987, which substantiates the assertion made by the plaintiff's attorney in the Supreme Court, that Edward J. Cromer, Inc., was dissolved by proclamation in 1981. We recognize, of course, the general rule that documents which were not submitted to

[86] Lane v. Lane, 68 A.D.3d 995, 892 N.Y.S.2d 130 (2nd Dept., 2009); Schmidt v. Magnetic Head Corp. 97 A.D.2d 151, 468 N.Y.S.2d 649 (2nd Dept.,1983).

the court of original instance may not be considered on appeal (e.g., Mi Suk Buley v. Beacon Tex-Print, 118 A.D.2d 630, 499 N.Y.S.2d 782; Broida v. Bancroft, 103 A.D.2d 88, 478 N.Y.S.2d 333). This rule, however, is subject to certain exceptions. It has long been the law that an incontrovertible official document, even though it dehors the record, may be considered on appeal for the purposes of sustaining a judgment (Dunham v. Townshend, 118 N.Y. 281, 286; State of New York v. Peerless Ins. Co., 117 A.D.2d 370, 374, 503 N.Y.S.2d 448; Kirp v. Caleb's Path Realty Corp., 19 A.D.2d 744, 242 N.Y.S.2d 877). The Court of Appeals has also recognized a narrow exception, which allows the consideration, on appeal, of reliable documents, the existence and accuracy of which are not disputed, even for the purposes of modifying or reversing the order under review (cites omitted)... Also, this court may, in general, take judicial notice of matters of public record (cites omitted).

O'Neill v. Board of Zoning Appeals of Town of Harrison, 225 A.D.2d 782, 639 N.Y.S.2d 961 (2nd Dept. 1996):
Although it is generally true that the record on appeal is limited to the documents submitted before the Supreme Court, it is well settled "that an incontrovertible official document, even though it is dehors the record, may be considered on appeal for the purposes of sustaining a judgment" (Brandes Meat Corp. v. Cromer...). Further, a failure to dispute the accuracy of such documents amounts to a concession of their accuracy (Brandes...).

The material to which the appellant objects consists of deeds, building permits, and tax records, all of which can be said to be "incontrovertible official documents" (Brandes Meat...). Moreover, the petitioner has not disputed the accuracy of any of them. The respondent's brief will therefore be allowed to stand as submitted.

State v. Peerless Ins. Co., 117 A.D.2d 370, 503 N.Y.S.2d 448 (3rd Dept.,1986):[87]
➤"[F]or the purpose of sustaining a judgment, incontrovertible, documentary evidence dehors the appeal record may be received by an appellate court" (Kirp v. Caleb's Path Realty Corp., 19 A.D.2d 744, 745, 242 N.Y.S.2d 877; accord, Dunford v. Weaver, 84 N.Y. 445, 451; cf. Matter of Atkinson v. Marquette Mfg. Co., 24 A.D.2d 795, 263 N.Y.S.2d 927). Neither the authenticity nor the accuracy

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87 Raqiyb v. Coughlin 214 A.D.2d 788, 789, 624 N.Y.S.2d 667, 669 (3rd Dept.,1995): [T]he exception which permits receipt of incontrovertible documentary evidence outside the appeal record to sustain a judgment (see, State of New York v. Peerless Ins. Co., 117 A.D.2d 370, 374, 503 N.Y.S.2d 448) does not apply. Here, the authenticity of the document is controverted by respondents and petitioner seeks reversal of the judgment (see, id.).

of the document is disputed. The document is accordingly received (Matter of Dwyer, 57 A.D.2d 772, 394 N.Y.S.2d 438, lv. denied 45 N.Y.2d 709 [official document of Internal Revenue Service, not in record on appeal, considered by court]). To do otherwise would unnecessarily delay the proceedings.

Bravo v. Terstiege, 196 A.D.2d 473, 601 N.Y.S.2d 129 (2nd Dept.,1993):
For the purpose of sustaining a judgment, incontrovertible documentary evidence dehors the record may be received by an appellate court (State of New York v. Peerless Ins. Co...; Kirp v. Caleb's Path Realty Corp...). [T]he survey map is based on the descriptions in the contracts of sale of both parcels, which were before the Supreme Court and are part of the record on appeal, and the defendants do not contend that the map is inaccurate. Accordingly, we will consider the map on this appeal.

JUDICIAL NOTICE OF SELF AUTHENTICATING BANK RECORDS IN THE POST MADOFF ERA

Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2 (1st Dept.,1991):
No error was committed by the trial court in admitting into evidence, without foundation testimony, records of defendant-husband's accounts in European banks. To be sure, "[b]usiness records are not self-proving"... and "are customarily offered through a custodian or employee" of the business organization that created them (People v. Kennedy, 68 N.Y.2d 569, 577, 510 N.Y.S.2d 853), "who can explain the record-keeping of his organization"...; but, it is also true "that judicial notice can provide a foundation for admitting the records of a particular business"...when the records "are so patently trustworthy as to be self-authenticating" (People v. Kennedy, at fn. 4), or, as one commentator has said about the similar federal business records rule, "[a] foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records observed by the court, particularly in the case of bank and similar statements."...see, Federal Deposit Insurance Corporation v. Staudinger, 797 F.2d 908, 910 (10th Cir.) Here, the bank records were procured by defendant himself (under compulsion of a court order) from the banks which supposedly created them, and thus their authenticity cannot be seriously challenged, and indeed is not challenged. They appear regular on their face, and in format conform to the type of statements with which banks customarily supply their customers on a monthly basis for the purpose of advising them of deposits, withdrawals and balances. No reasons are offered by defendant why these records should not be viewed as reliable and trustworthy, other than that they are technically hearsay and that no witness was called to testify that they were made in the regular course of the banks' business at or about the time of the transactions they describe, but, in the circumstances, we do not consider this reason enough to exclude what appears to be perfectly trustworthy evidence.

Thomas v. Rogers Auto Collision, Inc., 69 A.D.3d 608, 896 N.Y.S.2d 73 (2nd Dept.,2010):
[T]he trial court did not err in allowing the admission of the bank statement into evidence inasmuch as it was a self-authenticating document (**Elkaim v. Elkaim**, 176 A.D.2d 116).

People v. Ramos, 60 A.D.3d 1091, 876 N.Y.S.2d 127 (2nd Dept.,2009):
The defendant did not dispute the authenticity or the accuracy of the bank records, and we see no reason to view them as other than reliable and trustworthy (**Elkaim v. Elkaim, 176 A.D.2d at 117)**. Accordingly, the records were properly admitted.

IRB-Brasil Resseguros S.A. v. Eldorado Trading Corp. Ltd., 68 A.D.3d 576, 891 N.Y.S.2d 362 (1st Dept.,2009):
[W]e would hold that plaintiff met its prima facie burden on the initial motion for summary judgment by submitting evidence of defendant Eldorado Trading's

promise to pay under the note, the guarantee by defendants Eldorado S.A. and Verpar, and nonpayment (Eastbank v. Phoenix Garden Rest., 216 A.D.2d 152, 628 N.Y.S.2d 283 [1995], lv. denied 86 N.Y.2d 711 [1995]). Plaintiff also submitted evidence demonstrating it had purchased the note, which was held by BB Securities on its behalf in a secure account at Euroclear. Contrary to defendants' contention, the affidavit of a corporate officer with personal knowledge, together with authenticated business records, is admissible in support of a motion for summary judgment (First Interstate Credit Alliance v. Sokol, 179 A.D.2d 583, 584, 579 N.Y.S.2d 653 [1992]). In addition, a certified statement of account issued by Euroclear was admissible under the terms of the note, which provided that such record would be "conclusive evidence" as to the identity of any holder, and because it had sufficient indicia of trustworthiness (**Elkaim v. Elkaim, 176 A.D.2d 116, 117, 574 N.Y.S.2d 2 [1991], appeal and lv. dismissed 78 N.Y.2d 1072 [1991]**).

Progressive Classic Ins. Co. v. Kitchen, 46 A.D.3d 333, 850 N.Y.S.2d 1 (1st Dept.,2007):
The expansion should not have been received as evidence of a section 313 cancellation unless so patently trustworthy in that respect as to be self-authenticating, which it is not (**cf. Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2 [1991], appeal dismissed 78 N.Y.2d 1072 [1991]**[88]).

➤**Manzo v. Gross, 19 A.D.3d 379, 796 N.Y.S.2d 702 (2nd Dept.,2005):**
Under the circumstances of this case, there is no merit to the appellant's contention that the trial court erred in admitting certain business records into evidence (New York State Higher Educ. Serv. Corp. v. Barry, 267 A.D.2d 567, 699 N.Y.S.2d 204; Niagara Frontier Tr. Metro Sys. v. County of Erie, 212 A.D.2d 1027, 623 N.Y.S.2d 33; **Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2**).

People v. Markowitz, 187 Misc.2d 266, 721 N.Y.S.2d 758 (N.Y.Sup.,2001):
There appears to be a divide in the departments of the Appellate Division concerning the foundation requirements of CPLR 4518 as they apply to documents created by one entity and then transferred to a second entity. [S]tandard Textile Co. v. National Equip. Rental, 80 A.D.2d 911, 437 N.Y.S.2d 398 (2nd Dept.,1981), [held] that "the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records." The rationale for this holding is that employees from the receiving entity would be in no position to provide the necessary foundation testimony as to the regularity and timeliness of a document's preparation. (Alexander, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 4518:1, at 105). In a similar case, the Appellate Division, Third Department ruled that it was error to admit plaintiff's bank statements and a loan

[88] Cited in In re John QQ. 19 A.D.3d 754, 796 N.Y.S.2d 432 (3rd Dept.,2005)**.**

commitment prepared by plaintiff's bank and mailed to plaintiff in the ordinary course of business without foundation testimony from any bank personnel. Tomanelli v. Lizda Realty, Ltd., 174 A.D.2d 889, 571 N.Y.S.2d 171 (3rd Dept., 1991). However, the Appellate Division, First Department, has upheld the admission of bank records as business records without foundation testimony from a bank employee. **Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2 (1st Dept., 1991)**. There the Court held "that judicial notice can provide a foundation for admitting the records of a particular business when the records are so patently trustworthy as to be self-authenticating."

OBJECTIONS TO SUPPORT MAGISTRATE'S FINDINGS IN FAMILY COURT

In his Supplementary Practice Commentaries, FCA 439, 2012, The Objection Process, Prof. Merril Sobie states: "Filing and determining an objection to a support magistrate's determination is a condition precedent to filing an appeal with the Appellate Division; no ifs, ands or buts."

> "Following a determination of objections, an appeal may be initiated in the relevant Appellate Division pursuant to Article 11. May the parties waive the objection process, and thereby proceed directly from the support magistrate to the Appellate Division? The First Department's answer is an emphatic "no"; Comm'n of Social Serv. of the City of New York v. Harris, 26 A.D.3d 283, 810 N.Y.S.2d 175 (1st Dept. 2006)."

The record revealed that the father's obligation to pay maintenance had been terminated in an earlier order of the Support Magistrate, dated January 31 , 2006, to which the mother did not file objections. "The hearing of objections in Family Court is the equivalent of an appellate review."[89]

> **Hubbard v. Barber 107 A.D.3d 1344, 968 N.Y.S.2d 245 (3rd Dept.,2013):**
> It is well established that "an order from a Support Magistrate is final and Family Court's review under Family Ct. Act § 439(e) is tantamount to appellate review and requires specific objections for issues to be preserved" (Matter of Renee XX. v. John ZZ., 51 A.D.3d 1090, 1092, 857 N.Y.S.2d 770 [2008]; see Matter of Commissioner of Social Servs. v. Segarra, 78 N.Y.2d 220, 222, 573 N.Y.S.2d 56, 577 N.E.2d 47 n. 1 [1991]). Family Court therefore lacked the authority to review the order dismissing the mother's first modification petition, to which no objections had been filed (see Matter of Lawrence v. Bernier, 100 A.D.3d 634, 634–635, 953 N.Y.S.2d 270 [2012]; Matter of O'Brien v. O'Brien, 156 A.D.2d 778, 779, 549 N.Y.S.2d 202 [1989]). The father did lodge objections to the order granting the second modification petition, which entitled Family Court to review that order and make its "own findings of fact" (Family Ct. Act § 439[e]). That power, however, did not extend to matters to which the father had not *1346 objected (see Matter of Hammill v. Mayer, 66 A.D.3d 1196, 1198, 887 N.Y.S.2d 716 [2009]; Matter of Renee XX. v. John ZZ., 51 A.D.3d at 1092–1093, 857 N.Y.S.2d 770; **247 Matter of Ballard v. Davis, 229 A.D.2d 705, 706, 645

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[89] Kasun v. Peluso 82 A.D.3d 769, 919 N.Y.S.2d 30 (2nd Dept.,2011); Musarra v. Musarra 28 A.D.3d 668, 814 N.Y.S.2d 657 (2nd Dept.,2006) (The father failed to preserve the willfulness issue for appellate review. The hearing of objections in Family Court is the equivalent of an appellate review.); Redmond v. Easy 18 A.D.3d 283, 794 N.Y.S.2d 643 (1st Dept. 2005); J.A.E. v. A.B., 10 Misc.3d 446, 805 N.Y.S.2d 811 (N.Y.Fam.Ct.,2005) (Objections are the equivalent of an appellate review, and this Court is not to consider matters which were not brought before the Support Magistrate or preserved by proper objection.); Hammill v. Mayer, 66 A.D.3d 1196, 887 N.Y.S.2d 716 [2009]; White v. Knapp, 66 A.D.3d 1358, 886 N.Y.S.2d 527 [2009]).

N.Y.S.2d 148 [1996]). Remittal is thus necessary so that Family Court may conduct an appropriately limited review and resolve the specific objections lodged by the father.

Reynolds v. Reynolds, 92 A.D.3d 1109, 938 N.Y.S.2d 382 (3rd Dept.,2012): Family Ct. Act § 439(e) requires a judge of the Family Court to review any objections made by the parties to a Support Magistrate's final order before an appeal may be taken pursuant to Family Ct. Act article 11 (Matter of Corry v. Corry, 59 A.D.3d 618, 875 N.Y.S.2d 87 [2009]; Commissioner of Social Servs. of City of N.Y. v. Harris, 26 A.D.3d 283, 810 N.Y.S.2d 175 [2006]; Matter of Feliz v. Rojas, 21 A.D.3d 373, 800 N.Y.S.2d 187 [2005]; Matter of Dambrowski v. Dambrowski, 8 A.D.3d 913, 778 N.Y.S.2d 733 [2004]). Contrary to Family Court's conclusion, this procedure is not altered by Family Ct. Act § 464(a), which permits Supreme Court to refer an application for support in a matrimonial action to Family Court and provides Family Court with jurisdiction to determine the application with the same powers possessed by Supreme Court (see e.g. Rossiter v. Rossiter, 56 A.D.3d 1011, n. 1, 869 N.Y.S.2d 624 [2008]; Zwickel v. Szajer, 47 A.D.3d 1157, 850 N.Y.S.2d 287 [2008]).

Costopoulos v. Ferguson, 74 A.D.3d 1457, 902 N.Y.S.2d 695 (3rd Dept.,2010):[90] [T]he father's current challenge to the amount of the children's expenses is not preserved for our review due to his failure to specifically object to the Support Magistrate's findings in that regard.

Kaplan v. Kaplan, 102 A.D.3d 873, 957 N.Y.S.2d 904 (2nd Dept.,2013): In a child support proceeding...the father appeals from an order of the Family Court...which denied his objections..finding that he willfully violated a child support order and directing him to pay the principal sum of $9,324.80 in arrears...The father's contentions are not properly before this Court, as they were not raised in his objections to the Support Magistrate's order.

[90] Glenda C. v. Wayne C., 100 A.D.3d 430, 953 N.Y.S.2d 213 (1st Dept.,2012); Suyunov v. Tarashchansky, 98 A.D.3d 744, 950 N.Y.S.2d 399 (2nd Dept.,2012).

WHERE PROOF OF SERVICE OF PROCESS IS STATUTORILY REQUIRED SUCH AS, IN THE FAMILY COURT, FAILURE TO FILE PROOF OF SERVICE IS A CONDITION PRECEDENT AND THE UNDERLYING PAPERS ARE NOT REVIEWABLE

Girgenti v. Gress, 85 A.D.3d 1166, 925 N.Y.S.2d 886 (2nd Dept. 2011):[91]
The issues raised by the father on this appeal are not reviewable, since he failed to file proof of service of a copy of the objections on the mother. Family Court Act § 439(e) provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order...Consequently, the Family Court lacked jurisdiction to consider the merits of the objections (cf. Matter of Perez v. Villamil, 19 A.D.3d 501, 502, 798 N.Y.S.2d 481), and the father waived his right to appellate review.

Burger v. Brennan, 77 A.D.3d 828, 909 N.Y.S.2d 370 (2nd Dept. 2010):
The issues raised by the father on this appeal are not reviewable. Family Court dismissed the father's objections on the ground that he failed to file adequate proof of service of a copy of the objections on the mother. In this regard, the purported affidavit of service filed by the father did not identify any date of alleged service. Notably, no rebuttal to the objections was filed by the mother. Family Court Act § 439(e) provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." By failing to file adequate proof of service of a copy of his objections on the mother, " 'the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order' "

Simpson v. Gelin, 48 A.D.3d 693, 850 N.Y.S.2d 913 (2nd Dept. 2008):
The issues raised by the father on this appeal are not reviewable by this Court (Matter of Suffolk County Commr. of Social Servs. [Roman] v. Carnegie, 12 A.D.3d 683, 784 N.Y.S.2d 886; Matter of Rinaldi v. Rinaldi, 239 A.D.2d 506, 657 N.Y.S.2d 443). Family Court Act § 439(e) provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." As the Family Court noted, the purported affidavit of service filed by the father did not

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[91] Chukwuogo v. Chukwuogo, 46 A.D.3d 558, 846 N.Y.S.2d 639 (2nd Dept.,2007), leave to appeal denied, 10 N.Y.3d 712, 891 N.E.2d 307, 861 N.Y.S.2d 272 (2008).

identify the person who allegedly served the mother with the objections. Further, the form affidavit was not signed and notarized, as required. This was tantamount to a complete failure to file any proof of service. “By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order”

DiFede v. DiFede, 99 A.D.3d 1003, 952 N.Y.S.2d 455 (2nd Dept.,2012):[92]
The issues raised by the father on this appeal are not reviewable. The Family Court properly denied the father's objections on the ground that he failed to file proof of service of a copy of the objections on the mother. Family Court Act § 439(e) provides, in pertinent part, that "[a] party filing objections shall serve a copy of such objections upon the opposing party," and that "[p]roof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal." By failing to file proof of service of a copy of his objections on the mother, the father failed to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order and, thus, failed to " exhaust the Family Court procedure for review of [his] objection'" (Matter of Semenova v Semenov, 85 AD3d 1036, 1037, quoting Matter of Davidson v Wilner, 214 AD2d 563). Consequently, the father waived his right to appellate review of the merits of his objections (Matter of Semenova v Semenov, 85 AD3d at 1037; Matter of Lusardi v Giovinazzi, 81 AD3d 958; Matter of Hidary v Hidary, 79 AD3d 880).

[92] Lawrence v. Bernier, 100 A.D.3d 634, 953 N.Y.S.2d 270 (2nd Dept.,2012) .

MISREPRESENTATIONS OF LAW:
COURTS "WILL NOT TOLERATE ATTEMPTS TO MISLEAD THE COURT THROUGH INACCURATE RENDITIONS OF CONTROLLING AUTHORITIES OR FACTS";
COUNSEL MAY NOT DO SO BEFORE ANY COURT

Truncated recitations of events or law are contemplated in these rulings. In **Peterson v. New York State Dept. of Correctional Services**, 100 A.D.2d 73, 473 N.Y.S.2d 473 (2nd Dept., 1984), the Second Department 'admonished" counsel:

> We again admonish counsel that we will not tolerate attempts to mislead the court through inaccurate renditions of controlling authorities or facts in briefs.

COUNSEL'S OBLIGATION TO CITE ADVERSE AUTHORITY

The former Code of Professional Responsibility imposed the "affirmative duty" of appellate advocacy "to advise the court of authorities adverse to his position."[93] This is continued in the current Rules of Professional Conduct – the Rules of Professional Conduct forbid counsel to posit false statements of law, non-meritorious or frivolous claims and defenses before any tribunal.

> Rule 3.1. Non-Meritorious Claims and Contentions provides:
> (a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.
>
> (b) A lawyer's conduct is "frivolous" [in relative part] for purposes of this Rule:
>
> > (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
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> Rule 3.3. Conduct Before a Tribunal, provides, in pertinent part:
> (a) A lawyer shall not knowingly:

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[93] La Cucina Mary Ann, Inc. v. State Liquor Authority, 150 A.D.2d 450, 541 N.Y.S.2d 220 (2nd Dept.,1989); Nachbaur v. American Transit Ins. Co., 300 A.D.2d 74, 752 N.Y.S.2d 605 (1st Dept., 2002), leave to appeal dismissed, 99 N.Y.2d 576 (2003), cert. denied, 538 U.S. 987 (2003): "We particularly disapprove of the failure of plaintiff's attorney to cite adverse authority."; Isabella City Carting Corp. v. Martinez, 15 A.D.3d 281, 789 N.Y.S.2d 494 (1st Dept., 2005); Tri Messine Const. Co. v. Martinez 15 A.D.3d 283, 790 N.Y.S.2d 24 (1st Dept.,2005): "We have previously explained that counsel has an obligation to bring adverse authority to the attention of this Court."

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

In **Cicio v. City of New York, 98 A.D.2d 38, 469 N.Y.S.2d 467 (2nd Dept.,1983)**, the Second Department admonished counsel engaging in inappropriate appellate practice:

The function of an appellate brief is to assist, not mislead, the court. Counsel have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration (Code of Professional Responsibility, DR 7-106, subd. [B], par. [1], EC 7-23 ...) We trust that this case will serve as a warning that counsel are expected to live up to the full measure of their professional obligation.

Amazon Coffee Co., Inc. v. Trans World Airlines, Inc., 111 A.D.2d 776, 490 N.Y.S.2d 523 (2nd Dept.,1985):[94]

"... in light of defendant's failure to draw this court's attention to the reversal of the United States District Court's decision in Denby v. Seaboard World Airlines, Inc., 575 F.Supp. 1134, revd. 737 F.2d 172, supra, we are granting costs to the plaintiff. Defendant's counsel, who relied on the lower court decision in Denby in his brief, was also counsel in the Denby case, and at the time the appeal in the instant case was submitted must have been, or should have been, aware of the reversal in Denby by the Second Circuit Court of Appeals several months earlier. There is no excuse for the failure to bring that fact to this court's attention (Cicio v. City of New York, 98 A.D.2d 38, 469 N.Y.S.2d 467 ...";

DEHORS-THE-RECORD DOCUMENTS IN THE RECORD ON APPEAL,

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[94] Bansi v. Flushing Hosp. Medical Center, 15 Misc.3d 215, 832 N.Y.S.2d 399 (Sup.Ct. Queens Co. 2007); Yellow Book of NY L.P. v. Dimilia 188 Misc.2d 489, 729 N.Y.S.2d 286 (N.Y.Dist.Ct., 2001): "DR 7-106(B) (22 NYCRR § 1200.37), requires a lawyer to cite 'controlling legal authority...directly adverse to the position of the client.' This has been extremely narrowly construed ... However, the Appellate Division, Second Department, apparently imposes upon counsel a broader "affirmative obligation to advise the court of authority adverse to his position."

COURTS "CONDEMN" SUCH PRACTICE,
MOTIONS TO STRIKE, ADD SUPPLEMENTAL BRIEF

Matters [dehors-the-record] will ordinarily be disregarded by the appellate court, permitted neither to buttress nor to weaken the case as the record shows it.[95]

> **Block v. Nelson, 71 A.D.2d 509, 423 N.Y.S.2d 34 (1st Dept. 1979):**[96]
> It is well established that review by this Court is limited by the record on appeal and the Court is bound by the certified record on appeal. Matter contained in the briefs, not properly presented by the record, is not to be considered by this Court (Mulligan v. Lackey, 33 A.D.2d 991, 992, 307 N.Y.S.2d 371, 373). With these rules in view, the appendix at the end of plaintiff's brief will be disregarded on this appeal. Likewise, those points in plaintiff's brief with no factual basis in the record will be rejected (emphasis provided).

> **Sprecher by Tenenbaum v. Port Washington Union Free School Dist., 166 A.D.2d 700, 561 N.Y.S.2d 284 (2nd Dept.,1990):**
> Preliminarily, we note that appellate review is limited to the record before the court of first instance (Broida v. Bancroft, 103 A.D.2d 88, 93, 478 N.Y.S.2d 333). Therefore, we have not considered the papers submitted in connection with the plaintiffs' unsuccessful motion for leave to reargue which were included in the record on appeal.

> **Block v. Magee, 146 A.D.2d 730, 537 N.Y.S.2d 215 (2nd Dept.,1989):**[97]

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[95] Siegel, N.Y. Prac. § 538 (5th ed.), Chapter 19, Appeals, E. Perfecting the Appeal.

[96] Chimarios v. Duhl 152 A.D.2d 508, 543 N.Y.S.2d 681 (1st Dept.,1989):
In connection with this appeal, the plaintiff requests leave of this court to file a supplemental record on appeal. To the extent that the plaintiff's proposed supplemental record is comprised wholly of information not available to the nisi prius court for its consideration, the motion is denied...In turn, the defendants and the third-party defendant have moved to strike matter from the plaintiff's brief which is similarly dehors the record. This court is limited to a review of facts and information contained in the record and that which may be judicially noticed (Broida, supra). The portions of plaintiff's reply brief that defendants request stricken fall into neither of these categories, therefore, the defendants' motion to strike is granted. Thus, in deciding the instant appeal, we do not take into consideration information contained within plaintiff's reply brief that is outside of the record.

Heinemeyer v. State Power Authority, 229 A.D.2d 841, 645 N.Y.S.2d 660 (3rd Dept. 1996), leave to appeal denied, 89 N.Y.2d 801 (1996).

[97] Mendoza v. Plaza Homes, LLC, 55 A.D.3d 692, 865 N.Y.S.2d 342 (2nd Dept. 2008).

Preliminarily, it is noted that appellate review is limited to the record made at the nisi prius court and, absent matters which may be judicially noticed, new facts may not be injected at the appellate level (Interfaith Med. Center v. Shahzad, 124 A.D.2d 557, 507 N.Y.S.2d 702).

This rule is inapplicable where the appellant is not injecting new facts, but is merely arguing questions of law. In that event, the rule is that an issue which was not raised before the nisi prius court is reviewable by this court if the question presented is one of law "which appeared upon the face of the record and which could not have been avoided by [the respondent] if brought to [his] attention at the proper juncture" (Matter of Knickerbocker Field Club v. Site Selection Bd. of City of N.Y., 41 A.D.2d 539, 540, 339 N.Y.S.2d 485; Matter of Burkins v. Scully, 108 A.D.2d 743, 744, 485 N.Y.S.2d 89; Matter of Block v. Franklin Sq. Union Free School Dist., 72 A.D.2d 602, 421 N.Y.S.2d 107) *[see above]*.

Courts "Condemn" Dehors-the-Record Documents
which Are Not Properly Part of the Record on Appeal
Liebling v. Liebling 146 A.D.2d 673, 537 N.Y.S.2d 46 (2nd Dept.,1989):
We condemn the inclusion by the husband of documents in the appendix which are not properly part of the record of appeal (Ro–Stan Equities v. Schechter, 44 A.D.2d 577, 353 N.Y.S.2d 224), as well as his failure to settle the transcript in accordance with the rules of this court (22 NYCRR 699.10).

Terner v. Terner 44 A.D.2d 702, 354 N.Y.S.2d 161 (2nd 1974):
In a brief...a copy of an affidavit was included which was not properly part of the record on appeal. This practice must be severely condemned (cf. Golden v. Golden, 37 A.D.2d 578, 323 N.Y.S.2d 714). Counsel do not help their cases by attaching to briefs matter dehors the record.

People v. Smith, 206 A.D.2d 102, 618 N.Y.S.2d 649 (1st Dept.,1994):
The appendix materials were obtained by the Legal Aid Society in January of 1994, in an unrelated case pending in the Bronx, several months after the Supreme Court entered the orders appealed from herein. Since these materials were not before the justices who decided the motions, they are not a part of the record on appeal, and may not be considered by this Court.

APPELLANT IS "OBLIGATED TO ASSEMBLE A PROPER RECORD ON APPEAL" TO "ENABLE AN INFORMED DETERMINATION ON THE MERITS"

> CPLR 5526, "content and form of record on appeal", directs, in pertinent part:
> "The record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, *the papers and other exhibits upon which the judgment or order was founded* and any opinions in the case" (emphasis provided).

It is settled law that the appellant bears the burden of "assembling a proper record on appeal", which must comport with CPLR 5526, at the pain of a striking of the record and dismissal of the appeal because "[w]ithout the benefit of a proper record, this Court cannot "render an informed decision on the merits" *[Lynch v. Consolidated Edison, Inc.*, 82 A.D.3d 442 (1st Dept., 2011); *Quezada v. Mensch Management Inc.*, 89 A.D.3d 647 (1st Dept.,2011); *Fernald v. Vinci*, 13 A.D.3d 333, 334, 786 N.Y.S.2d 211, 212 (2nd Dept.,2004)*]*.

A " 'proper record on appeaal' must include any relevant transcripts of proceedings before the Supreme Court" *[Waterside Estates at Cresthaven Homeowners Ass'n, Inc. v. Ciafone*, 108 A.D.3d 620, 968 N.Y.S.2d 388 (2nd Dept.,2013); *Kruseck v. Ross*, 82 A.D.3d 939, 918 N.Y.S.2d 727 (2nd Dept. 2011)*]* "to enable an [appellate] court to render an informed decision on the merits."

"An appellant's failure to provide a necessary transcript or pertinent exhibits inhibits the court's ability to render an informed decision on the merits of the appeal (internal cites omitted) Appeals that are not based upon complete and proper records must be dismissed" *[Garnerville Holding Co., Inc. v. IMC Management, Inc.*, 299 A.D.2d 450, 451, 749 N.Y.S.2d 892, 893 (2nd Dept. 2002); *Aurora Industries, Inc. v. Halwani*, 102 A.D.3d 900, 958 N.Y.S.2d 479 (2nd Dept.,2013)

"The record is inadequate to enable this Court to render an informed decision on the merits, and therefore, the appeal must be dismissed" *[Neunteufel v. Nelnet Loan Services, Inc.*, 104 A.D.3d 657, 959 N.Y.S.2d 923 (2nd Dept.,2013); In re Lynch, 98 A.D.3d 510, 49 N.Y.S.2d 454 (2nd Dept.,2012); *Smith v. Imagery Media, LLC*, 95 A.D.3d 1204, 945 N.Y.S.2d 133 (2nd Dept.,2012); *Butti v. Butti*, 92 A.D.3d 781, 938 N.Y.S.2d 458 (2nd Dept. 2012).*]*

> Prof. David Siegel, N.Y. Prac. § 538 (5th ed.), states:
> The appellant may not put the record together selectively; he may not include only materials favorable to his own side while omitting matter favorable to the other [citing *2001 Real Estate v. Campeau Corp. (U.S.), Inc.*, 148 A.D.2d 315, 538 N.Y.S.2d 531 (1st Dept. 1989)].

> **Kruseck v. Ross, 82 A.D.3d 939, 918 N.Y.S.2d 727 (2nd Dept. 2011):**
> It is the obligation of the appellant to assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court (Rivera v. City of New York, 80 A.D.3d 595, 915 N.Y.S.2d 281; Vandenburg &

Feliu, LLP v. Interboro Packaging Corp., 70 A.D.3d 931, 932, 896 N.Y.S.2d 111; Marcantonio v. Picozzi, 46 A.D.3d 522, 523, 846 N.Y.S.2d 647). [P]laintiffs seek review of an order which denied their motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of the defendant and against them on the issue of liability, yet they failed to include the trial transcript in the record on appeal. The record is inadequate to enable this Court to render an informed decision on the merits, and therefore, the appeal must be dismissed (Schwartz v. Schwartz, 73 A.D.3d 1156, 1156–1157, 902 N.Y.S.2d 127; Nakyeoung Seoung v. Vicuna, 38 A.D.3d 734, 735, 830 N.Y.S.2d 911; Gerhardt v. New York City Tr. Auth., 8 A.D.3d 427, 778 N.Y.S.2d 536; Matison v. County of Nassau, 290 A.D.2d 494, 495, 736 N.Y.S.2d 115).

Butti v. Butti, 92 A.D.3d 781, 938 N.Y.S.2d 458 (2nd Dept. 2012):
An appellant is obligated "to assemble a proper record on appeal, which must include any relevant transcripts of proceedings" before the hearing court or trial court (Kruseck v. Ross, 82 A.D.3d 939, 940, 918 N.Y.S.2d 727; see CPLR 5525...Kociubinski v. Kociubinski, 83 A.D.3d 1006, 1007, 921 N.Y.S.2d 566; Schwartz v. Schwartz, 73 A.D.3d 1156, 902 N.Y.S.2d 127). [T]he appellant's failure to provide this Court with the transcript of the Family Court hearing renders the record on appeal inadequate to enable this Court to reach an informed determination on the merits. Accordingly, the appeal must be dismissed ...

Clarke v. Clarke, 90 A.D.3d 690, 934 N.Y.S.2d 345 (2nd Dept.,2011):
An appellant is obligated "to assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court" (CPLR 5525[a]; 5526...). The record must also "contain all of the relevant papers that were before the Supreme Court, including the transcript, if any, of the proceedings" (Matison v County of Nassau, 290 AD2d 494, 494).

Here, the plaintiff appeals from a judgment which, inter alia, failed to direct the defendant to pay child support arrears, failed to award the plaintiff maintenance, and failed to equitably distribute the value of the defendant's medical license. However, the plaintiff's failure to provide this Court with the full transcript of the nonjury trial conducted before the Supreme Court renders the record on appeal inadequate to enable this Court to reach an informed determination on the merits. Thus, the appeal must be dismissed.

Gorelik v. Gorelik, 85 A.D.3d 859, 926 N.Y.S.2d 555 (2nd Dept.,2011):
We do not reach the plaintiff's remaining contentions. "It is the obligation of the appellant to assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court" ...(Rivera v. City of New York, 80 A.D.3d 595, 915 N.Y.S.2d 281; Vandenburg & Feliu, LLP v. Interboro Packaging Corp., 70 A.D.3d 931, 932, 896 N.Y.S.2d 111). The plaintiff seeks review of the judgment awarding the defendant the principal sum of $12,257, representing his pro rata share of the children's unreimbursed medical expenses

and 100% of their summer camp expenses, made after a hearing was held to determine the validity and reasonableness of the claimed expenses. However, the plaintiff has failed to include the hearing transcripts in the record on appeal. Accordingly, the record is inadequate to enable this Court to render an informed decision on the remaining issues raised in the plaintiff's brief (Rivera v. City of New York, 80 A.D.3d at 595, 915 N.Y.S.2d 281; Vandenburg & Feliu, LLP v. Interboro Packaging Corp., 70 A.D.3d at 932, 896 N.Y.S.2d 111), including the propriety of the amounts awarded.

-- Necessary Papers for Appendix Method

Reale v. Reale, 104 A.D.3d 747, 961 N.Y.S.2d 484 (2nd Dept.,2013):
" 'An appellant who perfects an appeal by using the appendix method must file an appendix that contains all the relevant portions of the record in order to enable the court to render an informed decision on the merits of the appeal' " (Gandolfi v. Gandolfi, 66 A.D.3d 834, 835, 886 N.Y.S.2d 617, quoting NYCTL 1998–1 Trust v. Shahipour, 29 A.D.3d 965, 965, 815 N.Y.S.2d 479 [internal quotation marks omitted]; see Mure v. Mure, 92 A.D.3d 653, 937 N.Y.S.2d 870). "The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent" (22 NYCRR 670.10.2[c][1]; see CPLR 5528[a][5]; Mure v. Mure, 92 A.D.3d at 653, 937 N.Y.S.2d 870). Here, the plaintiff omitted from his appendix certain evidence proffered by the defendant at the trial relating to the plaintiff's restaurant business. This omission "inhibit[s] the court's ability to render an informed decision on the merits of the appeal" (Matter of Embro v. Smith, 59 A.D.3d 542, 542, 872 N.Y.S.2d 291 [internal quotation marks omitted]; see Mure v. Mure, 92 A.D.3d at 653, 937 N.Y.S.2d 870). Accordingly, the appeal from so much of the judgment as directed the plaintiff to pay the defendant the sum of $62,500, representing the defendant's share of the plaintiff's restaurant business, must be dismissed.

Appellant's Failure to Assemble a Proper Record
Is "Highly Unprofessional" and "Can Only Be Deplored"

2001 Real Estate v. Campeau Corp. (U.S.), Inc., 148 A.D.2d 315, 538 N.Y.S.2d 531 (1st Dept. 1989), calls the failure to present a "proper record" "deplorable" and "highly unprofessional":

> [T]hird-party defendant prepared a record which selectively failed to include many motion papers and supporting exhibits which had been submitted by the opposing party in the Supreme Court and were an integral part of the record before that court. In that regard, CPLR 5526 provides that the "record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other

exhibits upon which the judgment or order was founded and any opinions in the case" (emphasis added). The omission from the appeal record by third-party defendant of much of the record before the Supreme Court, specifically documents filed by third-party plaintiff, is not only in violation of the statute but is highly unprofessional as well. It appears that third-party defendant was only interested in having this court examine fully its own arguments and not those presented by the other side. Accordingly, third-party plaintiff was compelled to submit its own extensive supplemental record on appeal, which is nearly three times the length of the original record on appeal. The failure by third-party defendant to file a full and complete record can only be deplored.]

Motion to Strike the Record

Owen v. BLC Fly Fishers Inc., 262 A.D.2d 922, 692 N.Y.S.2d 510 (3rd Dept.,1999):
Plaintiffs have moved to strike an affidavit submitted by defendant as an appendix to its appellate brief. Inasmuch as this affidavit was not included in the record submitted and certified by plaintiffs' counsel and, further, given defendant's failure to move to strike the record and replace it, we can only conclude that this affidavit is a matter dehors the record and hence cannot properly be considered on this appeal...Plaintiff's motion to strike is accordingly granted.

Vermont Federal Bank v. Chase, 226 A.D.2d 1034, 641 N.Y.S.2d 440 (3rd Dept.,1996):
Chase has objected to plaintiff's belated submission of an appendix/supplemental record to its brief for inclusion in the record on appeal which Chase had already certified and filed. Chase objects that the late submission is improper as it contains matter outside the record and is uncertified. Plaintiff made no motion to strike the record and replace it. Accordingly, plaintiff's late submission is improper and will not be considered on this appeal

MUST ALERT THE COURT IF THE SAME ARGUMENT WAS RAISED IN A PRIOR APPEAL OR EVEN BEFORE A TRIAL COURT AND LOST

Isabella City Carting Corp. v. Martinez, 15 A.D.3d 281, 789 N.Y.S.2d 494 (1st Dept., 2005):[1]

[W]e note with disapproval that counsel for petitioner has brought approximately 70 proceedings in this Court and the Second Department, in which the same or similar arguments have been repeatedly raised, and has failed to mention in his appellate briefs the existence of case law rejecting his arguments. We have previously explained that counsel has an obligation to bring adverse authority to the attention of this Court.

People v. Whelan, 165 A.D.2d 313, 567 N.Y.S.2d 817 (2nd Dept., 1991), appeal denied, 78 N.Y.2d 927, 573 N.Y.S.2d 480 (1991):

FN3. We are disturbed by the failure of the defendant's counsel [] to refer in his brief to People v. Scalzo, since he was the attorney of record for Scalzo and had to know of that decision. "The function of an appellate brief is to assist, not mislead, the court" (Matter of Cicio v. City of New York, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467).

[1] Tri Messine Const. Co. v. Martinez, 15 A.D.3d 283, 790 N.Y.S.2d 24 (1st Dept., 2005).

➤ MOUNTAIN VIEW DOCTRINE – STARE DECISIS

Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2nd Dept.,1984)

Plaintiff appeals from so much of a judgment of the Supreme Court, Dutchess County, as dismissed its claim for damages for loss of use of a bus placed out of service as a result of defendant's negligence. The core issue is whether damages for loss of use are interdicted because plaintiff did not hire a substitute bus, utilizing one it maintained in reserve instead. We hold that loss of use damages are recoverable in such circumstances and decline to follow two Third Department cases to the contrary.

[A] collision occurred between a bus owned by the plaintiff and a motor vehicle owned by the defendant. The parties stipulated that the defendant was negligent, that the cost of repairs was $983.23, that the damages sustained for loss of use were $3,200, and that the facts supporting the claim for loss of use were the same as those in the two Third Department cases (Mountain View Coach Lines v. Gehr, supra; Mountain View Coach Lines v. Hartnett, supra), i.e., that no substitute was hired by the plaintiff during the period of repairs, plaintiff having substituted one of its own buses for the damaged bus. The loss of use claim was thus submitted to the Supreme Court as an issue of law, and was dismissed solely on constraint of the Third Department cases. We reverse the judgment insofar as appealed from and remit the case to the Supreme Court, Dutchess County, for entry of a judgment awarding plaintiff damages for loss of use.

[1] At the outset, we note that if the Third Department cases were, in fact, the only New York authorities on point, the trial court followed the correct procedural course in holding those cases to be binding authority at the nisi prius level. The Appellate Division is a single statewide court divided into departments for administrative convenience (see Waldo v. Schmidt, 200 N.Y. 199, 202; Project, The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court, 47 Ford L.Rev. 929, 941) and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (see, e.g., Kirby v. Rouselle Corp., 108 Misc.2d 291, 296, 437 N.Y.S.2d 512; Matter of Bonesteel, 38 Misc.2d 219, 222, 238 N.Y.S.2d 164, affd. 16 A.D.2d 324, 228 N.Y.S.2d 301; 1 Carmody-Wait 2d, N.Y.Prac., § 2:63, p. 75). This is a general principle of appellate procedure (see, e.g., Auto Equity Sales v. Superior Court of Santa Clara County, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937; Chapman v. Pinellas County, 423 So.2d 578, 580 [Fla.App.]; People v. Foote, 104 Ill.App.3d 581, 60 Ill.Dec. 355), necessary to maintain uniformity and consistency (Lee v. Consolidated Edison Co. of N.Y., 98 Misc.2d 304, 306, 413 N.Y.S.2d 826), and, consequently, any cases holding to the contrary (see, e.g.,

People v. Waterman, 122 Misc.2d 489, 495, n. 2, 471 N.Y.S.2d 968) are disapproved.

[2] [3] Such considerations do not, of course, pertain to this court. While we should accept the decisions of sister departments as persuasive (see, e.g., Sheridan v. Tucker, 145 App.Div. 145, 147, 129 N.Y.S. 18; 1 Carmody-Wait 2d, N.Y.Prac., § 2:62; cf. Matter of Ruth H., 26 Cal.App.3d 77, 86, 102 Cal.Rptr. 534), we are free to reach a contrary result (see, e.g., Matter of Johnson, 93 A.D.2d 1, 16, 460 N.Y.S.2d 932, revd. on other grounds 59 N.Y.2d 461, 465 N.Y.S.2d 900; State v. Hayes, 333 So.2d 51, 53 [Fla.App.]; Glasco Elec. Co. v. Department of Revenue, 87 Ill.App.3d 1070, 42 Ill.Dec. 896, affd. 86 Ill.2d 346, 56 Ill.Dec. 10, 427 N.E.2d 90). Denial of leave to appeal by the Court of Appeals is, of course, without precedential value (Giblin v. Nassau County Med. Center, 61 N.Y.2d 67, 76, n., 471 N.Y.S.2d 563). We find the Third Department decisions little more than a "conclusory assertion of result", in conflict with settled principles, and decline to follow them (People v. Hobson, 39 N.Y.2d 479, 490, 384 N.Y.S.2d 419).

First Department
– Approval

Nachbaur v. American Transit Ins. Co., **300 A.D.2d 74, 752 N.Y.S.2d 605, (1st Dept., 2002), leave to appeal dismissed, 99 N.Y.2d 576, 755 N.Y.S.2d 709 (2003), cert. denied, 538 U.S. 987, 123 S.Ct. 1801 (2003):**
We particularly disapprove of the failure of plaintiff's attorney to cite adverse authority. The failure is especially glaring in this case since plaintiff's attorney represented the losing appellant in Bettan (supra), a Second Department case issued a matter of weeks before plaintiff's reply brief on the instant appeal was submitted, which precisely addresses five out of six of plaintiff's causes of action as well as the issue of class certification (Amazon Coffee Co. v. Trans World Airlines, 111 A.D.2d 776, 778, 490 N.Y.S.2d 523) and, unless and until overruled or disagreed with by this Court, is "controlling" authority that plaintiff's attorney was obligated to bring to the attention of this Court (Matter of Cicio v. City of New York, 98 A.D.2d 38, 469 N.Y.S.2d 467; Merl v. Merl, 128 A.D.2d 685, 513 N.Y.S.2d 184; Mtn. View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664-665, 476 N.Y.S.2d 918).

--See:
People v. Shakur, 215 A.D.2d 184, 627 N.Y.S.2d 341 (1st Dept. 1995);

People v. Gundarev, **25 Misc.3d 1204(A), 901 N.Y.S.2d 909(U) (N.Y.City Crim.Ct. Kings Co., 2009)**.

– Lower court decisions are not on terra firma.

Sasson v. Gissler, 11 Misc.3d 1063(A), 816 N.Y.S.2d 701(U) (N.Y.City Civ.Ct., NY Co. 2005):
I therefore find that pursuant to Gloveman, 18 AD3d 812, **which likely binds me** in the absence of a First Department decision interpreting Wolinsky (see Mountain View Coach Lines v. Storms, 102 A.D.2d 663, 664 [2d Dept 1984]; Pestana, 195 Misc.2d at 836-838), respondent's loft unit is not protected under the ETPA, even though it is capable of being legalized.

Trial Courts and the Appellate Term

Trial courts do not consider themselves bound by Appellate Term decisions in other Departments.

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AGE OF A CASE: OLD CASES REMAIN VIABLE

People v. Turner, 5 N.Y.3d 476, 482, 806 N.Y.S.2d 154 (2005):
Appellate counsel's apparent conclusion that Di Pasquale was not worth citing was not a reasonable one, even by the undemanding standard we apply in ineffective-assistance cases. *Di Pasquale* (People v. Di Pasquale, 161 A.D. 196, 146 N.Y.S. 523 (3rd Dept.,1914)) though old, was still a valid precedent, binding on all trial-level courts in the state (Mountain View Coach Lines v. Storms, 102 A.D.2d 663, 664-665, 476 N.Y.S.2d 918 [2d Dept.1984]) and entitled to respect by appellate courts.

-- See:
"Which Appellate Division Rulings Bind Which Trial Courts? Stare Decisis And The Case For The 'Mountain View' Doctrine, Michael Gordon, NYLJ, 9/8/09.

Section 202.7. Calendaring of motions; uniform notice of motion form; affirmation of good faith

Not treated like FCA § 439(e) where failure to file precludes appealability.

➤➤ (a) There shall be compliance with the procedures prescribed in the CPLR for the bringing of motions. In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

(c) The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.

First Department: **Not Necessary where Effort Would Be "Futile"**

Carrasquillo ex rel. Rivera v. Netsloh Realty Corp., 279 A.D.2d 334, 719 N.Y.S.2d 57 (1st Dept.,2001):[2]
Under the unique circumstances of this case and in light of the frequency with which both sides have resorted to judicial intervention in discovery disputes in the three years prior to the instant motion to strike the note of issue, the failure of defendants to include an affirmation of good faith is excusable because any effort to resolve the present dispute non-judicially would have been "futile"...We find, however, that it was an improvident exercise of discretion for the motion court to have made any directive unavoidably requiring the production of medical records pertaining to the nonparty birth mother, who does not appear to have been served with the motion...

Scaba v. Scaba, 99 A.D.3d 610, 953 N.Y.S.2d 27 (1st Dept.,2012):
Defendant contends that plaintiff's motion should have been denied for her failure to comply with 22 NYCRR 202.7. However, this Court has excused compliance with that rule where, as here, any effort to resolve the dispute non-judicially would have been futile.

Diamond State Ins. Co. v. Utica First Ins. Co., 67 A.D.3d 613, 889 N.Y.S.2d

[2] Northern Leasing Systems, Inc. v. Estate of Turner, 82 A.D.3d 490, 918 N.Y.S.2d 413 (1st Dept.,2011); Baulieu v. Ardsley Associates L.P., 84 A.D.3d 666, 923 N.Y.S.2d 326 (1st Dept. 2011).

566 (1st Dept.,2009):
Defendant's behavior was particularly reprehensible because defendant not only violated the motion court's conference orders, but also endeavored to undermine an appellate order by limiting its search to only a small percentage of its potentially relevant files. Defendant contends that the striking of its pleadings was unwarranted because plaintiff had not submitted proof of any good faith effort to resolve its disagreement with defendant (22 NYCRR 202.7[a][2]). But in light of defendant's multiple delays and violations of repeated court orders, its numerous improper objections to practically every demand for disclosure made by plaintiff, its unjustifiable limitation of the search of its files, its continued refusal to produce responsive documents and its utter failure to account for its behavior, the motion court, under the unique facts of this case, appropriately found it would have been futile to compel plaintiff to confer once more with defendant as a condition for moving to strike its pleadings.

Second Department – Appears to Require Strict Compliance with § 202.7
-- No Contrary Cases

Greenfield v. Board of Assessment Review for Town of Babylon, 106 A.D.3d 908, 965 N.Y.S.2d 555 (2nd Dept.,2013):[3]
The Supreme Court properly denied that branch of the petitioner/plaintiff's motion which was to compel certain disclosure on the ground that he failed to submit an affirmation of good faith pursuant to 22 NYCRR 202.7(a)(2) detailing communications between the parties evincing a diligent effort to resolve the dispute, or indicating good cause why no such communications occurred.

Zorn v. Bottino, 18 A.D.3d 545, 794 N.Y.S.2d 659 (2nd Dept.,2005):
The Supreme Court providently exercised its discretion in adhering to its denial of the appellants' motion to strike the plaintiff's amended bill of particulars, and in denying that branch of the appellants' motion which was for leave to renew. The appellants did not submit an affirmation of good faith in connection with the original motion, as required by 22 NYCRR 202.7. Further, the omission was not cured by the appellants' subsequent submission asserting that the good-faith effort to resolve the issue was not made until after the motion was brought due to “time constraints” (Barnes v. NYNEX, Inc., 274 A.D.2d 368, 711 N.Y.S.2d 893).

Quiroz v. Beitia, 68 A.D.3d 957, 893 N.Y.S.2d 70 (2nd Dept.,2009):
Wyckoff Imaging's motion to dismiss the Medical Center's cross claim based upon the Medical Center's failure to respond to Wyckoff Imaging's discovery demands was properly denied. Wyckoff Imaging failed to provide an affirmation of a good-faith effort to resolve any discovery disputes as required by 22 NYCRR 202.7 (Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium, 51 A.D.3d 784, 857 N.Y.S.2d 697; Barnes v. NYNEX, Inc., 274 A.D.2d 368, 711

[3] Romero v. Korn 236 A.D.2d 598, 654 N.Y.S.2d 38 (2nd Dept.,1997)

N.Y.S.2d 893). In any event, Wyckoff Imaging failed to establish that any alleged failure by the Medical Center to comply with its discovery demands was the result of willful or contumacious conduct (Savin v. Brooklyn Mar. Park Dev. Corp., 61 A.D.3d 954, 954–955, 878 N.Y.S.2d 178; Diel v. Rosenfeld, 12 A.D.3d 558, 784 N.Y.S.2d 379; Dennis v. City of New York, 304 A.D.2d 611, 613, 758 N.Y.S.2d 661; Ploski v. Riverwood Owners Corp., 284 A.D.2d 316, 725 N.Y.S.2d 886).

Natoli v. Milazzo, 65 A.D.3d 1309, 886 N.Y.S.2d 205 (2nd Dept.,2009):
The court should have denied the cross motion because the affirmation of good faith submitted by the plaintiffs' counsel was insufficient, as it did not refer to any communications between the parties that would evince a diligent effort by the plaintiffs to resolve the discovery dispute (see 22 NYCRR 202.7[c]; Amherst Synagogue v. Schuele Paint Co., Inc., 30 A.D.3d 1055, 1056–1057, 816 N.Y.S.2d 782; Cestaro v. Chin, 20 A.D.3d 500, 501, 799 N.Y.S.2d 143; see also Baez v. Sugrue, 300 A.D.2d 519, 521, 752 N.Y.S.2d 385).

Third Department – Has a Futility Exception

Qian v. Dugan, 256 A.D.2d 782, 681 N.Y.S.2d 408 (3rd Dept.,1998):
Supreme Court did not err in precluding plaintiff from eliciting expert testimony regarding the value of the art objects that perished in the fire, for plaintiff's disclosure as to the substance of his appraisers' anticipated testimony did not, as Supreme Court observed, satisfy the statutory criteria (see, e.g., Chapman v. State of New York, 189 A.D.2d 1075, 593 N.Y.S.2d 104; Brossoit v. O'Brien, 169 A.D.2d 1019, 1020–1021, 565 N.Y.S.2d 299). Despite having been made aware of the ways in which defendant viewed the proffered summary of this testimony as incomplete, plaintiff still made no attempt to redress these defects prior to trial. In light of this, it would clearly have been futile (although plaintiff would have us conclude otherwise) for defendant to undertake further “good faith efforts” (see, 22 NYCRR 202.7[a]; Koelbl v. Harvey, 176 A.D.2d 1040, 575 N.Y.S.2d 189) toward resolving this dispute prior to seeking judicial intervention (see, Gardner v. Kawasaki Heavy Indus., 213 A.D.2d 840, 841–842, 623 N.Y.S.2d 416). Moreover, plaintiff's failure to make any effort to augment his responses, even after having been apprised of defendant's challenge to the level of detail provided, constitutes ample basis for concluding that plaintiff's lack of compliance was “intentional or willful” (see, Tleige v. Troy Pediatrics, 237 A.D.2d 772, 774, 654 N.Y.S.2d 486; Fuoco v. County of Nassau, 223 A.D.2d 668, 669, 637 N.Y.S.2d 428).

Gardner v. Kawasaki Heavy Industries Ltd., 213 A.D.2d 840, 623 N.Y.S.2d

416 (3rd Dept.,1995):
We agree with Supreme Court that Kawasaki's claim that plaintiff did not comply with the "good faith effort" requirement set forth in 22 NYCRR 202.7(a)(2) lacks merit, particularly in view of Kawasaki's stated position that it had given plaintiff all that "we believe you are reasonably entitled to".

Koelbl v. Harvey, 176 A.D.2d 1040, 575 N.Y.S.2d 189 (3rd Dept.,1991):
In August 1988, defendants served a demand for a bill of particulars upon plaintiffs. In September 1990 defendants moved for an order of absolute preclusion, alleging plaintiffs' failure to respond to the demand, to serve a bill of particulars, or to move to vacate or modify the demand....Plaintiffs [] served a bill of particulars and affidavits in opposition to defendants' motion. Supreme Court denied the motion and defendants appeal.

[1] [2] We affirm. There is no question that defendants failed to fulfill the requirement of 22 NYCRR 202.7(a)(2) that, with respect to a motion relating to a bill of particulars, "no motion shall be filed with the court unless there ha[s] been served and filed with the motion papers * * * an affirmation that counsel has conferred with * * * the opposing party in a good faith effort to resolve the issues raised by the motion". Accordingly, Supreme Court was justified in summarily denying defendants' motion (Eaton v. Chahal, 146 Misc.2d 977, 983, 553 N.Y.S.2d 642). Contrary to the position taken by defendants that it was not their obligation to make a further request for a bill of particulars or to serve "reminders" upon plaintiffs, they were required to communicate with plaintiffs in a good-faith effort to obtain the requested particulars without filing a motion with Supreme Court (see, id., at 982, 553 N.Y.S.2d 642)....Under the circumstances, and in view of the fact that plaintiffs have now served a bill of particulars, we need not consider the merits of defendants' motion.

Fourth Department – Has a "Futility" Exception

Yargeau v. Lasertron, 74 A.D.3d 1805, 904 N.Y.S.2d 840 (4th Dept.,2010):
Supreme Court erred in granting plaintiffs' motion, and we therefore modify the order accordingly. Plaintiffs failed to comply with 22 NYCRR 202.7(a). Pursuant to that regulation, a movant seeking to compel disclosure is required to serve and file "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." "The affirmation of the good faith effort 'shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions' "...It is well established that the failure to file that affirmation or a deficiency in that affirmation may justify denial of a motion to compel (Natoli v. Milazzo, 65 A.D.3d 1309, 1310–1311, 886 N.Y.S.2d 205; Kane v. Shapiro, Rosenbaum, Liebschutz, & Nelson, L.L.P., 57 A.D.3d 1513, 871 N.Y.S.2d 794; Amherst Synagogue, 30 A.D.3d at 1056–1057, 816 N.Y.S.2d 782). The failure to include the good faith

affirmation may be excused, however, where “any effort to resolve the present dispute non-judicially would have been ‘futile’ ” Carrasquillo v. Netsloh Realty Corp., 279 A.D.2d 334, 334, 719 N.Y.S.2d 57; see Diamond State Ins. Co. v. Utica First Ins. Co., 67 A.D.3d 613, 889 N.Y.S.2d 566; Qian v. Dugan, 256 A.D.2d 782–783, 681 N.Y.S.2d 408). In Carrasquillo, the Court determined that such efforts would have been futile “[u]nder the unique circumstances of [that] case and in light of the frequency with which both sides have resorted to judicial intervention in discovery disputes in the three years prior to the instant motion” (279 A.D.2d at 334, 719 N.Y.S.2d 57). In Diamond State Ins. Co., the effort was deemed futile “in light of [the] defendant's multiple delays and violations of repeated court orders, its numerous improper objections to practically every demand for disclosure made by [the] plaintiff, its unjustifiable limitation of the search of its files, its continued refusal to produce responsive documents and its utter failure to account for its behavior” (67 A.D.3d at 613, 889 N.Y.S.2d 566). In Qian, any effort would have been futile because, “[d]espite having been made aware of the ways in which [the] defendant viewed the proffered summary of [the] testimony [in question] as incomplete, [the] plaintiff still made no attempt to redress [those] defects prior to trial” (256 A.D.2d at 782, 681 N.Y.S.2d 408).

Amherst Synagogue v. Schuele Paint Co., Inc., 30 A.D.3d 1055, 816 N.Y.S.2d 782 (4th Dept.,2006):

We further conclude in any event that the court should have denied defendants' motion in its entirety because defendants' affirmation setting forth that defendants' counsel conferred with plaintiff's counsel in a good faith effort to resolve the discovery dispute was deficient (see Uniform Rules for Trial Cts. [22 NYCRR] § 202.7[a][2]; Cestaro v. Mun Yuen Roger Chin, 20 A.D.3d 500, 799 N.Y.S.2d 143). The affirmation of the good faith effort “shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions” (§ 202.7[c]). Here, after plaintiff objected to the interrogatories and responded in part and objected in part to the discovery demands, defendants made no effort to modify or simplify the demands. Instead, they informed plaintiff in two letters that plaintiff's rejection of their discovery demands was improper, and they demanded responses to their requests. Defendants thus “failed to demonstrate that they made a diligent effort to resolve this discovery dispute” (Baez v. Sugrue, 300 A.D.2d 519, 521, 752 N.Y.S.2d 385).

EFFECTIVE COUNSEL – BRIEFING EVERY ARGUMENT?

People v. Ramchair, 8 N.Y.3d 313, 832 N.Y.S.2d 889 (2007); People v. Turner, 5 N.Y.3d 476, 806 N.Y.S.2d 154 (2005); People v. Stultz, 2 N.Y.3d 277, 778 N.Y.S.2d 431 (2004):

Appellate advocacy is meaningful if it reflects a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument. Effective appellate representation by no means requires counsel to brief or argue every issue that may have merit. When it comes to the choice of issues, appellate lawyers have latitude in deciding which points to advance and how to order them. With that in mind, we turn to the claim before us.

ASSIGNMENT OF NEW COUNSEL WHEN ASSIGNED COUNSEL DOES NOT DEMONSTRATE HAVING ACTED "AS AN ACTIVE ADVOCATE HIS CLIENT'S BEHALF"

In re Kenneth S., 104 A.D.3d 951, 961 N.Y.S.2d 577 (2nd Dept.,2013):
In two related child custody proceedings pursuant to Family Court Act article 6, Bethzaida P. appeals from an order of the Family Court which denied her motion to vacate an order of the same court, awarding custody of the subject children to Kenneth S. upon her default in appearing at a hearing. The mother's assigned counsel has submitted a brief in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, in which he moves for leave to withdraw as counsel. The brief...is deficient because it fails to adequately analyze potential appellate issues or highlight facts in the record that might arguably support the appeal (Matter of Dylan Mc. [Michelle M. Mc.], 95 A.D.3d 1016, 943 N.Y.S.2d 767; Matter of Giovanni S. [Jasmin A.], 89 A.D.3d 252, 931 N.Y.S.2d 676).

Since the brief does not demonstrate that assigned counsel acted "as an active advocate on behalf of his ... client" (Matter of Giovanni S. [Jasmin A.], 89 A.D.3d at 256, 931 N.Y.S.2d 676 [internal quotation marks omitted]), or that he diligently examined the record, we must assign new counsel to represent the appellant (see People v. Singleton, 101 A.D.3d 909, 954 N.Y.S.2d 910; People v. Brown, 96 A.D.3d 869, 946 N.Y.S.2d 254; Matter of Dylan Mc. [Michelle M. Mc.], 95 A.D.3d 1016, 943 N.Y.S.2d 767).

LOWER COURT MUST STRICTLY CONFORM TO
THE REMITTITUR ON REMAND

Breidbart v. Wiesenthal, 93 A.D.3d 751, 940 N.Y.S.2d 302 (2nd Dept.,2012):
A trial court, upon remittitur from a higher court, must obey the mandate of the higher court.

Wiener v. Wiener, 10 A.D.3d 362, 780 N.Y.S.2d 759 (2nd Dept.,2004);
Family Court Act § 467(a) permits the Supreme Court to refer an application to modify visitation to the Family Court. The Supreme Court's June 18, 2003, order was, however, contrary to and beyond the scope of the March 17, 2003, remittitur (Gittelson v. Gittelson, 263 A.D.2d 527, 693 N.Y.S.2d 212). "It is well settled that a trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith" (United States v. Pink, 36 N.Y.S.2d 961, 965). "The judgment or order entered by the lower court on a remittitur must conform strictly to the remittitur, and it cannot afterwards be set aside or modified by the lower court" (Matter of Minister, Elders and Deacons of the Reformed P.D. Church of City of N.Y. v. Municipal Court of City of N.Y., Borough of Manhattan, 185 Misc. 1003, 1007, 57 N.Y.S.2d 864, affd. 270 App.Div. 993, 63 N.Y.S.2d 214, affd. 296 N.Y. 822).

If the remittitur is erroneous in any respect, or if there is any uncertainty as to the effect of the language employed, the appropriate remedy is an application to amend it (CPLR 5524; Matter of Minister, Elders and Deacons of the Reformed P.D. Church of City of N.Y. v. Municipal Court of City of N.Y., Borough of Manhattan, supra at 1006, 57 N.Y.S.2d 864). Moreover, when a referral to the Family Court is warranted, it must be to a county within the same judicial district (FCA § 469[b]). The Supreme Court "erred in failing to adhere to the terms of this court's remittitur" (Campbell v. Campbell, 302 A.D.2d 345, 346, 754 N.Y.S.2d 651) and had no authority to refer this matter to the Family Court, Bronx County. "Trial courts are without authority to vacate or modify orders of the Appellate Division" (Maracina v. Schirrmeister, 152 A.D.2d 502, 502–503, 544 N.Y.S.2d 13). Accordingly, we reverse and remit this matter to the Supreme Court, Queens County, to comply with our earlier directive.

Trager v. Kampe, 16 A.D.3d 426, 791 N.Y.S.2d 153 (2nd Dept.,2005)
A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court and must render judgment in conformity therewith. The order or judgment entered by the Supreme Court must conform strictly to the remittitur and cannot thereafter be modified or set aside by the Supreme Court (see Wiener v. Wiener, 10 A.D.3d 362, 363, 780 N.Y.S.2d 759). Therefore, when the decision and order of this court dated October 22, 2001, was affirmed by the Court of Appeals, the proceeding "had to be remitted by the Court of Appeals to the trial court (22 NYCRR 500.15), and on that remittitur the Supreme Court had to enter a judgment" (Moran Towing & Transp. Co., Inc. v. Navigazione Libera

Triestina, S.A., 92 F.2d 37, 40 [2d Cir.1937], cert. denied 302 U.S. 744, 58 S.Ct. 145, 82 L.Ed. 575). The petitioner's filing of a note of issue was contrary to the terms of the remittitur (...Campbell v. Campbell, 302 A.D.2d 345, 346, 754 N.Y.S.2d 651).

Berry v Williams, 106 A.D.3d 935, 966 N.Y.S.2d 462 (2nd Dept 2013):
A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court" (see Matter of Ferrara, 50 AD3d 899, 900; Sweeney, Cohn, Stahl & Vaccaro v Kane, 33 AD3d 785, 786; Kopsidas v Krokos, 18 AD3d 822, 823; Wiener v Wiener, 10 AD3d 362, 363). "An order or judgment entered by the lower court on a remittitur must conform strictly to the remittitur'" (Matter of Ferrara, 50 AD3d at 900, quoting Wiener v Wiener, 10 AD3d at 363).

DeMille v. DeMille, 32 A.D.3d 411, 820 N.Y.S.2d 111 (2nd Dept.,2006):
ORDERED...the order is modified, on the law...and the matter is remitted to the Supreme Court, Nassau County, for further proceedings before a different Justice.

The issue ... was argued and determined on a prior appeal ... Thus, upon renewal, the Supreme Court should not have granted the plaintiff's prior motion for summary judgment dismissing the defendant's second counterclaim to enforce the agreement and should not have set aside the agreement based on such challenges.

Maracina v. Schirrmeister, 152 A.D.2d 502, 544 N.Y.S.2d 13 (1st Dept.1989):[4]
By memorandum decision and order dated November 29, 1984, this court granted plaintiff partial summary judgment on the issue of liability and ordered an assessment of damages in Supreme Court (105 A.D.2d 672, 482 N.Y.S.2d 14). Jury selection was completed on April 25, 1989, and the case was assigned for trial to Justice Carol E. Huff. On May 1, 1989, before there had been any opening statements, or other proceedings before the jury, the court orally granted a motion to dismiss the complaint. Three days later, on May 4, 1989, the court entered a written order, reading as follows: “Upon the court's own motion after trial, settle order/judgment” [sic]. As noted, no trial had ever taken place.

Respondent cites no authority, and...none exists, to support the judge's disregard of the earlier order of this court. Trial courts are without authority to vacate or modify orders of the Appellate Division, or to reverse holdings of this court.

Branciforte v. Spanish Naturopath Soc., Inc., 217 A.D.2d 619, 629 N.Y.S.2d 465 (2nd Dept.,1995):
Supreme Court properly found that it lacked subject matter jurisdiction to overturn a judgment of the Civil Court which had been affirmed by the Appellate Term and for which leave to appeal had been denied by this court (...Fleet Credit Corp. v. Cabin Service Co., 210 A.D.2d 57, 620 N.Y.S.2d 944; Brown v. Brown, 169 A.D.2d 487, 564 N.Y.S.2d 166).

[4] In re New Hampshire Ins. Co. (Bobak), 72 A.D.3d 1647, 900 N.Y.S.2d 526 (4th Dept. 2010).

RIFT BETWEEN THIRD AND FOURTH DEPARTMENTS AS TO APPEALABILITY OF JUDGMENTS OF DIVORCE WITHOUT EQUITABLE DISTRIBUTION; NO CASE LAW IN FIRST OR SECOND DEPARTMENTS

Sullivan v. Sullivan, 174 A.D.2d 862, 571 N.Y.S.2d 154 (3rd Dept.,1991):
Following a jury trial in this divorce action, Supreme Court made findings of fact and issued a judgment stating that plaintiff was entitled to the divorce, but that a final judgment of divorce would not be issued until the resolution of ancillary issues. Although defendant timely filed a notice of appeal, we conclude that this appeal must be dismissed. Domestic Relations Law § 236(B)(5)(a) specifically states that, in divorce actions such as the instant one, equitable distribution must be made in the final judgment of divorce. In the absence of a final judgment awarding equitable distribution, a finding of divorce is not effective. Accordingly, the "judgment" appealed from is nothing more than a decision stating the intention on the part of the court to divorce the parties in the future and, as such, is both nonbinding and nonfinal, as well as without legal effect. Because defendant cannot be aggrieved by such a "judgment" (CPLR 5511), dismissal of the appeal is proper. Although we recognize that we have considered appeals such as these in the past (e.g., McKilligan v. McKilligan, 156 A.D.2d 904, 550 N.Y.S.2d 121), we now fully see the futility of such a course and will not consider such an appeal if it is presented to us in the future.)

Garcia v. Garcia, 178 A.D.2d 683, 577 N.Y.S.2d 156 (3rd Dept.,1991):
While defendant filed a timely notice of appeal from the judgment of divorce, this court has recently noted that "[i]n the absence of a final judgment awarding equitable distribution, a finding of divorce is not effective" (Sullivan v. Sullivan, 174 A.D.2d 862, 571 N.Y.S.2d 154). Therefore, because Supreme Court's judgment only granted plaintiff a divorce but failed to make an award of equitable distribution, the judgment appealed from was nonbinding, nonfinal and without legal effect (see, id.; see also, Domestic Relations Law § 236[B][5][a]); the appeal therefrom must accordingly be dismissed.

Nagerl v. Nagerl, 46 A.D.3d 1199, 848 N.Y.S.2d 426 (3rd Dept.,2007):
FN1. In doing so, we decline defendant's request that this Court consider the merits of her appeal by departing from its established case law and adopt the rationale of the Fourth Department in Zack v. Zack, 183 A.D.2d 382, 590 N.Y.S.2d 632 [1992],[5] ***[see below]*.**

Chang v. Yu-Jen Chang, 92 A.D.3d 1153, 940 N.Y.S.2d 181 (3rd Dept.,2012):
The order awarding summary judgment, establishing that plaintiff is entitled to a divorce on the stated grounds, is nonfinal and not itself appealable; given Supreme Court's failure, as statutorily required (DRL § 236[B][5][c]), to also render a final award of equitable distribution as part of the final judgment of divorce, dismissal of the appeals is required *[*cites omitted*]*.

[5] Blaise v. Blaise, 206 A.D.2d 715, 614 N.Y.S.2d 779 (3rd Dept.,1994).

Plaintiff's assertions in her complaint that “equitable distribution is not an issue” and that “[t]here are no marital assets or liabilities that need to be addressed” did not relieve Supreme Court of its statutory obligation, absent a stipulation of the parties not present here, to make an award of equitable distribution (Domestic Relations Law § 236[B][5][a]). Thus, we must remit this action to Supreme Court to resolve the issue of equitable distribution of the parties' marital property and to issue a final judgment of divorce. We strongly encourage the court to proceed without delay, given defendant's past behavior.

The Fourth Department

Zack v. Zack, 183 A.D.2d 382, 590 N.Y.S.2d 632 (4th Dept.,1992):
Defendant appeals from a judgment which...granted plaintiff a judgment of divorce dissolving the parties' marriage. The judgment directed that the remaining ancillary issues would be resolved at a later date. Defendant maintains that the evidence was insufficient as a matter of law to support a cause of action for divorce on the ground of cruel and inhuman treatment.

[1] At the outset, before considering the merits of defendant's argument, we must address an issue raised by plaintiff about whether defendant may properly appeal the judgment of divorce. Plaintiff contends that the appeal should be dismissed because the judgment appealed from is a nonfinal judgment, interlocutory in nature, since it does not award equitable distribution (DRL § 236[B][5][a]).

In dismissing similar appeals, the Third Department has held that, in the absence of a final judgment awarding equitable distribution, a finding of divorce is not effective (Garcia v. Garcia, 178 A.D.2d 683, 577 N.Y.S.2d 156) and that the judgment “is nothing more than a decision stating the intention on the part of the court to divorce the parties in the future and, as such, is both nonbinding and nonfinal, as well as without legal effect” (Sullivan v. Sullivan, 174 A.D.2d 862).

DRL § 236(B)(5) requires that in all matrimonial cases, a final judgment shall be rendered determining all the respective rights of the parties including dissolution of the marriage as well as the economic issues. Plaintiff construes that statute as prohibiting the issuance of an appealable interlocutory divorce judgment prior to the final judgment awarding equitable distribution. In our view, that statute does not mandate such a result. That statute pertains only to disposition of property rights in the final judgment.

A judgment is the determination of the rights of the parties in an action and may be interlocutory or final (CPLR 5011). The court has the inherent power to order a severance and may direct judgment upon a part of a cause of action (CPLR 5012). Historically, the final judgment in a matrimonial action did not become final for a period of time. That was generally recognized as a cooling off period for the purpose of encouraging reconciliation of the parties. Those provisions

requiring a waiting period were repealed.

[2] In our view, when the Legislature repealed DRL §§ 241 and 242 (L.1968, ch. 645, effective June 16, 1968) pertaining to interlocutory judgments in matrimonial actions, it did not prohibit the court from entering an interlocutory judgment. The significant effect of the repeal of those sections was to eliminate the waiting period. If the Legislature had intended to abandon interlocutory judgments in matrimonial cases, it would have specifically done so. The goals of judicial economy will not be fostered by forcing litigants to wait until the court has heard all ancillary issues before a judgment of divorce can be appealed, especially when there are no grounds for that divorce. Accordingly, we decline to follow the rationale of the Third Department and will resolve the substantive issue on the merits.

The Second Department

-- Suffolk County

Matter of Johnson, 172 Misc.2d 684, 658 N.Y.S.2d 780 (N.Y.Sup.1997):
While the failure on the part of the court to determine the rights of the parties in their separate or marital property has been held by the Appellate Division, Third Department, to render a judgment dissolving the marriage nonbinding, nonfinal, and without effect (Garcia v. Garcia, 178 A.D.2d 683, 577 N.Y.S.2d 156; Sullivan v. Sullivan, 174 A.D.2d 862, 571 N.Y.S.2d 154), these case authorities have been rejected by the Appellate Division, Fourth Department (Zack v. Zack, 183 A.D.2d 382, 590 N.Y.S.2d 632). In Zack, the court found that the provisions of § 236B(5) requiring that a final judgment shall be rendered determining all of the respective rights of the parties, including the dissolution of the marriage and the economic issues contemplated therein, do not preclude issuance of an interlocutory divorce judgment prior to the entry of a final judgment awarding equitable distribution. Nothing precludes this court from adopting the holding of the Fourth Department in Zack v. Zack, supra, as neither the Court of Appeals nor the Appellate Division, Second Department has ruled upon the issue.

The court thus finds that bifurcation of the issues of marriage dissolution and economic rights which are the subject of DRL § 236B(5) is permissible since the court may enter an interlocutory judgment of divorce, annulment or dissolution prior to its issuance of a judgment determining economic rights of the parties to the marriage. Accordingly, issuance of this decision favorably determining the petitioners' entitlement to a judgment annulling the subject marriage without a concomitant determination of the parties' economic rights does not effect a violation of the mandate of DRL § 236B(5). If necessary, the court will direct a severance and the entry of an interlocutory judgment annulling the subject marriage pending determination of the economic rights of the parties under DRL § 236B(5). In the interim, the economic issues not decided herein are continued

pending the submission of proof on such issues...

-- Westchester County

Hannigan v. Hannigan, 9 Misc.3d 1129(A), 862 N.Y.S.2d 808(U) (N.Y.Sup.2005):

As has been recognized, "[t]he Appellate Division is a single State-wide court divided into departments for administrative convenience ..., [and] the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule" (➤Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663,664 [2d Dept.1984]). Therefore, if there is authority on the bifurcation and interlocutory judgment issues from the Second Department, this Court would be bound to follow the rule enunciated by that department of the Appellate Division.

* * *

The Court recognizes that there is a split of authority between the Third and Fourth Departments on the issue of whether a trial court may enter an interlocutory judgment of divorce, while the First Department has not directly addressed this question (Powers v. Powers, NYLJ, 11/1/05, p. 18 [Sup.Ct. N.Y.2005]). The Third Department considers an interlocutory judgment of divorce to be "nothing more than a decision stating the intention on the part of the court to divorce the parties in the future", which, "as such, is both nonbinding and nonfinal, as well as without legal effect" (Sullivan v. Sullivan, supra, 174 A.D.2d, at 862). That view has been rejected, however, by the Fourth Department, which has determined that a Trial Court is "not prohibit[ed] ... from entering an interlocutory judgment [of divorce]" (Zack v. Zack, supra, 183 A.D.2d, at 384).

Under these circumstances, "where the Court of Appeals has not spoken and there is no applicable Appellate Division decision in [this Court's] own Department, conflicting decisions in the other Departments are not binding on [this] court; and it is then free to fashion a decision which it deems to be appropriate and consistent with the overall objectives sought to be achieved by the applicable statute" (Matter of Daniel [MVAIC], 81 Misc.2d 941,952 [N.Y.C. Civ.Ct.1999]).

As explained by the Fourth Department *[citing Zack]*... For those reasons, the Court agrees with plaintiff that it is authorized to enter an interlocutory judgment divorcing the parties following a ground trial.

DIFFERENCES IN PROCEDURE BETWEEN CIVIL AND CRIMINAL APPEALS

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DIFFERENCES IN PROCEDURE BETWEEN CIVIL AND CRIMINAL APPEALS

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The statutory rules concerning the procedure for civil appeals generally are in CPLR 5501 et seq., for appeals to the Court of Appeals CPLR 5601 et seq. and for appeals to the Appellate Division CPLR 5701 et seq. The rules concerning criminal appeals are found in CPL 450.00 et seq., CPL 460.00 et seq. and CPL 470.00 et seq.

In addition, each of the four appellate divisions has its own rules and the Court of Appeals has its own rules.

Any rule in the 500's is a Court of Appeals Rule. The Appellate Division First Department rules are sections 600-636, the Second Department rules are sections 670-711, the Third Department rules are in sections 800-840 and the Fourth Department rules are in sections 1000- 1040.In citing the rules, one should preface it with 22 NYCRR such as 22 NYCRR 670.3

I will be addressing appeals involving actions commenced in the Supreme Court. Although the CPL refers to procedures involving a death penalty case since the death penalty statute was declared unconstitutional in People v. LaValle, 3 N.Y.3d 88, 131 (2004) I will not mention the statutes in the outline.

Many types of cases that lawyers consider to be a criminal proceeding, technically, are a civil proceeding. Examples include habeas corpus, hearing before a parole board, Article 78 proceeding of a denial of parole, a neglect proceeding in Family Court where it is alleged that the defendant engaged in conduct that would constitute a crime and risk level assessment per Sex Offender Registration Act. See CPLR 7002 (habeas corpus) (Article 78) (CPLR 7801 et seq.); (Family Court Article 10); Correction Law Section 168-d (3).

Appeal as of Right to Immediate Appellate Court

Criminal

Defendant CPL 450.10- Judgment; Sentence; Sentence including civil forfeiture order; setting aside the sentence upon motion of People; order denying motion pursuant to CPL 440.30 for forensic DNA testing. (CPL Article 440 contains post judgment motions). Interlocutory Orders are not appealable. Can raise on appeal from judgment of conviction determination made by the Court in an Interlocutory Order.

People- CPL 450.20 lists twelve situations, including, the granting motion to set aside the verdict, dismissing an accusatory instrument or a count or reducing a count and directing the filing of a prosecutor's information; granting motion pursuant to CPL 440.20 or CPL 440.10; setting aside or modifying a verdict of forfeiture; granting DNA testing; order finding the defendant mentally retarded; appeal from a sentence that is invalid as a matter of law. Before trial, appeal from the granting suppression provided that the People file a statement pursuant to CPL 450.50 (without suppressed evidence, remaining proof insufficient to convict as a matter of law or as a practical matter impossible to convict).

Civil

Judgments whether interlocutory or final unless the judgment is after an Appellate Division order disposing of all issues CPLR 5701 (a).

Orders whether interlocutory or final if they fall into the seven categories listed under CPLR 5701 (a) (2). The broadest category is "(iv) involves some part of the merits: or (v) affects a substantial right." Thus, the vast majority of orders are appealable as of right.

Appeal By Permission to Intermediate Appellate Court

Criminal- Order denying a motion pursuant to CPL 440.20 to set aside a sentence or order denying a motion made pursuant to CPL 440.10 to vacate a judgment CPL 450.15.

Civil- When order not appealable as of right, can request permission to

appeal CPLR 5701 ©. There are exceptions to this rule. The most common situation when the order is not appealable, even by permission, is the denial of a motion to reargue. See coursebook materials on Appellate Division jurisdiction.

As of Right and Directly to the Court of Appeals from the Supreme Court

Criminal

None.

Civil- Validity of New York or United States statutes under the state or federal constitution CPLR 5601 (b). The particulars of this section are addressed in detail in other materials in the coursebook.

As of Right from Intermediate Appellate Court

Criminal- None

Civil - See CPLR 5601 (a) Two dissents; intermediate court finally determines action where directly involved construction of the New York state or United States constitution CPLR 5601 (b); stipulation judgment absolute CPLR 5601 ©.

By Permission from Intermediate Appellate Court

Criminal- Adverse or partially adverse order of an intermediate appellate court on a question of law. This also includes the denial or granting of the motion in the Appellate Division of ineffective appellate counsel. CPL 450.90.

Civil- CPLR 5602 - Final Order not appealable as of right- Court of Appeals or Appellate Division can grant permission to review. Non-final order only by permission of the Appellate Division CPLR 5602 (b) (1). Other situations that are less common see CPLR 5602 (a) (b) and other materials in coursebook.

Oral Order

Criminal -Does not require a written order. Can appeal from an oral order People v. Elmer, 19 N.Y.3d 501,507 (2012).

Civil- Requires a written order Eaton v. Eaton, 46 A.D.3d 1432 (4th Dept. 2007); Small v. Suffolk County Honda, 141 A.D.2d 448,449 (1st Dept. 1988).

File With Note of Appeal

Criminal

First Department- two copies of a profile statement listing title of action, indictment number, county and court from where appeal is taken; full names of the defendant and any co-defendants; name address and telephone number of defense counsel, charges upon which the defendant was convicted; pre-trial hearings and dates, trial and/or plea date; whether the court ordered daily copy of the hearing or trial transcript were received and returned Rule 606.5 (b) (1).

Second Department: RADI (Request for Appellate Division Intervention) Criminal- Form D usually prepared by Clerk. Rule 670.3 (b).

Civil

First Department - A Pre-Argument Statement except for cases originating in Family Court Rule 600.17 (a).

Second Department- RADI, Civil- Form A Rule 670.3 (a).

Third Department- File a pre-calendar statement except in cases in Family Court proceedings involving child abuse or neglect, juvenile delinquency or persons in need of supervision, appeals from decisions of the Unemployment Insurance Appeal Board and Workers' Compensation Board or appeals pursuant to Correction Law Section 168-n (3) 800.24 (a).

Time to File Notice of Appeal

Civil- Thirty days after personal service of Order/Judgment with notice

of entry or 35 days if by regular mail CPLR 5513.

Criminal- Thirty days from the imposition of the sentence CPL 460.10; People v. Coaye, 68 N.Y.2d 857 (1986); People v. Torres, 179 A.D.2d 358 (1st Dept. 1992).

Where the sentence and entry of judgment follow an oral order, the People's appeal is within 30 days after the imposition of sentence People v. Coaye, 68 N.Y.2d 857 (1986). (Reduced conviction to a lower count and then sentenced the defendant).

Thirty days after service by the prevailing party of an order not included in the judgment (post judgment motions or order when no judgment made) (CPL 460.10 (1) (a); People v. Washington, 86 N.Y.2d 853 (1995). The Court in Washington did not address whether the order has to be served with notice of entry. There is a dispute whether service with a notice of entry is required. Compare People v. Washington, 209 A.D.2d 162 (1st Dept. 1994) (no); People v. Aubin, 245 A.D.2d 805 (3rd Dept. 1997) (yes).

When appeal is by permission, then 30 days after service of the order CPL Section 460.10 (4) (a), (5) (a).

Time to File Notice of Cross- Appeal

Civil- A party upon whom an adverse party has served a notice of appeal or motion for permission to appeal has either 10 days after such service or 30 days after service of the order with notice of entry, whichever is longer to file a cross-notice of appeal or a cross-application for permission to appeal CPLR 5513 ©.

Criminal-No extension for filing cross notice of appeal or cross-permission to appeal listed in the CPL.

Extension of Time To File a Notice of Appeal

Civil

No right to extend either by stipulation or by the appellate court Hecht v. City of New York, 60 N.Y.2d 57 (1983). Exceptions include within the time required to file notice of appeal the attorney becomes disabled, party mistakes the method to appeal seeking permission to appeal when appeal is as of right or visa-versa or service timely, while filing not timely or visa-versa or an event permitting a substitution of parties occurs CPLR 5514.

Criminal

Defendant- Right to extend if the failure to file was due to (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney or (b) the inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the incarceration in an institution and through no lack of diligence or fault of the attorney or defendant. The motion is made to the immediate appellate court and has to be made within one year CPL 460.30 (1). People v. Corso, 40 N.Y.2d 578 (1976). An application can be made after one year by writ of error coram nobis when an attorney failed to comply with the defendant's timely request for filing a notice of appeal and the omission could not reasonably have been discovered by the defendant within one year People v. Syville, 15 N.Y.3d 391 (2010). People precluded from raising one year limitation when through action or unjustifiable inaction by the prosecutor, defendant's diligent and good faith efforts to exercise his appellate rights within the one year time frame were thwarted People v. Thomas, 47 N.Y.2d 37 (1979).

The one year rule also applies to a request for permission to appeal to the Court of Appeals CPL 460.30, Rule 500.20 (g).

The People have no right to an extension of time to file a notice of appeal People v. Marsh, 127 A.D.2d 945 (3rd Dept. 1987).

The defendant's failure to serve a notice of appeal on the People which he filed with the Court is not a jurisdictional defect and thus may be waived. People v. Sayles, 292 A.D.2d 641 (3rd Dept. 2002). In any event, CPL 460.10 (6) allows extension of time to serve notice of appeal on the respondent if the notice of appeal is timely filed with the Court.

An order of the Appellate Division granting or denying motion to file a

late notice of appeal is appealable by permission to the Court of Appeals CPL 460.30 (6). This only applies to appeals that the party would have had as of right if the notice of appeal had been timely filed. A denial of an extension of time to make an application for permission to appeal to the Appellate Division is not reviewable by the Court of Appeals. People v. Nealy, 82 N.Y.2d 773 (1993).

Fees

Filing Notice of Appeal

Civil-$ 65.00 CPLR 8022 (a) except for a poor person, including a person represented by non-profit organization whose primary purpose is the furnishing of services to indigent persons or by private counsel working on the behalf or under the auspices of the organization. CPLR 1101, 1102.

Criminal- No Fee.

Perfect Appeal

Criminal- None.

Civil $315. Except for a poor person, including a person represented by non-profit organization whose primary purpose is the furnishing of services to indigent persons or by private counsel working on the behalf or under the auspices of the organization or when the State is the appellant CPLR 1101, 1102, 8017,8022.

Third Department also exempts claimant appealing the decision of the Unemployment Insurance Board from paying the fee 800.23 (a)

There is no additional fee for perfecting cross-appeal if appeal perfected see Rule 600.15, 670.22.

Motion

Civil- $45 except for a motion for leave to appeal as a poor person pursuant to CPLR 1101 (a); Rule 600.15 (a) (6), 670.22 (a) (2), 800.23. No motion is required for poor person status when the person is represented by non-profit

organization whose primary purpose is the furnishing of services to indigent persons or by private counsel working on the behalf or under the auspices of the organization CPLR 1101 (e).

Criminal- None

Right to Assigned Counsel

Criminal- Indigent has the right to counsel to be appointed and paid for by the government Gideon v. Wainwright, 372 US 335, 344 (1963).

Civil- No right to an attorney in private civil litigation. Matter of Smiley, 36 N.Y.2d 433 (1975). However there is a statutory right to counsel, which includes assignment of counsel for the indigent, for most matters that arise in the Family Court and in SORA proceedings see Family Court Act Section 262 and Correction Law Section 168-n(3). In some situations also constitutional right to counsel Matter of Evan F., 29 A.D.3d 905 (2nd Dept. 2006) (neglect proceeding under Article 10 FCA).

Stay

Automatic stay

Criminal

Defendant- none. Need order granting stay and fixing bail or releasing on one's own recognizance CPL 460.50 (1). Only one application allowed CPL 460.50(3); 460.60 (2); see People v. Shakur, 215 A.D.2d 184 (1st Dept. 1995). There is no direct appeal of a denial of a stay application Finetti v. Harris, 609 F.2d 594,597 (2d. Cir. 1979); see also People v. Shakur, 215 A.D.2d 184 (1st Dept. 1995). Factors considered in a stay application. See CPL 510.30(2) (a). Stays not allowed in certain cases See CPL 530.50.

People- Appeal to immediate appellate court from an order reducing a count or counts of an indictment and dismissing an indictment and directing the filing of a prosecutor's information CPL 460.40 (2)

No provision vacating the automatic stay.

Civil

CPLR 5519- (a) government entity files notice of appeal except as to cases covered under Family Court Act Section 1114; Undertaking necessary to satisfy payment of money whether required in a lump sum or in installments; judgment/order directs execution of instrument and instrument executed and deposited in office of entry of judgment/ order; appellant possession or control of real property judgment directs be conveyed, undertaking set by Court for use and occupancy; judgment/order directs assignment or delivery of personal property and property is placed in the Trial Court or the Trial Court sets an undertaking.

Automatic stay can be vacated by Court CPLR 5519 ©.

Length of Stay

Criminal

Stay if granted, limited to 120 days unless the appellate court extends the time for argument or submission of the appeal beyond 120 days or upon an application of the defendant the Court expressly orders that the order continue until the appeal is determined or some other future date or occurrence CPL 460.50 (4), CPL 460.60 (3).

Upon affirmance by Appellate Division, when there had been a stay, the Appellate Division remits the case to the Trial Court where the judgment was entered. The defendant, his surety and attorney are given at least two days notice by the Trial Court for the defendant to surrender himself CPL 460.50 (d) (5).

A similar rule applies when a stay is granted by the Court of Appeals and the Court of Appeals then affirms CPL 460.60 (b) (4).

Civil

Stay continues after affirmance until the determination of the motion or the appeal if motion for leave to appeal or a notice of appeal is filed within five

days of the service of the order of affirmance or modification with notice of entry on the appellant CPLR 5519 (e). This also applies to discretionary stays. DFI Communications Inc. v. Greenberg, 41 N.Y.2d 1017 (1977).

Time to Perfect

Civil - Second Department- Six months from the date of the Notice of Appeal 670.8 (e) (1) First and Third- Nine months from date of Notice of Appeal Rule 600.11 (a) (3), Rule 800.12, Fourth Department Nine months from service of Notice of Appeal 1000.12 (b).

Criminal

First Department

Defendant's appeal-120 days from last day that the notice of appeal was required to be filed Rule 600.8 (b).

People's Appeal- nine months from filing notice of appeal. Rule 600.8 (f).

Second Department

Defendant's Appeal -nine months from the date of the Notice of Appeal if the defendant did not apply for assignment of counsel Rule 670.8 (f).

People's Appeal- six months from the date of the notice of appeal except three months for appeals under CPL 450.20 (1-a) or (8) Rule 670.8. (g).

Third Department - 60 days after the last day for filing a notice of appeal 800.14 (b).

Fourth Department- Assigned counsel cases 120 days of receipt of transcript Rule 1000.2 ©.

Request for Enlargement of Time

Criminal

The First Department requires that the movant should submit an affidavit satisfactorily explaining the delay and stating whether there is an order of stay of judgment pending the determination of the appeal and if so when it was granted and whether the defendant is free on bail or his own recognizance 600.8 see also 600.12© (4) (the sentence imposed and whether the defendant is on probation or parole, or free on an order of stay of judgment pending determination of the appeal).

Second Department has the same rules for civil and criminal appeals 670.8 (d).

Third Department requires that the movant should submit an affidavit. The affidavit shall state (1) the date of conviction; (2) whether by trial or plea; (3) whether appellant is free on bail; (4) the date the notice of appeal was filed; (5) the date the trial transcript was ordered; (6) whether the transcript has been filed; (7) if the complete transcript has not been filed, the date it is expected to be filed; and (8) the date appellant's brief and appendix will be filed 800.14 ©

The Fourth Department requires a motion pursuant to CPL 460.30 to extend the time to take an appeal shall be made within one year of the date on which the time to take an appeal expired. An affidavit in support of the motion shall set forth facts demonstrating that the appeal was not timely taken because of the improper conduct of a public servant, the improper conduct, death or disability of the defendant's attorney or the inability of the defendant and the defendant's attorney to communicate about whether an appeal should be taken before the time to take the appeal expired. (1) Filed with the motion papers shall be proof of service of the papers on defendant’s trial counsel 1000.13 (I)

Civil

First Department- Affidavit satisfactorily explaining the delay and containing the following information: the nature of the order or judgement appealed from; the date the judgment or order appealed from was entered or, if the matter was transferred to this court pursuant to CPLR 7804, the date of the order of transferral; the date the notice of appeal was served; whether any enlargement of time to perfect the appeal has been granted 600.12

Third Department- Affidavit showing reasonable excuse for the delay and facts showing merit to the appeal or proceeding 800.12

Fourth Department Affidavit showing reasonable excuse for the delay and intent to file briefly within a reasonable time 1000.13 (h)

Dismissal Calendar

Criminal

First Department- Dismissal Calendar May and October. Criminal appeals or causes and all appeals involving writs of habeas corpus in criminal cases not perfected within eighteen months of awarding poor person relief are placed on the calender. Notice given to the defendant and his attorney on the appeal or one who last appeared for him. Rule 600.12 © (2).

Second Department-No dismissal calendar. However deemed abandoned if no application for assignment of counsel is made by defendant within nine months of the date of the notice of appeal Rule 670.8 (f).

Civil

Published in Law Journal-. First Department in May Rule 600.12 ©. Second Department periodically Rule 670.8 (h).

Third Department no requirement of publication. Deemed abandoned if not perfected within nine months Rule 800.12

Fourth Department no requirement of publication. Deemed abandoned and dismissed if not perfected within nine months Rule 1000.12 (b).

Withdrawal of Appeal

Court of Appeals

Civil- stipulation signed by attorneys for all parties to the appeal.
Criminal- client must also sign request. Rule 500.8 (a).

Record on Appeal

Criminal

First Department- needs Court permission to proceed on the original record. Rule 600.8 (a) (1).

Second Department- can be heard on the original record without requesting permission from the Court. Rule 670.9 (d) (viii)

First and Second Departments -People's appeal pursuant to CPL 450.20 (1-a) (reducing a count or counts of an indictment, dismissing the indictment or directing the filing of a prosecutor's information) should include an appendix Rule 600.8, 670.12 (e)

Third and Fourth Department- only by Appendix method Rule 800.14, 1004 (e) (1).

Civil- Must file record; either a full record or by appendix method Rule 600.5., 670.9 (a) (b), 800.4, 1000.3

In the First Department one can proceed on the original papers without having to request Court permission for election cases, an appeal from Family Court and appeals concerning compensation awarded to a Judicial appointee. Rule 600.6, 600.9, 600.19.

However, in the Second Department the following appeals and proceedings can be heard on the original record: (a) appeals from the Appellate Term; (b) appeals from the Family Court; © appeals under the Election Law; (d) appeals under the Human Rights Law (Executive Law Section 298); (e) appeals where the sole issue is compensation of a judicial appointee; (f) appeals under Correction Law Section 168-d(3) and 168-n (3); (g) other appeals where a statute authorizes an original record; (h) transferred Article 78 proceedings; (I) transferred proceeding under the Human Rights Law (Executive Law Section 298); (j) special proceedings listed in Rule 670.18; (k) appeals where the Appellate Division has authorized to proceed upon the original record. Rule 670.9 (d) 1; 670.16, 670.17, 670.18.

In the Fourth Department transferred proceedings and election cases can be heard on the original record Rule 1000.5, 1000.8 (a). A person granted poor person status only has to file one copy of the original record Rule 1000.14 (2).

Appellant's Brief

Criminal-

The First Department requires a statement setting forth the decision and judgment and sentence imposed, whether an application for a stay was made, the date of the application, to whom it was made and the decision of the Court. Rule 600.8 (a) (2).

Second Department. Does not require mentioning about a stay unless it was granted. In addition to setting forth the decision and judgment and sentence imposed the statement, the statement should set forth whether an order issued pursuant to CPL 460.50 is outstanding, date of the order, the name of the judge who issued it and whether the defendant is free on bail or on his or her own recognizance or is incarcerated and whether there were co-defendants in the trial court, the disposition of their cases and status of any appeals by the co-defendant Rule 670.10.3 (g) (2) (viii) (B).

Civil- If perfected on original papers-

The First Department requires opinion and findings of a hearing officer and the determination and decision of an administrative department board or agency to be appended to the brief filed by same 600.10 (d) (1) (iv). In other cases, the opinion should be annexed to the brief Rule 600.10 (d) (2) (vi).

Second Department- Annex to the brief a copy of judgment or order appealed from, the decision, if any, the notice of appeal and copy of any order transferring the proceeding to the Appellate Division. Rule 670.10.3(g) (2) (vi).

Matrimonial action

First Department- Appeal from an order involving alimony and counsel

fees, the brief should also state the date of joinder of issue and whether the case has been noticed for trial. Rule 600.10 (d) (2) (vii).

Second Department- Matrimonial action involving pendente lite, brief should state whether the issue has been joined, if so the date it was joined and whether the case has been noticed for trial. Rule 670.10.3 (g) (2) (vii).

Service of Brief on the Defendant

Criminal- There is no state constitutional right to file a pro-se supplemental brief. People v. White, 73 N.Y.2d 468 (1989). Nevertheless the Second and Fourth Department requires that you serve your client with a copy of the brief that you are filing and submit an affidavit of service. Rule 670.12 (g) (1), 1022.11 ©. Normally there is no requirement to tell the client that he has a right within 30 days to make an application to the Court for permission to file a supplemental brief See Rule 670.12 (h)

The Appellate Division cannot require the People to personally serve their appellate brief on the defendant pursuant to its rule-making authority. People v. Ramos, 85 N.Y.2d 678 (1995). Old rule 600.8 (f). The current Appellate Division First Department rule requires the People to serve the defendant's appellate attorney if he has appeared or if no appellate attorney has appeared then on the attorney who last appeared for the defendant in the trial court Rule 600.8 (f). See however, Donovan v. Pesce, 73 A.D.3d 137,141 (2nd Dept. 2010) (upheld Appellate Term order requiring personal service of the brief on the defendant). The Fourth Department requires service on the defendant in any manner authorized by CPLR 2013 Rule 1000.3 (g).

Civil-No requirement to serve your client with a copy of the brief.

Proceed by Motion

Criminal- In the Second Department when the only issue on appeal is the legality, propriety or excessiveness of the sentence, you can proceed by motion. Rule 670.12 © (1).

Civil- Special Proceeding originating in Appellate Division Rule 600. 2(b), 670.5. 800.2 (b); 1000.9. However the Second and Third Departments requires briefs in certain special proceedings. Rule 670.18, 800.©. The Fourth Department requires briefs in all cases Rule 1000.9 ©.

Appeals concerning compensation awarded to a judicial appointee. 600.19; 670.15 (appellant's option whether to proceed by motion or by regular manner of appeals).

Oral Argument Allowed

Criminal-

First Department- all cases except for an order concerning a grand jury report Rule 600.4 (a) (7); 600.16 (a).

Second Department & Third Department All cases except legality, propriety or excessiveness of the sentence and grand jury reports. Rule 670.20 © 800.10 (3), 800.15. See however, Rule 800.14 (g).

Fourth Department- not allowed when only issue is the legality or length of the sentence imposed Rule 1000.11 ©.

Civil-

The First Department lists thirteen categories of appeals that can be argued and indicates the remainder is on submission Rule 600.4. (a) (b).

Second Department- no argument allowed in issues involving maintenance, spousal support, child support, counsel fees, calender and practice matters including but not limited to bill of particulars, preferences, correction of pleadings, examinations before trial; discovery of records, interrogatories, physical examinations, change of venue and transfers of actions from or to the Supreme Court and determinations made pursuant to the sex offender registration act Rule 670.20 ©.

Third Department- does not allow argument on appeals from the Unemployment Insurance Appeal Board, Workers' Compensation Board and a

CPLR Article 78 proceeding where sole issue is whether there was substantial evidence to support the determination Rule 800.10 (a).

Fourth Department- Not allow argument on a transferred CPLR Article 78 proceeding where sole issue is whether there was substantial evidence to support the determination Rule 1000.12 ©.

Leave Applications to the Court of Appeals

Number of and what is included in the Application.

Civil

Two. Can first request leave from the Appellate Division and once it is denied, then from the Court of Appeals CPLR 5602 (a). In the Appellate Division it is made by motion to the Court and not to a particular judge.

Must be made by motion. Rule 500.22 indicates what is necessary to include in the application.

Criminal

Only entitled to one leave application either to the Appellate Division or to the Court of Appeals CPL 460.50 (3). However, there is no right to request leave from a denial by the Appellate Division of a request for leave to the Appellate Division. People v. Adams, 82 N.Y.2d 773 (1993); People v. James, 206 A.D.2d 243 (1st Dept. 1994).

Under most circumstances the one application should be made to the Court of Appeals and not to the Appellate Division. Although one's chance for obtaining leave to the Court of Appeals is slim, the chances are better with a request to the Court of Appeals and not to the Appellate Division. The reason given is that the Appellate Division wants to let the Court of Appeals control its calendar and to decide which cases it wants to consider. The exception to the rule is where there is a dissenting Judge. In a criminal case the party requesting leave to appeal to the Court of Appeals in the Appellate Division has the right to request leave from any Judge who was on the panel.

Format

Applications to the Chief Judge for leave to appeal in a criminal case (CPL 460.20) shall be by letter addressed to 20 Eagle Street, Albany, New York 12207-1095, and shall be sent to the Clerk of the Court, with proof of service of one copy on the adverse party.

The letter should include the names of all co-defendants in the trial court, if any, and the status of their appeals, if known; whether an application has been addressed to a justice of the Appellate Division; whether oral argument is requested and grounds upon which leave to appeal is sought. Particular written attention shall be given to reviewability and preservation of error identifying and reproducing the particular portions of the record where the questions sought to be reviewed are raised and preserved.

Also included are a copy of the briefs submitted in the immediate appellate court, the order and decision of the immediate appellate court and all relevant opinions or memoranda of the courts below along with any other papers to be relied upon in furtherance of the application and if the defendant is a corporation or other business entity, a disclosure statement Rule 520.20(b) (1).

After the application is assigned to a Judge for review, counsel will be given an opportunity to serve and file additional submissions, if any, and opposing counsel will be given an opportunity to respond. Rule 500.20 (a)

An application for leave to appeal from an intermediate appellate court order determining an application for coram nobis relief shall include: (I) the order and decision sought to be appealed from; (ii) the papers in support of and opposing the application filed in the intermediate appellate court; and (iii) the intermediate appellate court decision and order sought to be vacated, as well as the briefs filed on the underlying appeal, if available. CPL 500.20 (b)(2).

It is important that when you make the application to request leave you must raise all the issues that you raised in the Court below. Also, where applicable one should raise a claim of the violation of an amendment to the United States Constitution. The failure to raise a federal constitutional claim in the leave application, even if raised in the Trial Court and in the Appellate Division, does not preserve the claim for an application in the Federal Court for Habeas Corpus or on

certiorari appeal O'Sullivan v. Boerckel, 526 U.S. 838, 119 Sct. 1728 (1999); Picard v. Connor, 404 US 270 (1971).

Court of Appeals does not assign counsel for leave applications. Once leave is granted, an application could be made for assignment of counsel Rule 500.20 (e).

A request for a stay can be incorporated in an application for leave to appeal or made separately by letter, with proof of service of one copy on the other side. The letter should state (a) whether the relief sought has been previously requested; whether the defendant is presently incarcerated and the incarceration status, if known of any co-defendants and defendant is at liberty whether a surrender date has been set and the conditions of the release. Rule 500.20 (f).

Civil- only by motion. Need to show timeliness, jurisdiction and reason to grant leave Rule 500.22.

Basis for Affirmance

Criminal

An appellate court cannot affirm a judgment in a criminal case on a ground not decided adversely to the defendant-appellant in the Trial Court People v. LaFontaine, 92 N.Y.2d 470,474 (1998); CPL Section 470.15.

Civil

An appellate court can affirm on a ground rejected by the Trial Court. See Parochial v. Board of Education, 60 N.Y.2d 539,545,546 (1983)

Ineffective Assistance of Counsel

Criminal- Constitutional right to effective counsel. A claim of ineffective trial or appellate counsel can be raised in the appellate courts if based on the record before the Court. A claim of ineffective assistance of trial counsel can be brought on direct appeal or by granting of leave to appeal the denial of a CPL 440.00 motion alleging ineffective assistance of trial counsel. Ineffective

assistance of trial counsel is usually raised first in the trial court by motion made under CPL 440.00 see People v. Rivera, 71 N.Y.2d 705 (1988).

Ineffective assistance of appellate counsel is brought by writ of Error Coram Nobis in the Appellate Division People v. Bachert, 69 N.Y.2d 593 (1987).

The issue of ineffective appellate counsel is first raised in the immediate appellate court with a right to request leave to appeal in the Court of Appeals if the claim is denied. See CPL 450.90 (1).

Civil- A claim of ineffective counsel is not entertained except in extraordinary circumstances. Galil v. Scott, 61 A.D.3d 820 (2nd Dept. 2009); Olmstead v. Federated Department Stores, 208 A.D.2d 979 (3rd Dept. 2004). If counsel makes a mistake, the remedy is to sue for malpractice. However, in Family Court appeals such as under Article 10, the constitutional standard is the same as in a criminal proceeding Matter of Alfred, 237 A.D.2d 517 (2nd Dept. 1997).

Trial Counsel's Obligations

Criminal & related proceedings

Trial Counsel has an obligation in criminal actions/ CPL 440.10 motions, habeas corpus and Article 78 actions arising out of criminal proceedings, upon conviction or denial of motions made under CPL 440.10 or CPL 440.20 or denial or dismissal of a habeas corpus or Article 78 proceeding, upon the pronouncement of sentence or service of the order, to give written notice to his client advising of his rights concerning the appeal and requesting instructions about what the client wants to do. Rule 606.5 (b), 671.3 (a)(b). The First Department also includes a determination revoking parole 606.5 (b) (1). The Third and Fourth Departments do not have any requirement in an Article 78 proceeding. Rule 821.2, 1022.11

Counsel also has the obligation to inform the defendant of his right upon proof of financial inability to prosecute the action as a poor person and inter-alia have counsel appointed. Rule 606.5 (b), 671.3 (b) (3), 821.2, 1022.11. If the

client indicates that he wants to appeal or make an application, then counsel is obligated to file the necessary formal notice of appeal or application to the appropriate appellate court. Rule 671.3 (a)(b) (4), 606.5 (a) (b), 821.2 (b), 1022.11 (a)

In the Second Department if counsel has not been retained to prosecute the appeal, the notice of appeal should indicate that it is being filed per rule 671.3 (a) and it should not be deemed counsel's appearance as the appellant's attorney for the appeal.

If transcribed at trial per order of the Court, the trial counsel is required to give copy to the defendant's appellate counsel. Rule 606.6; 671.9.

In the Second, Third and Fourth Department if the defendant has assigned counsel in the trial court and the People appeal to the Appellate Division, the defendant's trial counsel continues as the defendant's appellate counsel as the respondent on the appeal until entry of the order determining the appeal and should perform any additional duties as required by the rules unless relieved by the Court. Rule 671.3 (f), 800.14 (h) (4), 1000.7 ©. The failure to do so warrants the granting of a writ of error coram nobis People v. Braun, 15 N.Y.3d 875,876 (2010).

In the First Department, if no appellate counsel has appeared for the defendant, assigned trial counsel upon receipt of the People's brief shall make diligent efforts to locate the defendant and if located, in writing inform the defendant that the People have filed a brief, the consequences of the appeal and the defendant's rights. Rule 606.5 (d) (3). There is no requirement that assigned or retained trial counsel prepare and file a respondent's brief for the defendant. Rule 606.5 (a) (1). If trial counsel is a member of the assigned counsel appellate panel, he or she, with the defendant's written consent, may apply to the Appellate Division for appointment as appellate counsel. Rule 600.8 (g).

If the defendant's trial counsel was retained and the People appeal, then the trial counsel upon receipt of the order by the People, has to inform the defendant of the consequences of the People's appeal and right of the defendant, if indigent, to the appointment of counsel. People v. Forsythe, 105 A.D.3d 1430, 1432 (4th Dept. 2013); Second Department Rule 671.3 (d) (e) (duty starts upon

receipt of Notice of Appeal); First Department Rule 606.5 (d) (duty commences upon receipt of order being appealed; makes no distinction between assigned and retained trial counsel).

People v. Garcia, 93 N.Y.2d 42,44 (1999) which involved a People's appeal the Court held that the Trial Court is required to inform the defendant of the right to appellate counsel and how to obtain assigned counsel if indigent. If the Trial Court did not inform the defendant of said right then the Appellate Division should do so. In addition, the Appellate Division had an obligation to determine whether the defendant was represented or had waived counsel before it can consider and decide the People's appeal. Id at 46

Civil

Generally Representation ends upon entry of final order or judgment in the Trial Court. Vitale v. La Cour, 92 A.D.2d 892 (2nd Dept. 1983). No requirement to appear as appellate counsel except per agreement. Nevertheless good idea to advise the client of right to appeal and time limitations for filing notice of appeal.

The Fourth Department requires that assigned or retained Trial Counsel has an obligation certain proceedings in Surrogate's Court or Family Court upon entry of an order in which his client was unsuccessful to give written notice to his client advising him of the time limitations applicable to taking an appeal or moving for permission to appeal; the possible reasons upon which an appeal may be based; the nature and possible consequences of the appellate process; the manner of instituting an appeal or moving for permission to appeal; the procedure for obtaining a transcript of testimony, if any; and the right to apply for permission to proceed as a poor person Rule 1022.11a (a,b)

Moreover, when a party or the law guardian determines to appeal or to move for permission to appeal, counsel or the law guardian shall serve the notice of appeal or motion for permission and shall file the notice of appeal or motion for permission Except when counsel has been retained to prosecute the appeal, the notice of appeal may include the statement that it is being filed and served on behalf of appellant pursuant to 22 NYCRR1022.11a (c) and that it shall not be deemed an appearance by counsel as counsel for appellant on the appeal. When a

party has indicated a desire to appeal, counsel shall, when appropriate, move for permission to proceed as a poor person and assignment of counsel pursuant to 22 NYCRR 1000.14. Rule 1022.11a (c-e).

Appellate Counsel's Obligations

Appellate counsel has a duty upon service of notice of appeal or upon an order of appointment to notify the defendant that the People have taken an appeal and the consequences of the appeal Rule 606.5(d).

Appellate counsel in the appellate division has an obligation upon affirmance in criminal actions/ CPL 440.10 motions, habeas corpus and Article 78 actions arising out of criminal proceedings of a conviction or denial of motions made under CPL 440.10 or CPL 440.20 or denial or dismissal of a habeas corpus or Article 78 proceeding or upon entry of the order, to give written notice to his client advising of his rights concerning right to make an application for leave to appeal and requesting instructions as to whether the client wants to do so. Rule 671.4 (a)(b). First, Third and Fourth Departments omits Article 78 proceeding. 606.5 (b) (2), 821.2 (b), 1022.11 (b). Second Department also includes upon appeal by the People results in an order by the intermediate appellate court, adverse or partially adverse to the defendant Rule 671.4 (e).

If the client indicates that he wants to make an application then counsel is obligated to file the necessary application to the appropriate appellate court. Rule; 606.5 (b) (2), 671.3 (a), 821.2 (b), 1022.11 (b).

In addition, the First Department requires that parolee's counsel, after notice of an adverse determination by the Board of Parole revoking his parole, shall advise the parolee of his right to bring an Article 78 proceeding and the time limitations to bring said proceeding Rule 606.5 (b) (2).

In Article 78 or a habeas corpus proceeding where there are two dissenters, appellate counsel in his written notice shall indicate to the defendant of his absolute right to appeal to the Court of Appeals. Rule 606.5 (b), 671.4 (b), (2), 821.2 (b), 1022.11 (b) (only mentions habeas corpus).

Second Department- In Article 78 or a habeas corpus proceeding where

there are two dissenters if counsel has not been retained to prosecute the appeal in the Court of Appeals, the notice of appeal should indicate that it is being filed per rule 671.4 and it should not be deemed to be counsel's appearance as the appellant's attorney for the appeal. Rule 671.4 (b).

Frivolous appeals

Assigned counsel

Criminal- If assigned counsel believes that an appeal is wholly frivolous the attorney may request permission to be relieved of the assignment. The request must be accompanied by an "Anders brief."Anders v. California, 386 US 738 (1967); People v. Stokes, 95 N.Y.2d 633 (2001) A copy of the brief has to be sent to the defendant. Id

In the brief, counsel has to recite the facts and mention potential points and citations why no non frivolous issues can be raised. People v. Stokes, 95 N.Y.2d 633 (2001). Counsel also has to send a letter to the client indicating that if the defendant wishes to file a pro-se supplemental brief the defendant should notify the Court within 30 days after mailing, of his or her intention to do so People v. Saunders, 52 A.D.2d 833 (1st Dept. 1977); Rule 670.12 (g); see. Rule 1000.13 (q) 1022.11(a) 30 days before return date of motion.

In an assigned counsel case, if the attorney is incorrect and that there is a non frivolous issue on appeal, then the attorney is discharged and a new attorney is assigned. People v. Davis, 73 N.Y.2d 864 (1989). The Court names the outgoing attorney in its order, which is published in the NY Law Journel. See, e.g., People v. Rawlings, 150 A.D.2d 619 (2nd Dept. 1989).

Civil- Could be subject to sanctions Rule 670.2 (h), Rule 130-1. (c). If assigned counsel believes that appeal is totally frivolous, then counsel proceeds in the same manner as assigned criminal counsel See, e.g., Matter of Stuart v. Stuart, 21 A.D.3d 967 (2nd Dept. 2005).

In the Interest of Justice

Criminal- Right for the Appellate Division to consider unpreserved issues "in the interest of justice."CPL 470.15 (3) (c)(6). The Court of Appeals has no right to consider issues in the interest of justice CPL 470.35 (1).

Civil- Generally no right to consider on appeal issues not raised in the Court below. There are some exceptions to this rule. See materials submitted in the preservation portion of the coursebook for examples of exceptions.

Settlement Conferences

Civil- First Department-Rule 600.17 (e) Second Department - Rule 670.4 (b); Third Department- Rule 800.24-b

Criminal- No conferences.

CPL & CPLR

The CPL does not apply in civil cases. See CPL 1.10.Does the CPLR apply to Criminal Proceedings?

It is clear where the CPL explicitly refers to CPLR such as CPL 60.10, then the CPLR applies. See, e.g., People v. Cratsley, 68 NY2d 81 (1995).

The issue is in the other cases. The Appellate Division in the First and Third Departments have held that the CPLR has no application in criminal actions and proceedings People v. Stacchini, 108 A.D. 3d 866, FN1 (3rd Dept. 2013); People v. Silva, 122 A.D.2d 750 (1st Dept. 1986); See also People v. Crisp, 268 A.D.2d 247 (1st Dept. 2000). Although the Appellate Division Second Department has not decided the issue the Appellate Term has agreed with this position People v. Manupelli, 22 Misc.3d 67 (App. Term 2nd Dept. 2008).

Nevertheless, some lower courts including those in the covered under the First Department have ruled otherwise See, e.g., People v. Ellington, 2012 NY Slip Op 51219 (U) (Sup. Bronx 2012).

ETHICS—WHAT WOULD YOU DO?

A PRACTICAL EXERCISE IN APPELLATE ETHICS

by

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Ethics—What Would You Do? A Practical Exercise in Appellate Ethics

I. INTRODUCTION

Appeals seem to follow trial court judgments just as surely as night follows day. Indeed, many lawyers specialize in appellate practice. Lawyers' compliance with rules of professional conduct obviously is as important in appellate litigation as it is in matters before a trial court or any other tribunal. Given the nature of appellate practice and its inherent differences from trial practice or the representation of clients in transactional or other non-litigation contexts, however, there are a variety of ethics rules that simply do not apply to representations of clients before appellate courts. There being no jury, no witness examinations, and no discovery in appellate representations, for example, rules concerning pretrial procedure and conduct in discovery, conduct at trial, and limits on a lawyer's ability to act as advocate at trial when lawyer is also a witness simply do not apply to the normal life of an appellate lawyer. A number of other rules or professional conduct, such as those regarding a lawyer's service as a third-party neutral, limiting lawyers' ability to communicate with jurors after discharge, and establishing the duties of lawyers involved as advocates in non-adjudicative proceedings, are also not likely to surface in appellate representations.

While some professional responsibility issues will seldom, if ever, confront an appellate lawyer, a number of professional responsibility issues do tend to either arise more frequently, or be of weightier concern, in appellate litigation. Part II of this Chapter addresses a number of ethics issues relating to lawyers' duty of candor to appellate courts and others. Part III explores the limits of appellate lawyers' ability to criticize courts and judges. Although lawyers do not necessarily check their First Amendment rights at the courthouse door, those rights are notably scaled back in most jurisdictions. Part IV focuses on the pursuit of frivolous appeals and bad faith litigation at the appellate stage. Part V examines lawyers' duties to avoid delay and to

expedite litigation in the context of appellate proceedings. Part VI discusses a conflict of interest issue—so-called positional conflicts—that, while rare, can be difficult to recognize and resolve.

II. APPELLATE LAWYERS AND THE TRUTH

"Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth."[1] For appellate lawyers, allegiance and fidelity to truth can be made more difficult when the core premise of their mission for their client may simply be untrue—the lower court decision that they are seeking to have reversed as erroneous may clearly have been correct. Or, when representing an appellee, an appellate lawyer may desperately wish to cling to a trial court victory that should have properly gone the other way. Unhappily for appellate lawyers, their duty of "allegiance and fidelity to truth" may, on the right facts, compel them to confess error below, notwithstanding their concurrent duty to competently advocate their clients' claims.[2] This explains, for example, the general requirement that appellate lawyers call to a court's attention any uncertainties about the existence of appellate jurisdiction.[3]

This broad and overriding duty to be truthful, often described as a duty of candor, is critical. As the court in *United States v. Shaffer Equipment Co.*[4] explained:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or lack of candor in any material respect

[1] Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47, 56 (Pa. 2005); *see also In re* Kalil's Case, 773 A.2d 647, 648 (N.H. 2001) ("The confidence of judges to rely with certainty upon the word of attorneys forms 'the very bedrock' of our judicial system.").

[2] Boca Burger, Inc. v. Forum, 912 So. 2d 561, 571-73 (Fla. 2005).

[3] Grow Co. v. Chokshi, 959 A.2d 252, 263 n.7 (N.J. Super. Ct. App. Div. 2008).

[4] 11 F.3d 450 (4th Cir. 1993)

> quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.[5]

Indeed, courts can and do treat this duty of candor owed by lawyers as officers of the court as being both broader than that imposed by any ethics rules and a duty which ethics rules do not supplant.[6] This broader, general duty of candor derives from lawyers' larger duty to protect the integrity of the judicial process and can provide a basis for sanctioning a lawyer even if the lawyer's dishonesty arguably does not amount to a violation of pertinent ethics rules, such as Model Rule 3.3,[7] which generally establishes lawyers' duty of candor to tribunals.[8] In addition to Model Rule 3.3, acts of dishonesty in handling appeals can result in a determination that a lawyer violated Model Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," or Model Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice," or both.[9]

Model Rule 3.3, straightforwardly entitled "Candor Toward the Tribunal," contains two provisions of vital importance to lawyers handling cases on appeal. The first is the prohibition in Model Rule 3.3(a)(1) against knowingly making "a false statement of fact or law to a tribunal."[10] The second is the prohibition in Model Rule 3.3(a)(2) against knowingly failing "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[11] Because Model

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[5] *Id.* at 457.

[6] *Id.* at 458.

[7] *Id.* at 458-63.

[8] MODEL RULES OF PROF'L CONDUCT R. 3.3(2011).

[9] *Id.* R. 8.4(c) & (d).

[10] *Id.* R. 3.3(a)(1).

[11] *Id.* R. 3.3(a)(2).

Rule 3.3(c) explicitly provides that a lawyer's duties under Model Rule 3.3 trump any obligation of client confidentiality,[12] these two candor-based duties under the ethics rules can require an appellate lawyer to disclose information despite the fact that it is confidential client information. Working through the duty to disclose adverse authority and its impact on marshaling arguments for the client can be particularly challenging for appellate lawyers.

A. The Duty to Disclose Adverse Authority

One of an attorney's "basic duties" as an officer of the court is to call applicable legal authority to the court's attention.[13] Ethics rules require a lawyer to not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[14] Phrased positively, a lawyer is ethically obligated to disclose the described authority. "Legal authority," for purposes of this rule, is not limited merely to case law and statutory authority, but extends to administrative rulings, ordinances, rules, and regulations.[15] Sources commonly described by lawyers as "secondary authorities," such as law review and bar journal articles, treatises, legal encyclopedias, hornbooks and similar sources, however, do not qualify as legal authority for purposes of this rule.

Model Rule 3.3(a)(2) speaks in terms of disclosing legal authority in the "controlling jurisdiction," which means that this duty to reveal directly adverse case law is not limited to

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[12] *Id.* R. 3.3(c) (explaining that lawyers' duties under Rule 3.3(a) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6").

[13] Dike v. People, 30 P.3d 197, 201 (Colo. 2001)

[14] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2011).

[15] *See, e.g.*, Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (holding that defense lawyer in horseback riding accident lawsuit had duty to disclose that statute immunizing defendant from liability had post-accident effective date).

appellate decisions, but can extend even to trial court decisions.[16] The "controlling jurisdiction," for purposes of this rule, typically means the forum state in cases pending before state courts and the same judicial district or appellate circuit for federal court cases.[17] Of course, whether you are in state court or federal court, decisions of the United States Supreme Court are always considered to be from a controlling jurisdiction.[18]

One interesting phenomenon is how prone lawyers can be to simply misconstrue the ethics requirement to disclose directly adverse authority to require only the disclosure of controlling authority.[19] From time-to-time, attorneys try to mount creative arguments about whether a case is from a controlling jurisdiction or not, but more often than not those arguments merely involve a variation on the mistaken concept that the test is whether the case amounts to controlling authority. *Schutts v. Bentley Nevada Corp.*[20] is one such instance. In *Schutts*, the plaintiff's lawyer was taken to task by the Nevada district court for failing to cite two Ninth Circuit decisions that were directly adverse to the plaintiff's position in the litigation. The

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[16] Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1344 (5th Cir. 1990); Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 538-40 (W.D. pa. 2001). *But see* Brundage v. Estate of Carambio, 951 A.2d 947 (N.J. 2008) ("Both because the *Levine* decision was unpublished, and because it was the decision of a trial court, it was not 'legal authority in the controlling jurisdiction' that Collins was obligated to call to the attention of either the Family Part judge or the appellate panel.").

[17] *See, e.g.*, Pannell v. McBride, 306 F.3d 499, 502 n.1 (7th Cir. 2002) (failing to disclose two cases from the same judicial circuit); Shelton v. S. Energy Homes, Inc., 420 F. Supp. 2d 579, 583 n.1 (S.D. Miss. 2006) (failing to disclose Supreme Court case and case from governing judicial circuit); Chew v. KPMG LLP, 407 F. Supp. 2d 790, 802 n.13 (S.D. Miss. 2006) (failing to cite case from governing judicial circuit); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (failing to disclose case from same judicial district); Massey v. Prince George's County, 907 F. Supp. 138, 141-43 (D. Md. 1995) (failing to disclose case from same federal circuit); Time Warner Entm't Co. v. Does #1-2, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) (failing to disclose applicable federal statute and case from same federal circuit); *In re* Thonert, 733 N.E.2d 932, 933-34 (Ind. 2000) (failing to disclose directly adverse Indiana Supreme Court authority); State v. Cagle, 641 S.E.2d 705, 709 (N.C. Ct. App. 2007) (failing to disclose directly adverse North Carolina Supreme Court case).

[18] Batko v. Sayreville Democratic Org., 860 A.2d 967, 968 (N.J. Super. Ct. App. Div. 2004) ("There is no more important or dispositive source of legal authority than decisions of the Supreme Court of the United States."); State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (criticizing lawyers who omitted any discussion of Supreme Court decision that clearly controlled an important issue in the case and had actually been relied upon by lower court).

[19] *See, e.g.*, Tyler v. State, 47 P.3d 1095, 1104 (Alaska Ct. App. 2001).

[20] 966 F. Supp. 1549 (D. Nev. 1997)

lawyer sought to justify his omission on the basis that there was a conflicting decision in the Second Circuit and that one of the Ninth Circuit cases was "not the law of the land" until the Supreme Court acted to reconcile the Ninth Circuit and Second Circuit decisions. The Nevada district court labeled the lawyer's argument as "truly bizarre"[21] and dispatched it fairly simply. Because the cases were decisions by the federal court of appeals encompassing Nevada, "they [were] the law, here, in this court. End of story."[22]

What if there is no authority on point in the controlling jurisdiction, but there is directly adverse authority in another jurisdiction? Must a lawyer who knows of such authority cite it even though it is not in the controlling jurisdiction? Model Rule 3.3(a)(2) itself does not require disclosure in this situation, and disclosure of such authority could very well undermine an advocate's duty to competently represent her client. If, on the other hand, a lawyer cites authority from outside the controlling jurisdiction because there is no authority on point in the jurisdiction, some courts reason that the lawyer then becomes required to also reveal directly adverse authority from outside the controlling jurisdiction.[23] Courts advocating such an obligation posit that Rule 3.3(a)(2) only establishes a minimum standard of conduct; a lawyer's general duty of candor can require more.[24] Moreover, a lawyer's selective citation of authorities from other jurisdictions arguably represents an attempt to deceive the court,[25] thus implicating

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[21] *Id.* at 1563.

[22] *Id.*

[23] *See* Mannheim Video, Inc. v. County of Cook, 884 F.2d 1043, 1047 (7th Cir. 1989); Plant v. Doe, 19 F. Supp. 2d 1316, 1318-19 (S.D. Fla. 1998); Rural Water Sys. #1 v. City of Sioux Ctr., 967 F. Supp. 1483, 1498 n.2 (N.D. Iowa 1997).

[24] *See, e.g., Rural Water*, 967 F. Supp. at 1498 n.2 (stating that "basic notions of professionalism" demand something more than mere compliance with ethics rules regarding the disclosure of directly adverse authority in the controlling jurisdiction in situations such as this).

[25] *See Mannheim Video*, 884 F.2d at 1047 (calling the selective citation of such authorities "a poor example of an attorney conforming to his duties as an officer of the court"); *Rural Water*, 967 F. Supp. at 1498 n.2 (saying that the selective citation of authorities from outside the controlling jurisdiction "smacks of concealment").

Rules 8.4(c) and (d).[26] One could further argue, perhaps analogizing to tort law, that a lawyer may be held to assume a duty to reveal directly adverse authority from outside the controlling jurisdiction if she cites favorable authority from outside the jurisdiction.[27]

It may be possible for a lawyer to assume a duty to reveal directly adverse authority from outside the controlling jurisdiction, but courts should recognize such a duty sparingly. Even a lawyer's rigorous duty of candor as an officer of the court must have reasonable limits to accommodate the lawyer's duties to her client as an advocate. For example, it is one thing for a court to take a lawyer to task for cherry-picking a case from a non-controlling jurisdiction and ignoring another case in another non-controlling jurisdiction that is directly adverse to the lawyer's client's position. It is another, however, for a court to hold that because a lawyer cited a case from non-controlling jurisdiction *A* that adopted her client's argument, it would be a breach of the lawyer's duty of candor to not disclose the existence of a case from non-controlling jurisdiction *B* that rejected the client's argument. Further, in the rare instance when such a duty is imposed, it should not be premised in any respect upon Model Rule 3.3(a)(2), for the language of that rule in no way supports it. Depending on the facts, Model Rules 8.4(c) and (d) are better authorities on which to claim a premise for such a duty.[28]

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[26] MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2011) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation"); *id*. R. 8.4(d) (stating that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice").

[27] *See Mannheim Video*, 884 F.2d at 1047 (describing lawyer's failure to reveal non-dispositive authority from intermediate state appellate court as "an exercise in gall" when he had cited intermediate appellate court decisions from other states to support his position, in addition to citing federal district court decisions from outside the Seventh Circuit, but declining to reverse district judge's decision not to impose sanctions.).

[28] *See In re* Uchendu, 812 A.2d 933, 940-41 (D.C. 2002) (noting the breadth of Rule 8.4(d) and explaining that a lawyer's conduct may violate Rule 8.4(d) even if it does not actually affect a court's decision-making process, but merely has the potential to do so).

Under Model Rule 3.3(a)(2), the lawyer's ethical duty to reveal authority is not triggered unless the authority is known to be "directly adverse" to her client's position.[29] Nevertheless, lawyers who split hairs over whether adverse authority is something they know to be "directly" adverse dance on a razor's edge, inasmuch as that determination is almost always subject to objective evaluation rather than pivoting on the subjective view of the attorney involved. Lawyers should recognize that, for purposes of their ethical obligation, authority may be "directly adverse" even though the lawyer reasonably believes that the authority is factually distinguishable or that the court will otherwise be led to determine that the authority is inapposite.[30]

An example of a "doomed to fail" type of argument involves claiming that a case is not directly adverse because it has been rendered questionable or "stale" because of the passage of time. While the passage of many years without any mention in the case law can provide a basis for seeking to distinguish authority and even seeking to have a modern court question its vitality, it does not offer an excuse for failing to disclose the existence of the authority.[31] The mere passage of time alone cannot transform directly adverse authority into something else any more than an alchemist can transform lead into gold.

From a practical perspective, Model Rule 3.3(a)(2) should seldom have to concern good advocates. As advocates, our credibility is an essential commodity in all our dealings, but even more significantly so with respect to the courts in which we practice. Failing to reveal authority

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[29] *See, e.g.*, O'Neill v. Dunham, 203 P.3d 68, 73 (Kan. Ct. App. 2009) (concluding that counsel had no duty to reveal inapposite case in the controlling jurisdiction).

[30] Shocklee v. Mass. Mut. Life Ins. Co., 369 F.3d 437, 440 n.3 (5th Cir. 2004); Tyler v. State, 47 P.3d 1095, 1105-05 (Alaska Ct. App. 2001).

[31] *See* Lieber v. ITT Hartford Ins. Ctr., Inc., 15 P.3d 1030, 1039 n. 14 (Utah 2000) (rejecting argument that "simply because a case has not been cited recently, it has no precedential value. It does not matter when a case was decided; as long as it has not been overruled, it is still the law and binding precedent. . . .").

that the lawyer realizes the court is likely to view as important or advocating a position contrary to directly adverse authority that was not disclosed are obvious ways to leave a court feeling misled and erode judicial trust. In fact, judges, like everyone else, are commonly inclined to ascribe greater importance to items that people seek to hide from them; thus, a lawyer's failure to reveal directly adverse authority can actually serve to enhance the status of the authority from the court's viewpoint—after all, if the authority was so obviously wrong or readily distinguishable, surely the lawyer would have taken the opportunity to so argue. For these reasons, the best appellate advocates do not shy away from revealing directly adverse authority in the controlling jurisdiction, but rather reveal its existence while simultaneously offering up their best arguments to criticize, distinguish, or downplay the authority's importance or, if unable to do anything else, candidly seek its reversal outright.[32] An added benefit of doing so is that such behavior builds credibility with the court and may even favorably influence the court's ultimate decision.[33]

A particularly telling example of how ineffective taking the opposite sort of approach to dealing with directly adverse authority can be is *Tyler v. State*.[34] After being convicted of a felony for driving while intoxicated, David Tyler appealed his conviction to challenge how the court treated his two prior DWI offenses because they affected his status as a repeat offender and meant a felony conviction this time instead of a misdemeanor.[35] Because it was not cited by the prosecutor nor by Tyler's own attorney, Eugene Cyrus, the existence of an Alaska Supreme Court case, *McGhee v. State*,[36] which "addressed this very issue in a slightly different setting"

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[32] *See, e.g.*, Williams v. State, 74 S.W.3d 902, 905 (Tex. App. 2002) ("Showing high ethical standards, appellant's counsel on appeal acknowledges the existence of controlling case authority directly contrary to his arguments.")

[33] *See* Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 540 (W.D. Pa. 2001) (providing an explanation of this very point).

[34] 47 P.3d 1095 (Alaska Ct. App. 2001).

[35] *Id.* at 1097-99.

[36] 951 P.2d 1215 (Alaska 1998).

only came to the appellate court's attention as a result of its own research.[37] Cyrus could not claim, however, that he was unaware of *McGhee*, because Cyrus was the lawyer who represented McGhee before the Alaska Supreme Court.[38]

Cyrus explained that he had not cited *McGhee* because he believed that it did not control the outcome of Tyler's case.[39] He contended that *McGhee* was factually distinguishable, and that the court was wrong to rely on *McGhee* to find against Tyler because the cases arose in different contexts.[40] Among other things, Cyrus looked for assistance from a trial court order in another case in which the judge had agreed that *McGhee* did not control the disposition of a case like Tyler's. Thus, because "reasonable attorneys and judges could disagree on . . . whether *McGhee* was controlling authority in Tyler's case," Rule 3.3 did not require him to reveal it.[41]

The court easily rejected Cyrus' arguments. *McGhee*, having been decided by the Alaska Supreme Court, was clearly authority in the controlling jurisdiction and, as the court explained Tyler's duty of disclosure extended to directly adverse authority in the "controlling jurisdiction," not just "controlling authority."[42] With respect to whether *McGhee* should be considered "directly adverse," the court stated:

> [A] court decision can be "directly adverse" to a lawyer's position even though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will

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[37] *Tyler*, 47 P.3d at 1099.

[38] *Id.* at 1102.

[39] *Id.*

[40] *Id.* at 1102-03. The making of this type of doomed argument, especially by attorneys who were involved in the prior case, is surprisingly commonplace. *See, e.g.*, *In re Thonert*, 733 N.E.2d 932, 933-34 (Ind. 2000) (reprimanding and admonishing lawyer for failing to disclose in appellate brief controlling authority).

[41] *Tyler*, 47 P.3d at 1104.

[42] *Id.*

> ultimately conclude that the decision does not control the current case.[43]

The court explained that such a determination is not made in hindsight; rather, it turns on whether the attorney knows, at the time the attorney makes the conscious decision not to cite the authority, that the omitted authority was directly adverse to the attorney's position.[44] Cyrus did not claim ignorance of *McGhee's* potential importance to Tyler's appeal. Rather, he contended instead that he honestly believed that it was factually distinguishable, should not have controlled the court's decision, and, thus, he was not required to disclose it. Not surprisingly, the *Tyler* court again rejected this argument.[45] Cyrus was obligated to call *McGhee* to the court's attention even if he reasonably believed the case to be inapposite.[46] The *Tyler* court concluded that Cyrus violated Rule 3.3, but because the court determined that he did not act in bad faith, it only fined him $250.[47]

Although Model Rule 3.3(a)(2) provides that the duty to reveal authority will not arise unless the authority is "not disclosed by opposing counsel,"[48] this language does not arm a lawyer who knows of directly adverse authority in the controlling jurisdiction to omit that authority from an opening brief in the hope that her opponent will thereafter find and cite it.[49] This is because of the lawyer's duty "to refrain from affirmatively misleading [a] court as to the state of the law" and the unsurprising view of courts that a breach of that duty is not cured by

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[43] *Id.* at 1105-06.

[44] *Id.* at 1107.

[45] *Id.* ("When an attorney knows of a decision that is 'directly adverse' . . . , and when opposing counsel fails to cite that decision, Rule 3.3(a)(3) requires the attorney to reveal the decision even though one could reasonably argue that it does not control the case at hand.").

[46] *Id.* at 1108.

[47] *Id.* at 1109.

[48] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2011).

[49] Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988).

subsequent citation of the authority in question by opposing counsel.[50] Thus, from an ethical standpoint, this apparent safe harbor only opens for appellate lawyers when it is least useful—when they are second to file a brief and their adversary has already raised and argued the authority in the opening brief.

A final question worth raising is what must a lawyer do to be able to claim to have satisfied the obligation to "disclose" the directly adverse authority? Insight into the answer to this question can be gained by discussing a postscript to the *Tyler* decision.[51] There, despite finding that Cyrus violated Rule 3.3, the Alaska Court of Appeals fined him $250—a pittance. Remarkably, given that outcome, Cyrus petitioned the court for rehearing. He pointed out for the first time on rehearing that he actually *did* cite *McGhee* in his opening brief; however, he cited the case for an unrelated point of law.[52] The court did not find this "interesting coincidence" to provide a basis for changing its original decision and denied his petition for rehearing.[53]

From a practitioner's perspective, the court's conclusion on rehearing that Cyrus violated Rule 3.3 even though he actually had cited *McGhee* in his opening brief, albeit on an unrelated point, may seem a surprising outcome. Many lawyers would consider mere citation to a directly adverse case to be "disclosure" for purposes of the rule. After all, an advocate is only obligated to disclose directly adverse authority; she is not required to engage in a "disinterested exposition

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[50] *Id. But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 cmt. c. (2000) ("If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, [the lawyer is required] to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.").

[51] Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001).

[52] *Id.* at 1111.

[53] *Id.*

of the law."[54] Thus, citation should be treated as sufficient disclosure given that the court ought to be expected to read the case for itself once it is cited.

That line of thought, however, takes too crabbed a view of the purpose behind Model Rule 3.3(a)(2) and state analogs. The purpose behind the rule is to require that what is being disclosed to the court is the fact that *directly adverse* authority in the controlling jurisdiction exists. It is precisely such authority that may be important to the court in reaching a correct result. The fact that the citation to *McGhee* was made in relation to an unrelated point of law—a point of law for which it did not constitute directly adverse authority—means that Cyrus' citation to *McGhee* in that manner did not satisfy the purpose of the rule and that the *Tyler* court reached the correct conclusion.

Had Cyrus simply added a footnote to his argument with a *but see* citation to *McGhee* with no further explanation, he would have been in the clear. A *but see* signal indicates that cited authority clearly supports a proposition contrary to the main proposition. A lawyer's citation to directly adverse authority for a proposition different than that on which the authority is directly adverse, however, should not be deemed to satisfy the lawyer's duty under Model Rule 3.3(a)(2). Courts rely on counsel to supply most legal argument, and it is unreasonable for a lawyer to claim to have complied with her ethical obligation through means that would require the court to scour every cited case for other issues or points that also happened to be relevant to the dispute at hand. Moreover, requiring courts to read all cases cited to them for purposes of ferreting out directly adverse authority delays the resolution of all disputes, increases the courts' workloads, and leads to the unnecessary expenditure of judicial resources.[55] As the *Tyler* court explained:

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[54] MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 4 (2011).

[55] *See* Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 539 (W.D. Pa. 2001) (stating that the disclosure of adverse authority "may save considerable time and effort in the court's own analysis"); *Tyler*, 47 P.3d at 1108 (discussing the "unneeded expenditure of judicial resources" caused by lawyers' failure to disclose directly adverse

> When a lawyer practicing before us fails to disclose a decision . . . that is directly adverse to the lawyer's position, the lawyer's conduct will, at the very best, merely result in an unneeded expenditure of judicial resources – the time spent by judges or law clerks in tracking down the adverse authority. At worst, we will not find the adverse authority and we will issue a decision that fails to take account of it, leading to confusion in the law and possibly unfair outcomes for the litigants involved. This potential damage is compounded by the fact that our decision, if published, will be binding in future cases.[56]

Of course, in *Tyler*, the fact that Cyrus apparently overlooked until the eleventh hour when he petitioned for rehearing that he had actually cited *McGhee* at all perhaps suggested to the court that Cyrus always knew that his citation to the case for an unrelated point did not provide a defense to his alleged Rule 3.3 violation.[57] The fact that, even though Cyrus had cited the decision, the prosecuting attorney also failed to cite and argue *McGhee* to support the State's position, only means that there was plenty of poor advocacy to go around in *Tyler*.

B. False Statements of Material Fact or Law and Other Forms of Dishonesty

Appellate lawyers can run afoul of their duty of candor through various types of conduct having as a common thread acts of dishonesty. Given how important written communication is to the appellate process, it will come as no surprise that many such instances involve dishonest conduct relating to, or revealed within, briefs. In *Thomas v. City of North Las Vegas*,[58] for example, the court sanctioned a lawyer for materially misrepresenting facts, filling his brief with assertions that lacked citations to the record, and making arguments without case law support.[59]

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authority in the controlling jurisdiction); Schlafly v. Schlafly, 33 S.W.3d 863, 873 (Tex. App. 2000) (discussing the burden placed on appellate court staffs when counsel misrepresent the facts on which their arguments are based).

[56] *Tyler*, 47 P.3d at 1108 (footnote omitted).

[57] *Id.* at 1111.

[58] 127 P.3d 1057 (Nev. 2006).

[59] *Id.* at 1066-67; *see also* Sierra Glass & Mirror v. Viking Indus., Inc., 808 P.2d 512, 516-17 (Nev. 1991) (involving a false statement of material fact in an appellate brief); *In re* Disciplinary Proceedings Against Kalal, 643 N.W.2d 466, 468-74 (Wis. 2002) (reprimanding lawyer who misrepresented facts during appellate oral argument).

Likewise, in *Schlafly v. Schlafly*,[60] the court castigated the appellants' lawyers for "blatant misrepresentation and mischaracterization of the facts" in briefs filed with the court and wrote at length to condemn their breach of the duty of candor and the hardships their unprofessional conduct caused others.[61] Lawyers occasionally ghost write briefs for ostensibly pro se litigants, conduct which can be argued to amount to a misrepresentation to the court in which the brief is filed.[62] Lawyers also will, far too frequently, engage in acts of plagiarism[63] in violation not only of their ethical obligations but in dereliction of their duties of competence and diligence given that acknowledging that the ideas being brought forth are those of scholars or other recognized secondary authority will be far more persuasive than claiming them as your own.

Briefing also provides a fertile source of a number of additional types of unfortunate and unethical conduct for which lawyers can find themselves subject to professional discipline. In *Weeki Wachee Springs, LLC v. Southwest Florida Water Management*,[64] the court sanctioned a lawyer for cheating on line-spacing and font size in his client's brief in order to circumvent the court's rules on page limits for briefs. The court succinctly rejected the lawyer's "convoluted argument" as to why he had not violated the rules, an unremarkable outcome given that the court had previously caught the same lawyer using an impermissibly small font in his brief.[65] Lawyers

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[60] 33 S.W.2d 863 (Tex. App. 2000).

[61] *Id.* at 872-74; *see also* Myers v. Trendwest Resorts, Inc., 100 Cal. Rptr. 3d 658, 665 (Cal. Ct. App. 2009) (stating that "[p]rofessional ethics and considerations of credibility in advocacy require that appellants support their arguments with fair and accurate representations of trial court proceedings," and lamenting the need to scour a voluminous record to discover evidence that a party should highlight); People v. Roose, 44 P.3d 266, 271 (Colo. 2002) (holding that lawyer who misrepresented facts in notice of appeal violated ethical rules, including Rule 3.3(a)(1)).

[62] *See, e.g.*, Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079 (E.D. Va. 1997).

[63] *See, e.g.*, Frith v. State, 325 N.E.2d 186, 188 (Ind. 1975) (noting that appellant copied ten ALR pages in brief "without quotation marks, indentation or citation" and without listing ALR in table of citations or in any other identification of authority in brief).

[64] 900 So.2d 594 (Fla. Dist. Ct. App. 2004).

[65] *Id.* at 595-56.

also can be found to have acted unethically by employing selective quotations of authority, including the misuse of ellipses to wrongly alter the meaning or import of authorities or documents in the record.[66]

Although not an appellate decision, *Northwestern National Insurance Co. v. Guthrie*[67] illustrates this kind of troubling conduct. *Northwestern National* was an insurance coverage case. In arguing that the district court should reconsider its denial of their motion for judgment on the pleadings, counsel for the defendants recited in their memorandum the line of cases establishing the general rule in Illinois that an insurer's duty to defend is to be determined by the allegations in the complaint against the insured. Defense counsel, however, neglected to discuss a critical exception to the general rule that permits the insurer to challenge the existence of any duty to defend by showing that the actions forming the basis of the suit against the insured fall within a policy exception.[68] The court considered that failure to be "something more than mere oversight."[69] For example, the defense lawyers quoted a lengthy passage from a case setting forth the general rule, but "[t]he very next sentence explaining the exception to the rule in the declaratory judgment context, [was] not disclosed by counsel."[70] Nor did they find another space in their memorandum to make mention of the existence of the exception; this failure to disclose

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[66] *See, e.g.*, Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1357 (Fed. Cir. 2003) (sanctioning lawyer who "in quoting from and citing published opinions, . . . distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them"); Amstar Corp. v. Envirotech Corp., 730 F.2d 1476, 1486 (Fed. Cir. 1984) ("Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of candor required by . . . Rule 3.3."); Federated Mut. Ins. Co. v. Anderson, 920 P.2d 97, 103-04 (Mont. 1996) (sanctioning insurer that attempted to mislead court through alteration of case holding by use of ellipses); Sobol v. Capital Mgmt. Consultants, Inc., 726 P.2d 335, 337 (Nev. 1986) (quoting case as though quoted language was the court's holding when, in fact, the quote came from the dissent); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 280-81 (W. Va. 1991) (suspending lawyer who, among other things, misrepresented paraphrasing as a block quotation).

[67] No. 90 C 04050, 1990 WL 205945 (N.D. Ill. Dec. 3, 1990).

[68] *Id.* at *1.

[69] *Id.* at *2.

[70] *Id.*

relevant authority, the court observed, came "perilously close to a violation of the legal profession's ethical canons."[71] The court, however, opted to assume that the failure to reveal the authority at issue was simply the result of the lawyers' "sloppy research and writing" rather than a purposeful attempt to mislead the court.[72] Instead of treating the matter as something requiring a disciplinary referral or a court sanction, the district court opted instead to direct the head of the litigation department at the firm employing defense counsel to write to the court in response to its concerns about the matter.[73] Although this outcome likely annoyed the lawyer who was required to correspond with the court, it was a much more fortunate outcome than the lawyers involved had any right to expect.

While certainly a common source of problems, briefs are not the only medium in which appellate lawyers can engage in acts of dishonesty leading to discipline. In *In re Kalal*,[74] the Wisconsin Supreme Court publicly reprimanded a lawyer who lied and also gave "knowingly misleading" answers to questions posed by the justices during oral argument.[75] Misleading a court through omissions and silence about the fact that a case has actually settled, as occurred in *Merkle v. Guardianship of Jacob*,[76] involves a lack of candor striking at the core of the court system.

In *Merkle*, a Florida lawyer who was hoping for a ruling to provide precedent for similar cases ended up being fined and sanctioned instead. While serving as a guardian, LeRoy Merkle paid himself nearly $4000 that the trial court ordered him to refund to the estate. He appealed

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[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] 643 N.W.2d 466 (Wis. 2002).

[75] *Id.* at 472-74.

[76] 912 So. 2d 595 (Fla. Dist. Ct. App. 2005).

that decision, acting as his own lawyer, and when no one appeared as an appellee, the appellate court reversed and remanded the case to the trial court.[77] Thereafter, the Department of Veterans Affairs filed a motion to vacate in the court of appeals revealing that, prior to the appellate court's decision, Merkle and the Department had agreed that Merkle would refund the money to the estate and the Department would consent to Merkle being discharged as guardian.[78]

After being asked to respond by the appellate court, Merkle claimed that the agreement with the Department was conditioned on the fact it would not prevent appellate review of the trial court ruling. The appellate court referred the dispute to a commissioner for a hearing.[79] The hearing revealed that Merkle had actually filed his appellate brief the day after he executed the settlement agreement with the Department. During the hearing, Merkle asserted that the court had not been notified because of "greater issues besides this immediate case."[80]

In addition to stressing that Merkle's conduct violated his duty of candor to the court, the court noted that Merkle had clearly violated Florida Rule of Appellate Procedure 9.350(a), which explicitly requires the court to be "immediately notified" through a "signed stipulation for dismissal" when a case is settled before a decision on the merits.[81] Although willing to treat his admitted lack of appellate experience as justifying mitigation of discipline, the court of appeals determined that Merkle's conduct warranted sanctions, including payment of a $500 fine, payment of the costs of the proceedings before the commissioner, and mandatory attendance at

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[77] *Id.* at 597.

[78] *Id.* at 598.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 599.

an additional 15 hours of continuing legal education programming regarding appellate practice and procedure.[82]

AIG Hawai'i Insurance Co. v. Bateman[83] is another illustrative case from the same mold as *Merkle*. *Bateman* stemmed from an earlier declaratory judgment action, *Vincente*.[84] The parties in *Vincente*, including AIG, settled the declaratory judgment action. They did not reveal the settlement, however, and instead proceeded on appeal, because *Vincente* involved insurance coverage issues that AIG wanted resolved.[85] Both AIG's lawyers and Vincente's lawyers briefed the case; neither side revealed the settlement, which, of course, rendered the appeal moot.[86] After the Hawaii Supreme Court in *Vincente* issued an opinion favorable to AIG, and remanded the case to the trial court to enter summary judgment in AIG's favor, AIG moved to rescind the parties' settlement as having been premised on a mutual mistake of law. The trial court denied AIG's recission motion and the *Bateman* appeal followed.

The *Bateman* court was unimpressed by AIG's prosecution of an appeal that should have been moot to essentially obtain an advisory opinion.[87] The court was most disturbed, however, by the conduct of AIG's and Vincente's lawyers in concealing the settlement so that the *Vincente* appeal could proceed. In discussing their conduct, the court observed that "[t]he failure to make disclosure of a material fact to a tribunal is the equivalent of affirmative misrepresentation."[88] It

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[82] *Id.* at 602.

[83] 923 P.2d 395 (Haw. 1996).

[84] AIG Haw. Ins. Co. v. Vincente, 891 P.2d 1041 (Haw. 1995).

[85] *Bateman*, 923 P.2d at 397-98.

[86] *Id*. at 398.

[87] *Id*. at 400-01.

[88] *Id*. at 402.

was clear that the parties' settlement in *Vincente* was a material fact; had the lawyers revealed it, the appeal would have been moot. By not revealing the settlement, the lawyers duped the court into entering an opinion. Under the circumstances, the lawyers' failure to reveal the settlement "was tantamount to affirmative misrepresentation."[89] The lawyers' conduct thus appeared to violate Rules 3.3(a)(1) and 8.4(c), and the supreme court referred the matter to state disciplinary authorities for possible prosecution.

III. LAWYERS' CRITICISM OF COURTS

Driven by both altruism and self-interest, lawyers generally are deferential to, and respectful of, courts. Nevertheless, litigation is an exceedingly competitive endeavor and advocates and their clients alike can be very disappointed when decisions go against them. Once a case has reached the appellate stage, opportunities to alter a disappointing outcome often begin to dwindle as a result of the standard of review or simply because the case is closer to reaching a truly final, non-appealable judgment. Unfortunately, advocates who find themselves on the wrong side of a ruling, and especially those who feel pressured by a disappointed client, may allow personal factors to lead them to improperly criticize the court believed to have wrongly decided a case and, in so doing, potentially violate their ethical obligations. In *Northern Security Insurance Co. v. Mitec Electronics, Ltd.*,[90] for example, Mitec's counsel derided the trial court's reasoning and conclusions as "disingenuous," "inane," "ludicrous," and "risible."[91] While the Vermont Supreme Court did not sanction the lawyers, it pointedly noted that Mitec's briefs "lack

[89] *Id.*

[90] 965 A.2d 447 (Vt. 2008).

[91] *Id.* at 453 n.3.

the professional tone we expect from members of the bar," and reminded the lawyers that the tenor of their protestations could not create error where none existed.[92]

Appellate lawyers must think very carefully in fashioning their criticisms of lower court decisions to ensure that they are not doing so in ways that are capable of being read as attacks on the integrity or qualifications of the responsible judges. If it seems ridiculous to have to suggest that lawyers generally should not attack the integrity or qualifications of courts or judges, the many cases in which lawyers have been disciplined for allowing their zeal or disappointment to overcome their good judgment amply demonstrate the need to call lawyers' attention to their duties under the ethics rules.[93] Model Rule 8.2(a) provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.[94]

In addition to potential exposure to discipline, a lawyer who falsely or recklessly remarks about the qualifications or integrity of a court in a brief risks having her brief stricken in whole or part,[95] surely hurting the client's case as a result.

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[92] *Id.* at 453 & n.3.

[93] In addition to violating Rule 8.2, attorneys who make disparaging statements about a judge in reckless disregard of the truth run the risk of being disciplined for engaging in conduct "prejudicial to the administration of justice" in violation of Rule 8.4(d). *See, e.g.*, Notopolous v. Statewide Grievance Comm'n, 890 A.2d 509, 521 (Conn. 2006) ("[F]alse statements or statements made in reckless disregard of the truth that disparage a judge erode the public confidence in the judiciary and thereby undermine the administration of justice."); *In re* Disciplinary Action Against Nathan, 671 N.W.2d 578, 580 (Minn. 2003) (holding that "baseless and derogatory statements about judges" also violated Rule 8.4(d)); Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 445-46 (Pa. 2000) (imposing five-year suspension against attorney who violated Rule 8.4 by accusing "two judicial officers of violating their oath of office by rendering decisions in official matters on the basis of outside influence"); *see also* Anthony v. Va. State Bar, 621 S.E.2d 121, 127 (Va. 2005) (affirming public reprimand for violating Rule 8.2 and rejecting free-speech argument by declaring that the statement regarding the judges justifying discipline created "a substantial likelihood of material prejudice to the administration of justice as a matter of law").

[94] MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (2011).

[95] *See, e.g.*, Henry v. Eberhard, 832 S.W.2d 467, 474 (Ark. 1992) (striking six pages of appellants' brief for "inflammatory and disrespectful" remarks about trial court); McLemore v. Elliot, 614 S.W.2d 226, 227 (Ark. 1981) (striking appellant's brief in its entirety for "intemperate and distasteful language" directed at trial court); Peters v.

A. Limitations on Lawyers' Speech Rights and the First Amendment

The decision to insert the "knowingly or with reckless disregard as to its truth or falsity" standard in Model Rule 8.2(a) was no accident. The prohibitions in Model Rule 8.2(a) regarding what lawyers can and cannot say about courts and judges obviously have First Amendment implications.[96] The fact that a lawyer's criticism of a court may be in bad taste or reflect poor judgment does not necessarily make the lawyer's statements unethical. That said, "a lawyer's speech may be limited more than that of a lay person."[97] Although lawyers do not surrender their right to free speech upon admission to the bar, they must temper their criticisms of courts in accordance with professional standards.[98] Still, the drafters of the Model Rules expressly acknowledged the influence of groundbreaking Supreme Court precedent that determined that a lawyer's speech critical of the judiciary was "speech concerning public affairs" and part of "the essence of self-government."[99] In *Garrison v. Louisiana*,[100] the Supreme Court struck down Louisiana's criminal libel statute as unconstitutional. In so doing, the Court overturned the

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Pine Meadow Ranch Home Ass'n, 151 P.3d 962, 963, 967-68 (Utah 2007) (striking brief in its entirety with result being that court of appeals decision explicitly acknowledged by supreme court as in error was summarily affirmed).

[96] *See In re* Green, 11 P.3d 1078, 1083-87 (Colo. 2000) (discussing at length the application of the First Amendment to lawyer's claim that trial judge was racist, and the standard to be applied to lawyer's conduct); *In re* Charges of Unprof'l Conduct Involving File No. 17139, 720 N.W.2d 807, 813-15 (Minn. 2006) (discussing First Amendment implications of attorneys' criticism of judges, appropriate standard to be applied, and Rule 8.2(a)).

[97] *In re* Gershater, 17 P.3d 929, 936 (Kan. 2001); *see also In re* Zeno, 504 F.3d 64, 66 (1st Cir. 2007) (quoting Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991)); *In re* Shearin, 765 A.2d 930, 938 (Del. 2000) ("[T]here are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer's constitutional right to freedom of speech.").

[98] *In re* Arnold, 56 P.3d 259, 267-68 (Kan. 2002) (quoting *In re* Johnson, 729 P.2d 1175 (Kan. 1986)); *In re* Madison, 282 S.W.3d 350, 353-54 (Mo. 2009) (quoting various sources); *In re* Slavin, 145 S.W.3d 538, 548-50 (Tenn. 2004) (finding lawyer's First Amendment defense unavailing and suspending lawyer for statements that an administrative law judge was "[p]etty, barbarous and cruel," and a "[d]isgrace [to] his judicial office"); *Anthony*, 621 S.E.2d at 126-27. *But see In re Green*, 11 P.3d at 1083-87 (holding that lawyer's claim that trial judge was racist and therefore biased against him was speech protected by the First Amendment).

[99] Garrison v. La., 379 U.S. 64, 74 (1964); AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 8.2 Legal Background 206 (Proposed Final Draft, 1981) (explaining that Model Rule 8.2 is consistent with the limitations imposed by the Supreme Court, namely "that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is 'false or with reckless disregard'" of its truth or falsity).

[100] 379 U.S. 64 (1964).

conviction of a district attorney for statements made at a press conference, including speculation about the influence of racketeers on the judiciary and an accusation that the large backlog of criminal cases was caused by "the inefficiency, laziness, and excessive vacations" of certain specifically identified judges.[101] Citing *Garrison*, the drafters of the Model Rules explained in the legal background relevant to Model Rule 8.2(a) that "critical factors in constitutional analysis are the statement's falsity and the individual's knowledge concerning its falsity at the time of the utterance."[102]

Model Rule 8.2(a) might be subject to serious attack on First Amendment grounds if, for example, it were employed to discipline a lawyer for speech about a judicial candidate while campaigning on behalf of a sitting judge during a contested judicial election, it is not as vulnerable when applied to lawyers' speech as advocates in litigation. The First Amendment generally does not exempt a lawyer from discipline for intemperate speech in court,[103] nor from inappropriate statements in pleadings or briefs.[104] In most jurisdictions, lawyers' false statements about courts and judges in such contexts made knowingly or with reckless disregard for the truth simply do not enjoy any significant constitutional protection.[105] Further, despite the

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[101] *Id.* at 65-67.

[102] AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT R. 8.2 Legal Background 206 (Proposed Final Draft, 1981).

[103] *In re* Coe, 903 S.W.2d 916, 917 (Mo. 1995); *In re* Disciplinary Action Against Garaas, 652 N.W.2d 918, 925 (N.D. 2002).

[104] *See, e.g.*, Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 517 (Iowa 1997) (imposing discipline for "statements and accusations contained in pleadings and briefs do not infringe upon the attorney's constitutional right to freedom of speech"); Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 182-83 (Ky. 1996) (suspending lawyer who in a pleading opined that a new judge assigned to a case was "much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade . . .," and rejecting lawyer's claim that First Amendment shielded him from discipline); Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962, 967-68 (Utah 2007) (striking briefs and assessing sanction of attorneys' fees as a result of lawyer's many inflammatory statements regarding appellate panel, including analogizing its conduct to an alleged slaughter in Haditha of Iraqi civilians)..

[105] *See In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); *see, e.g.*, Miss. Bar v. Lumumba, 912 So. 2d 871, 884-86 (Miss. 2005) (finding Rule 8.2(a) violation where lawyer insinuated in court proceedings that judge could be bribed, accused the judge of unfairness, impugned judge's qualifications, and called the judge a "barbarian" in a press interview).

historical underpinnings of the adoption of this standard in the rule, "recklessness" as used in Model Rule 8.2(a) is measured by the majority of courts using an objective standard, rather than a subjective one.[106] This remains true where the lawyer is a party and appears pro se.[107]

Ramirez v. State Bar of California[108] is a prime example of a lawyer finding no solace in the First Amendment as a defense to discipline for attacking the integrity of a court. The lawyer charged with misconduct in that case, Glenn Ramirez, was representing his clients in a case involving the foreclosure of security interests in the clients' farm property, equipment, and livestock. Ramirez filed a reply brief in the United States Court of Appeals for the Ninth Circuit that asserted that three state court judges who decided a related case involving the same issues had acted "illegally" and "unlawfully" in reversing a trial court judgment for his clients.[109] He also argued that the judges had "become parties to the theft" of his clients' property, and that they had entered into an "invidious alliance" with the foreclosing creditor.[110] In a subsequent petition for certiorari, Ramirez implied that the state court judges had falsified the court record, and further stated that their "'unblemished' judicial records were 'undeserved.'"[111] The California State Bar charged Ramirez with violating provisions of the state's Business & Professions Code that prohibited lawyers from falsely maligning judges.

In arguing against discipline, Ramirez contended that his statements were protected by the First Amendment. The California Supreme Court disagreed, concluding that Ramirez's

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[106] Iowa Sup. Ct. Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 84 (Iowa 2008) (examining statement from standpoint of whether a "reasonable attorney" would have made it and concluding that the respondent attorney "did not have an objectively reasonable basis" for the statement); Bd. of Prof'l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1014 (Wyo. 2009) (determining that "attorney must have had an objectively reasonable basis for making the statements" in question) (citing *In re* Cobb, 838 N.E.2d 1197, 1213 (Mass. 2005)).

[107] Notopolous v. Statewide Grievance Comm'n, 890 A.2d 509, 518-20 (Conn. 2006).

[108] 619 P.2d 399 (Cal. 1980).

[109] *Id.* at 400-01.

[110] *Id.* at 401.

[111] *Id.* (footnote omitted).

statements were made with reckless disregard for the truth, and thus were not constitutionally-protected. Ramirez also argued that his statements should be excused because they were the product of the "zealous but proper representation of his clients' interests."[112] The court rejected this argument as well, noting that Ramirez's perceived duty of zealous advocacy did not excuse "the breach of his duties as an attorney."[113] The court ultimately suspended Ramirez from practice for one year. In doing so, it reasoned that Ramirez had to be punished "if for no other reason than the protection of the public and preservation of respect for the courts and the legal profession."[114]

A number of courts have rejected efforts by attorneys to claim that their challenged statements about a judge were merely statements of opinion that should be constitutionally protected.[115] In *In re Disciplinary Action Against Nathan*,[116] for example, a lawyer who wrote that the judge whose order he was seeking to have overturned on appeal was "a bad judge" who "won election to the office of judge by appealing to racism" and had "substituted his personal view for the law" was disciplined despite his efforts to claim that such statements were statements of opinion for which he could not be punished.[117] In rejecting the lawyer's argument,

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[112] *Id*. at 405 (footnote omitted).

[113] *Id*. at 405-06.

[114] *Id*. at 406.

[115] *In re* Disciplinary Action Against Nathan, 671 N.W.2d 578, 581-84 (Minn. 2003); *see also In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1996) (explaining that statements like "I think that Judge X is dishonest" implies a factual assertion rather than expressing an opinion); *In re* Comfort, 159 P.3d 1011, 1025 (Kan. 2007) (explaining that a lawyer cannot avoid discipline merely by characterizing statements as opinions); Pilli v. Va. State Bar, 611 S.E.2d 389, 392 (Va. 2005) (treating a lawyer's accusation that a judge was lying as a false factual assertion and not merely an opinion).

[116] 671 N.W.2d 578 (Minn. 2003).

[117] *Id.* at 581-82.

the Minnesota Supreme Court explained that "[m]erely cloaking an assertion of fact as an opinion does not give that assertion constitutional protection."[118]

Another illustrative case where an appellate advocate was disciplined for attacks on the judiciary after unsuccessfully invoking the First Amendment is *Office of Disciplinary Counsel v. Gardner*.[119] After losing his client's case before the Ohio Court of Appeals, Mark Gardner filed a motion for reconsideration that alternatively sought certification to the Ohio Supreme Court. In that motion, Gardner accused the appellate panel that heard the case of being dishonest and ignorant of the law.[120] He declared the panel's decision "so 'result driven' that 'any fair-minded judge' would have been 'ashamed to attach his/her name' to it."[121] He added that the court "did not give 'a damn about how wrong, disingenuous, and biased its opinion [was].'"[122]

Gardner further accused the panel of distorting the truth and of having done so grossly and maliciously.[123] Although that would likely have been more than enough for any author to feel like he had made his point, Gardner went on to write:

> Wouldn't it be nice if this panel had the basic decency and honesty to write and acknowledge these simple unquestionable truths in its opinion? Would writing an opinion that actually reflected the truth be that hard? Must this panel's desire to achieve a particular result upholding a wrongful conviction of a man who was unquestionably guilty of an uncharged offense—necessarily justify its own corruption of the law and truth? Doesn't an oath to uphold and follow the law mean anything to this panel?
>
> Is that claim that "We are a nation of laws, not men' have any meaning after reading the panel's decision? Can't this panel have the decency to actually address—rather than to ignore—the cases

[118] *Id.* at 584 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).

[119] 793 N.E.2d 425 (Ohio 2003).

[120] *Id.* at 427.

[121] *Id.* (quoting motion).

[122] *Id.* (quoting motion).

[123] *Id.* (quoting motion).

> cited by [the client] which demonstrate beyond any doubt that he was convicted of an offense he was never charged with having violated?
>
> In this case, beyond the ignored concepts of the law and truth, lies that of policy. As a policy matter, is this court really encouraging all officers in the Eighth District to charge a generic statute—or Chapter or Title—and not the particular offense they are accusing a citizen of violating? In the name of God, WHY? What is so difficult with a police officer doing his job in an intelligent manner? Why must this panel bend over backwards and ignore well established law just to encourage law officers to be slovenly and careless? In *State v. Homan (2000)*, 89 Ohio St.3d 421 [732 N.E.2d 952], didn't the Ohio Supreme Court just state that officers actually have to follow the rules strictly? Doesn't that mean anything to this panel?[124]

At the time, Ohio ethics rules tracked the Model Code of Professional Conduct. Ohio disciplinary authorities charged Gardner with violating two ethics rules based on the Model Code, including the provision most analogous to Model Rule 8.2, DR 8-102(B).[125] That rule provided: "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."[126] Facing suspension for his conduct, Gardner appealed his case to the Ohio Supreme Court, where he argued that his criticism of the court of appeals was protected speech under the First Amendment and the Ohio Constitution. The supreme court disagreed, finding that Gardner's statements were factual assertions of the lower court's corruption and bias and not merely "rhetorical hyperbole" or "imaginative expression"; the supreme court also rejected the notion that the statements qualified as protected speech by being "loosely definable" or "variously interpretable" as criticism of the law as applied by the panel.[127]

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[124] *Id.*

[125] *Id.* at 427-28.

[126] MODEL CODE OF PROF'L RESPONSIBILITY DR 8-102(B) (1969).

[127] *See Gardner*, 793 N.E.2d at 428-30.

The *Gardner* court next addressed DR 8-102(B)'s requirement that a lawyer shall not "knowingly" make accusations against a judge that are false."[128] Gardner had argued that the disciplinary board was required both to prove that his accusations of bias and corruption were false and that he subjectively knew them to be so. Although noting that a few jurisdictions had adopted the subjective standard Gardner urged,[129] the Ohio Supreme Court, following the majority approach, applied an objective standard.[130] Under an objective standard, attorneys may exercise their rights to free speech and make statements supported by reasonable factual basis even if they turn out to the mistaken. Lawyers may, however, be sanctioned for making accusations of judicial misconduct that a reasonable attorney would believe to be false.[131]

Importantly, Gardner conceded that he did not inquire into the integrity of the court of appeals panel before attacking it, and that he ignored his partner's advice not to accuse the panel of bias and corruption.[132] Given those facts, the supreme court easily concluded that Gardner had shown a reckless disregard for the truth in his allegations, bolstered also by the fact that it could find no evidence of bias or corruption in its own examination of the appellate record.[133] In the end, the court concluded that Gardner had violated the ethics rules and suspended him from practice for six months.[134]

Some courts, however, approach these questions in a manner that seems to acknowledge the context in which the Model Rule 8.2 standard was created, as well as the fact that judges are public officials (and, in many jurisdictions, elected public officials). The Oklahoma Supreme

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[128] *Id.* at 431.

[129] *Id.* (citing cases from four states).

[130] *Id.* at 432.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 433.

Court, for example, acknowledged the inappropriateness of allowing attorney speech critical of judges to be subjected to a different level of scrutiny particularly when lawyers are well-situated to know of which they speak.[135] In *State ex rel. Oklahoma Bar Ass'n v. Porter*,[136] the Oklahoma Supreme Court imposed no discipline upon an attorney for his statements to the media after trial that the judge "showed all the signs of being a racist," that if the judge "wants to practice his racism that way that's his business," and that the attorney had "never tried a case before [the judge] that [he] felt [he] got an impartial trial out of him."[137] The *Porter* court explained that such statements stood "at the epicenter of those expressive activities protected by the First Amendment."[138] The Colorado Supreme Court, analogizing a disciplinary proceeding against a lawyer for criticizing a judge to a public official pursuing a claim for defamation, found that a lawyer's accusation that a judge was "a racist and bigot" was protected by the First Amendment as a statement of opinion and could not be the basis for discipline under Rule 8.2.[139] Likewise, the Ninth Circuit, when confronted with a lawyer who had attacked a judge as being "ignorant, ill-tempered, [a] buffoon, substandard-human, right-wing fanatic, [and] a bully," concluded that such statements were protected by the First Amendment as statements of opinion and not fact.[140]

A recent Missouri Supreme Court opinion, *Smith v. Pace (In re Smith)*,[141] reflects both an awareness of the important First Amendment issues in play when lawyers engage in speech

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[135] State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 968-69 (Okla. 1988) ("In keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism, while at the same time subjecting the balance of government officials to the stringent requirements of *New York Times Co. v. Sullivan* and its progeny.").

[136] 766 P.2d 958 (Okla. 1988).

[137] *Id.* at 960.

[138] *Id.* at 966.

[139] *In re* Green, 11 P.3d 1078, 1082 (Colo. 2000).

[140] Standing Comm. v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995).

[141] 313 S.W.3d 124 (Mo. 2010).

critical of courts and the need to examine the lawyer's conduct with respect to the lawyer's own knowledge of whether the statements in question were false, or whether the lawyer acted with reckless disregard as to truth or falsity. Interestingly, however, the *Smith* court did so only with respect to imposition of criminal contempt for such speech and explicitly held open the possibility that discipline could still be imposed upon a lawyer without having to undertake such an examination.[142]

Carl Smith, the lawyer initially convicted of criminal contempt and sentenced to jail for 120 days, had used inflammatory language in two paragraphs of a writ filed with the Missouri Court of Appeals seeking to quash a grand jury subpoena that sought production of documents from his clients.[143] Smith petitioned the Missouri Supreme Court for a writ of habeas corpus. The supreme court issued the writ and stayed the remainder of Smith's jail sentence pending the outcome of the matter. The court then reversed Smith's conviction because "[t]here simply was no evidence from which the jurors could find the requisite state of Smith's mind regarding the falsity of the statements, nor were they asked to do so."[144] The specific portions of Smith's appellate filing that were at issue involved accusations against both a judge and the prosecutor relating to their role in the grand jury proceedings. Smith had alleged "personal interest, bias, and purported criminal conduct" on the part of the judge and prosecutor and further asserted that the judge's and the prosecutor's participation "in the convening, overseeing, and handling . . . of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do

[142] *Id.* at 126 ("The result of this proceeding has no bearing on any disciplinary measures that may result from the attorney's conduct.").

[143] *Id.*

[144] *Id.* at 136.

so."[145] Smith had additionally decried that the grand jury was "being used by those in power in the judicial system as a covert tool to threaten, intimidate and silence any opposition to their personal control—not the laudable common law and statutory purposes for which the grand jury system was created."[146] Inflammatory language indeed.

The Missouri Supreme Court acknowledged the First Amendment issues in play even though the individual whose speech was being questioned was a lawyer, offered a brief survey of numerous cases examining the question in the disciplinary context, and acknowledged, albeit far too indirectly, that one of its own earlier decisions explaining the use of an objective standard for reviewing the lawyer's statements in a disciplinary proceeding[147] might be subjected to much higher scrutiny today in light of more recent First Amendment cases such as *Republican Party of Minnesota v. White.*[148] Because the matter before it involved criminal contempt charges, the court in *Smith* concluded that the conviction could not stand because there was no evidence from which a jury could find "that the lawyer's statements were false and that he either knew the statements were false or that he acted with reckless disregard of whether these statements were true or false."[149]

While it may be difficult to justify limiting the analysis in *Smith* solely to criminal contempt cases, lawyers must remember that most courts employ an objective standard when determining whether such speech will justify discipline. Under that objective standard, a lawyer who impugns the qualifications or integrity of a judge must have an objectively reasonable

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[145] *Id.* at 127.

[146] *Id.*

[147] *In re* Westfall, 808 S.W.2d 829, 937 (Mo. 1991).

[148] 536 U.S. 765 (2002).

[149] *Smith*, 313 S.W.3d at 136.

factual basis for believing the accusations to be true.[150] The prevailing approach sets the bar so high that even reliance upon information provided by clients, anonymous sources, or the media may not provide a sufficient basis for a lawyer to resist a finding that accusations impugning the integrity or qualifications of a court were made with reckless disregard of the truth.[151] In the flowery language of one court, "sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense" to disciplinary charges brought against a lawyer for falsely accusing a court of misconduct.[152]

Strong arguments can be made that the way the majority of courts have read Model Rule 8.2(a)'s restrictions on attorney speech offends public policy.[153] Presumably lawyers are more knowledgeable than the general public about judges' qualifications and are better positioned to know when criticism should be leveled against courts. Simultaneously, because ethics rules do not serve in the same manner to chill attorney speech praising judges, the majority interpretation of Model Rule 8.2 further serves to skew the balance of speech about judges heard by the public toward speech lauding the judiciary.

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[150] *In re* Disciplinary Action Against Nathan, 671 N.W.2d 578, 584-85 (Minn. 2003) ("The standard used to determine if a statement is false or made with reckless disregard as to its truth or falsity is 'an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.'"); Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281 (Pa. 2006) (determining that although subjective belief in truth was sufficient to defeat perjury charge, the lawyer had to have objectively reasonable belief to rebut charge of violation of Rule 8.2).

[151] Welsh v. Mounger, 912 So. 2d 823, 828 (Miss. 2005) (finding a newspaper editorial to be an insufficient source); Anthony v. Va. State Bar, 621 S.E.2d 121, 125-26 (Va. 2005) (determining that anonymous letter and telephone calls were not sufficient); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 242-43 (W. Va. 2000) (concluding that lawyer's reliance upon client's word not sufficient to justify accusation of manufacturing evidence against judge).

[152] West Va. Comm. on Legal Ethics v. Farber, 408 S.E.2d 274 (W. Va. 1991).

[153] The rule's scope is, of course, not limited to statements made by attorneys in court or in court papers. A recent, high-profile example of an attorney being disciplined for violating Rule 8.2 for statements made in the media involves a Florida defense attorney who posted statements on his blog calling a judge an "Evil Unfair Witch," "seemingly mentally ill," and claimed that the judge was "condescending and ugly" towards him and other attorneys as well. Fla. Bar v. Conway, 996 So. 2d 213, 2008 Fla. LEXIS 2104 (Fla. 2008); Respondent Sean William Conway's Response to This Court's Rule to Show Cause Order at 3 (copy on file with authors).

While the public policy issues and the issue of what the First Amendment rights of a lawyer *should be* are important and intriguing ones when viewed purely from the standpoint of what clients expect from their lawyers—effective advocacy—such questions truly should be nothing more than academic. After all, when the lawyer is acting as an advocate on behalf of a client, the lawyer's ultimate goal should not be to vindicate her First Amendment rights but to vindicate the client's position. It is difficult to imagine circumstances in which the client's interests on appeal are well-served by an advocate's use of rhetoric that can be justified against an ethical challenge only on First Amendment grounds. Courts rarely respond well to personal attacks on any target, including sister courts. Thus, absent a legitimate factual basis capable of overwhelming proof at the time of making of the allegation, a lawyer should never accuse a judge of bias or prejudice against her client,[154] allege that a judge is biased against her personally,[155] charge a judge with corruption or abuse of office,[156] assert that a judge was bribed,[157] challenge a judge's impartiality,[158] accuse a judge of lying,[159] allege that a judge is

[154] *See, e.g.*, People v. Thomas, 925 P.2d 1081, 1083 (Colo. 1996) (publicly censuring lawyer who accused judge of bias for violating Rule 8.2(a)); Key Equip. Fin., Inc. v. Hawkins, 985 A.2d 1139, 1146-47 (Me. 2009) (sanctioning lawyer in the amount of $2500); Office of Disciplinary Counsel v. West, 706 N.E.2d 760, 761 (Ohio 1999) (suspending lawyer for accusing judge of receiving kickbacks from bankruptcy trustee); *In re* Disciplinary Proceedings Against Boyd, 767 N.W.2d 226, 231 (Wis. 2009) (suspending lawyer from practice for six months for this and other violations).

[155] *See, e.g.*, *In re* Crenshaw, 815 N.E.2d 1013, 1014-15 (Ind. 2004) (concluding that lawyer violated Rule 8.2(a) by baselessly accusing judge of being biased against her because of her race and gender, and for falsely reporting that another judge asked her to sit on his lap); *In re* Eckelman, 144 P.3d 713, 717 (Kan. 2006) (finding Rule 8.2(a) violation, among others).

[156] *See, e.g.*, Ky. Bar Ass'n v. Prewitt, 4 S.W.2d 142, 143-44 (Ky. 1999) (suspending lawyer for violating Rule 8.2(a)).

[157] *See, e.g.*, Moseley v. Va. State Bar, 694 S.E.2d 586, 588-90 (Va. 2010) (finding that a lawyer violated Rule 8.2 by stating that an order entered against him by a trial court judge "was 'an absurd decision from a whacko judge, whom [he] believe[d] was bribed'") (quoting the lawyer).

[158] *See, e.g.*, *In re* Simon, 913 So. 2d 816, 824-27 (La. 2005) (suspending lawyer for six months); State *ex rel.* Special Counsel for Discipline v. Sivick, 648 N.W.2d 315, 318 (Neb. 2002) (reprimanding lawyer).

[159] *See, e.g.*, Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 521-23 (Iowa 1997) (disbarring lawyer).

guilty of criminal conduct,[160] claim that a judge's decision is politically-motivated,[161] suggest that a judge suffers from a mental disability or personality disorder,[162] accuse a judge of being in cahoots with an adversary to shape the outcome of a case,[163] assert that a judge could have reached a conclusion or made a determination only through ex parte communication with an adversary,[164] allege that a judge is incompetent,[165] accuse a judge of testicular inadequacy,[166] or suggest that a judge is capable of being unfairly or improperly influenced.[167] And, though it should go without saying, lawyers cannot escape discipline by phrasing these kinds of accusations against judges in the form of a hypothetical.[168]

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[160] *See, e.g.*, *Ronwin*, 557 N.W.2d at 521-23; *In re* Mordkofsky, 649 N.Y.S.2d 71, 72-73 (N.Y. App. Div. 1996) (disbarring lawyer); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 280-86 (W. Va. 1991) (suspending lawyer).

[161] *See, e.g.*, Idaho State Bar v. Topp, 925 P.2d 1113, 1114-17 (Idaho 1996) (suspending lawyer for violating Rule 8.2(a)).

[162] *See, e.g.*, *In re* Shearin, 765 A.2d 930, 933, 937-38 (Del. 2000) (finding that lawyer who, among other things, stated that a judge "'suffered a progressive mental disability' which caused him to 'exhibit mood swings and injudicious conduct, including hostility to litigants and court personnel,'" violated Rule 8.2(a)); *Moseley*, 694 S.E.2d at 588-90 (finding that lawyer violated Rule 8.2 by referring to a trial court judge as a "whacko").

[163] *See, e.g.*, Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 242-45 (W. Va. 2000) (suspending lawyer for two years for violating Rule 8.2(a)).

[164] *See, e.g.*, Attorney Grievance Comm'n of Md. v. Hermina, 842 A.2d 762, 771-72 (Md. 2004) (reprimanding lawyer); Bd. of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1012-17 (Wyo. 2009) (finding that lawyer violated Rule 8.2(a) by making reckless accusations and that he further violated Rule 8.4(d) for the same reason).

[165] *See, e.g.*, Key Equip. Fin., Inc. v. Hawkins, 985 A.2d 1139, 1146-47 (Me. 2009) (sanctioning lawyer in the amount of $2500).

[166] *See, e.g.*, *In re* Lee, 977 So. 2d 852, 854-55 (La. 2008) (suspending a lawyer who reacted angrily and euphemistically characterized a trial judge's lack of courage when the judge indicated that he would recuse himself voluntarily rather than requiring the opposing party to file a motion).

[167] *See, e.g.*, Prudential Ballard Realty Co. v. Weatherly, 769 So. 2d 1045, 1060, 1067-68 (Ala. 2000) (involving elected state supreme court judges and suggestion by appellate lawyer that judges who depend on campaign contributions were willing to sell "favorable decisions to the highest bidder"); *In re* Howard, 912 S.W.2d 61, 63-64 (Mo. 1995) (suspending lawyer for violating Rule 8.2(a), among others).

[168] *See, e.g.*, *In re* Simon, 913 So. 2d 816, 825 (La. 2005) ("We would eviscerate Rule 8.2(a) if we were to shield an attorney from discipline for making knowingly false statements about judges simply because he used the artifice of a 'hypothetical.'").

B. The Problem of Perception and Courts' Willingness to Presume the Worst

Cases involving obvious false or reckless attacks on a judge's integrity or qualifications to hold office are easy to understand and involve conduct that appellate lawyers can easily avoid should they so choose. The more difficult issue faced by appellate lawyers is that courts sometimes appear willing to perceive an ambiguous statement as a disciplinable offense because of its tone rather than adopting an interpretation of the statement as one involving legitimate criticism or mere hyperbole. A troubling example of such a case, even though it both involves extrajudicial statements by a lawyer and was decided prior to the Supreme Court's landmark ruling in *Gentile v. State*,[169] is the imposition of discipline against a prosecutor in *In re Westfall*.[170]

After the issuance of an appellate decision holding that the double jeopardy doctrine prohibited his office from prosecuting a defendant, George Westfall, a Missouri prosecutor, criticized the judge by saying that he found the court's reasons to be "somewhat illogical, and I think even a little bit less than honest" and asserted that the court had "distorted the statute" and used "convoluted logic to arrive at a decision that [the judge] personally likes."[171] In defending the statements in his disciplinary proceeding, Westfall indicated that all that he meant was that "the court of appeals opinion was 'intellectually dishonest.'"[172]

Instead of evaluating Westfall's actual words, the Missouri Supreme Court, in its opinion imposing discipline, engaged in frequent paraphrasing and restating in its own language what it was Westfall had said. The majority concluded that the imposition of discipline was necessary

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[169] 501 U.S. 1030 (1991).

[170] 808 S.W.2d 829 (Mo. 1991).

[171] *Id.* at 831.

[172] *Id.* at 833.

because Westfall had accused the judge "of deliberate dishonesty," had "purposefully ignore[ed] the law to achieve his personal ends," and asserted that Westfall's statement was not to be read as "an implication of carelessness or negligence but of a deliberate, dishonest, conscious design on the part of the judge to serve his own interests."[173] The majority's decision was subject to serious attack in dissent for having employed "at least six unsupportable paraphrases of [Westfall's] actual words" to support its ruling.[174]

In re Wilkins ("Wilkins I")[175] is a more recent and more troubling example of a court upbraiding a lawyer more for what it claimed he had written about a lower court than what he actually did write. Wilkins, an Indiana lawyer, represented a Michigan insurance company as its local counsel, working with the insurer's Michigan counsel in appealing from an adverse verdict. The Indiana Court of Appeals affirmed the trial court's verdict and award, but Wilkins believed the court of appeals, in so doing, had misstated material facts, and had ignored or misapplied controlling precedent, such that a special procedural rule might permit transfer to the Indiana Supreme Court.[176]

Wilkins' Michigan co-counsel prepared a petition for transfer and accompanying draft brief, and forwarded them to Wilkins for review. Wilkins edited the draft provided by Michigan counsel, toning down the tenor of the brief.[177] He then signed and filed the petition and brief. After being toned down from its original version, the revised brief still contained the following statement:

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[173] *Id.* at 838.

[174] *Id.* at 841 (Blackmar, J., dissenting).

[175] 777 N.E.2d 714 (Ind. 2002) (*Wilkins I*).

[176] *Id*. at 715. In Indiana, transfer to the supreme court is available under the rules of appellate procedure when an "opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record." *Id.* at 716 (quoting rule).

[177] *Id*. at 715.

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.[178]

This passage was footnoted as follows:

> Indeed, the opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or law supported its decision).[179]

The Indiana Supreme Court denied the insurer's petition for transfer and ordered that the supporting brief be stricken as "a 'scurrilous and intemperate attack on the integrity'" of the lower appellate court.[180] Subsequently, Wilkins contacted the Chief Judge of the Indiana Court of Appeals and the Chief Justice of the Indiana Supreme Court to schedule meetings with them to personally apologize for the content of the brief. Before he was able to speak personally with either judge, however, the Indiana Supreme Court Disciplinary Commission instituted proceedings against him. Wilkins then wrote to the Chief Judge and Chief Justice, respectively, "offering to apologize in person and to acknowledge that the footnote was 'overly-aggressive and inappropriate and never should have made its way into [the] Brief.'"[181]

Indiana disciplinary authorities charged Wilkins with violating Indiana Rule of Professional Conduct 8.2(a), which, like Model Rule 8.2(a), prohibits a lawyer from making

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[178] *Id*. (footnote omitted). Given the standard established by the rule of appellate procedure being relied upon, these assertions would appear required in order to establish jurisdiction.

[179] *Id*. at 716. Although Wilkins did not actually author the quoted text or the footnote, there could be no dispute under Indiana's disciplinary rules that by signing the brief he became jointly responsible for its content.

[180] *Id*. at 715 (quoting Mich. Mut. Ins. Co. v. Sports, Inc., 706 N.E.2d 555 (Ind. 1999)).

[181] *Id*.

statements that he "knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge."[182] In Wilkins' case, the "judge" was the three-judge panel of the court of appeals from whose opinion his client sought transfer.
In his disciplinary hearing, Wilkins contended that a contract that was cited to the court of appeals in the record, as well as the testimony of two trial witnesses, supported the contention that the court of appeals had misstated the record and the facts. He also cited case law alleged to have been ignored by the court of appeals.[183]

The Indiana Supreme Court determined that the language in the body of the brief to which the footnote was anchored, while "heavy-handed," roughly paraphrased the bases for transfer expressed in the Indiana Rules of Appellate Procedure.[184] Thus, the court concluded that language provided no grounds for discipline. The comments about the court of appeals in the footnote, however, the court declared to be "not even colorably appropriate."[185]

The court in *Wilkins I* began its analysis of the footnote by indicating that Rule 8.2(a) is concerned with preserving public confidence in the administration of justice, referring in the process to one of its earlier decisions in which it had observed that "unwarranted public suggestion" by an attorney that a judge "is motivated by criminal purpose and considerations" weakens and erodes public confidence in the judicial system.[186] The court, finding that Wilkins had no evidence to support his contentions in the footnote, determined that the state's interest in preserving public confidence in the judicial system and the administration of justice generally far

[182] *Id*. & n.2.

[183] *Id*. at 716.

[184] *Id*. at 717.

[185] *Id*.

[186] *Id*. (citing *In re* Garringer, 626 N.E.2d 809, 813 (Ind. 1994)).

outweighed Wilkins' need to air his unsubstantiated concerns in an inappropriate forum.[187] Thus, the Indiana Supreme Court determined that the footnote was inappropriate because it suggested that the judges on the court of appeals panel may have been motivated "by something other than the proper administration of justice" in deciding the underlying case.[188] In fact, the supreme court asserted that the language in the footnote suggested that the judges of the court of appeals were driven to decide as they did by "unethical motivations."[189]

Wilkins argued that the statements in the footnote "were merely 'a critique of the Opinion in a format used throughout the bench, bar and journals.'"[190] The supreme court faulted Wilkins for not citing authority to support this argument. Beyond that:

> Our current rules of appellate procedure dictate the boundaries of acceptable appellate practice. For example, App.R. 46(A)(8)(a) requires that arguments on appeal must be supported by cogent reasoning, citations to authorities, statutes or the record. A statement used in a document filed before the appellate courts that contains an assertion the lawyer knows to be false or made with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge is neither a "format" contemplated by our appellate rules nor allowed by our *Rules of Professional Conduct*.[191]

Having determined that Wilkins violated Rule 8.2(a) by way of the intemperate footnote, the court then discussed what would be the appropriate sanction. The court considered as aggravating factors what can be fairly characterized in the category of lack of remorse. These included Wilkins' continuing belief that the court of appeals had erred (even though he regretted

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[187] *Id*. at 718. "Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission." *Id.* at 717.

[188] *Id*. at 717.

[189] *Id.*

[190] *Id.*

[191] *Id.*

his choice of language in criticizing its opinion) and his decision to defend himself against the charge of misconduct.[192] As the *Wilkins I* court explained:

> [T]he hearing officer found that the respondent's testimony "belied his belief that this disciplinary action stems merely from a poor choice of words." The respondent's stated remorse related only to his feelings of personal embarrassment and public humiliation as the result of this Court's order striking the offending brief. In essence, the respondent averred that, although he might use different language, he believes in the substance of the language contained in the footnote. That he chose to contest this matter through all procedures available under the Admission and Discipline Rules further underscores our conclusion that his remorse only attaches to the fact his statements were not without consequence, notwithstanding his earlier attempts personally to apologize to members of the appellate bench.[193]

The *Wilkins I* court concluded that Wilkins had "alleged deliberately unethical conduct on the part of the Court of Appeals."[194] Accordingly, and because Wilkins was not sufficiently remorseful, the court suspended him for thirty days.[195]

Wilkins I was a 3-2 decision with a vigorous dissent. For the dissenting justices, the footnote was "tasteless" and "poor advocacy,"[196] but it should not have provided a basis for discipline. Nothing about the footnote suggested that the court of appeals harbored criminal motives and, for that matter, it was not all that harsh in its criticism. In the dissent's view:

> Although footnote 2 certainly is understood to challenge the intellectual integrity of the opinion, I do not believe it suggests any motive other than deciding the case in favor of the party the court determined should prevail. It certainly does not suggest criminal motives. In this respect, it seems to me no different from the attacks many lawyers and nonprofessionals have launched on many court decisions, including such notable ones as *Bush v. Gore*

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[192] *Id.*

[193] *Id.* at 719.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 719-20 (Boehm, J., dissenting).

> and *Brown v. Board of Education*. I cannot see how this footnote differs from the charges occasionally leveled by judges at other judges. For example, Justice Scalia recently contended in *Atkins v. Virginia* . . . that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." *See also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Scalia, J., concurring) (stating that assertions by Justice O'Connor were "irrational" and "cannot be taken seriously").[197]

Finally, the dissent warned that the court should be very cautious in imposing discipline for lawyers' acts that implicate judicial actions or processes but do not affect clients' interests. Under the circumstances, and given the supreme court's unique and often conflicting roles when deciding a lawyer discipline case involving criticism of the judiciary, the dissent considered there to have been no basis to discipline Wilkins.[198]

To be sure, the language with which the court took issue was poor advocacy,[199] but it seems obvious that *Wilkins I* was wrongly decided. Undoubtedly, the effect of including the allegations in the footnote was to make it much more likely that the court would view the overall affect of the brief as being an attack on the court of appeals than to persuade it to accept transfer. All veteran advocates know that judges often protect their brethren. Wilkins obviously did not go far enough in "toning down" the brief his Michigan co-counsel had drafted. That does not necessarily mean, however, that his decision to spare the red ink when it came time to edit the offending footnote gave rise to a Rule 8.2(a) violation.

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[197] *Id*. at 720 (Boehm, J., dissenting).

[198] *Id*. at 720-21 (Boehm, J., dissenting).

[199] *See* Prudential Ballard Realty Co. v. Weatherly, 769 So. 2d 1045, 1060 (Ala. 2000) ("By couching . . . argument in the form of a written temper tantrum, an attorney can detract from the merits of the argument and do his or her client irreparable harm by failing to maintain the required level of professionalism.").

Most troubling for appellate lawyers is the supreme court majority's willingness to equate the footnote with a suggestion that the court of appeals was motivated by a criminal purpose,[200] and to state that the footnote effectively accused the court of appeals judges of having "unethical motivations."[201] Reasonable people should be able to agree that the footnote is susceptible to several other, significantly less pernicious interpretations. For example, the language could be read to indicate that the court of appeals might have been determined to find for the appellee because it thought that would be the just result. Perhaps the court of appeals disregarded the facts and law that Wilkins thought compelled a contrary result because it did not agree with Wilkins' view of their significance. Of course, by framing the issues the way it wanted to treat the footnote as an attack on the court's integrity, it became significantly easier for the supreme court to find that the statements were made with reckless disregard for their truth or falsity. Although truth would be an absolute defense, it was impossible for Wilkins to prove that the contents of the footnote were true given the gloss added to them by the supreme court. Given that nowhere in the brief had Wilkins actually accused the court of appeals of corrupt or unethical behavior, it would certainly have been surprising if Wilkins had been willing to do so thereafter in trying to defend the charges against him. With the Indiana Supreme Court holding the sole power to characterize Wilkins' claims, and further serving as both judge and jury, any commentator inclined to cynicism might say that the court deprived Wilkins of the ability to defend himself and then declared that he had not met his burden.

The *Wilkins I* court's approach to punishing Wilkins also seems harsh under the circumstances. Although Wilkins tried to apologize to the supreme court and to the court of appeals even before being charged with misconduct, and always expressed remorse, the majority

[200] *See Wilkins I*, 777 N.E.2d at 717.

[201] *Id.*

of the supreme court determined that was not sufficient. Rather, it appears that the only remorse that would have been sufficient for the court would have been for Wilkins to declare that the court of appeals had properly applied the facts and law and was right after all.[202] Worse yet, the court opined that by contesting the charges against him, Wilkins supposedly deserved a sanction harsher than his professional record otherwise warranted.[203] That reasoning ought to offend any observer as a gross affront to due process.

It certainly seems ironic that the Indiana Supreme Court majority's ruling is subject to fair criticism as the act of three judges who appear to have been determined to find an ethics violation and then said whatever was necessary to reach that conclusion, regardless of whether the facts or law supported that decision. To be clear, those who would so criticize the court's majority know that the judges did not hold as they did because they were somehow corrupt or unethical, because they were spiteful or vindictive, or because they were motivated by anything other than the proper administration of justice. Those critical of the court in *Wilkins I* would instead stress that the majority lost its way in reaching its decision because it forgot that judges "should hesitate to insulate themselves from the slings and arrows that they insist other public officials face."[204]

Apparently stung by immediate public criticism of its decision, the Indiana Supreme Court was presented the opportunity to correct its many missteps when Wilkins sought reconsideration of the application of the First Amendment to the offending language in the brief, as well as reconsideration of the sanction imposed.[205] In *In re Wilkins* ("*Wilkins II*"),[206] the court

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[202] *See id.* at 719 (faulting Wilkins for believing "in the substance of the language contained in the footnote").

[203] *Id.* (criticizing Wilkins for choosing to contest the charges against him "through all procedures available" under Indiana disciplinary rules).

[204] *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).

[205] *In re* Wilkins, 782 N.E.2d 985 (Ind. 2003) (*Wilkins II*).

effectively conceded that it erred in *Wilkins I* by reducing the sanction imposed without really acknowledging error because it stubbornly adhered to its earlier position that Wilkins violated Rule 8.2(a) by way of the troublesome footnote. Noting that "important interests of judicial administration require considerable latitude regarding the content of assertions in judicial pleadings, motions and briefs," the court reasoned that these considerations are tempered by Rule 8.2(a).[207] In this case:

> The language of footnote 2 does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible advocacy. The footnote goes further and ascribes bias and favoritism to the judges authoring and concurring in the majority opinion of the Court of Appeals, and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome. These aspersions transgress the wide latitude given appellate argument, and they clearly impugn the integrity of a judge in violation of . . . Rule 8.2(a).[208]

The court thus declined to reconsider its holding that Wilkins violated Rule 8.2(a).[209]

Interestingly, the court again did not discuss alternative interpretations of the footnote. Rather than explaining why its sinister interpretation of the footnote was the correct one, it opted to avoid the issue of interpretation altogether. This it presumably did either because Wilkins' attorneys did not raise the possibility of benign interpretations in seeking reconsideration or because to discuss alternative interpretations would be too harmful to its conclusion that Rule 8.2(a) had still been violated.

The *Wilkins II* court did, however, reduce Wilkins' discipline from a suspension to a public reprimand—a public reprimand it said had already been accomplished by the content of

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[206] *Id.*

[207] *Id.* at 986.

[208] *Id.*

[209] *Id.*

the *Wilkins I* opinion.[210] The court based its decision to scold Wilkins rather than suspend him on renewed consideration of his "outstanding and exemplary" professional record and reputation, and on the fact that the offending footnote was actually written not by Wilkins but by his Michigan co-counsel.[211] Of course, none of these items were new developments or newly-discovered information—the court considered these same factors in *Wilkins I* and nonetheless concluded that Wilkins should be suspended.[212] So then, why did the *Wilkins II* court reduce Wilkins' punishment? A likely answer is that by lessening his punishment the supreme court could practically erase the harm caused by its earlier decision without admitting its fundamental error, all the while upholding the perceived honor of the court of appeals.

Although the court in *Wilkins II* moved in the right direction by reducing Wilkins' punishment to a public reprimand, it is difficult to agree that it went far enough. In its opinion denying Wilkins' client's petition for rehearing, the supreme court could have sternly cautioned Wilkins that the offending footnote could be read to imply unethical behavior by the court of appeals in violation of Rule 8.2(a), and warned him against such irresponsible argument in the future;[213] indeed, courts routinely employ such an approach. [214]

While some lawyers' criticisms of courts clearly are beyond the pale, cases such as *Westfall* and *Wilkins I* raise practical questions for appellate lawyers as to how far a lawyer can

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[210] *Id.* at 987.

[211] *Id.*

[212] *In re* Wilkins, 777 N.E.2d 714, 715, 718-19 (Ind. 2002) (*Wilkins I*).

[213] Of course, at some level the supreme court had already done so. Mich. Mut. Ins. Co. v. Sports, Inc., 706 N.E.2d 555, 555 (Ind. 1999) ("As a scurrilous and intemperate attack on the integrity of the Court of Appeals, this sentence [in the footnote] is unacceptable, and the Brief in Support of Appellant's Petition to Transfer is hereby stricken.").

[214] *See, e.g.*, Cathey v. State, 60 P.3d 192, 197 (Alaska Ct. App. 2002) (discussing appellate lawyer's obligations under Rule 8.2(a) in connection with allegations of misconduct by prosecutor and stating that "[w]e urge [appellate counsel] to carefully consider before making similar unfounded charges in the future"); N. Sec. Ins. Co. v. Mitec Elec., Ltd., 965 A.2d 447, 453 n.3 (Vt. 2008) (noting that the advocate's briefs characterizing the lower court's conclusions as "ludicrous" and "inane" lacked "the professional tone the court expected from members of the bar and pointedly reminded readers that the tenor of one's protestations cannot create error where none exists).

safely go in criticizing a court with whose decision the lawyer and her client disagree. Returning for a moment to *Wilkins I*,[215] it appears that what Wilkins was really trying to do in the brief and the footnote was to suggest that the court of appeals had engaged in result-oriented reasoning. To critique an opinion as being result-oriented was, Wilkins contended, an approach employed '"throughout the bench, bar, and journals.'"[216] Justice Boehm, coming to Wilkins' defense in his dissent in *Wilkins I*, contended that the offending footnote was no harsher than the criticism that Justice Scalia has directed at other members of the Supreme Court in published opinions.[217] Both of these defenses merit further discussion.

With respect to the first, it is true that commentators and scholars criticize decisions as being result-oriented in articles and other media. We have done so in discussing the decision in *Wilkins I*. That does not mean, however, that a lawyer litigating a pending case can similarly chastise the court. Lawyers involved in a pending case operate in a more restrictive environment than do detached lawyers because involved lawyers' criticisms and mischaracterizations are more likely to disrupt the proceedings or impair the fair administration of justice. In short, comments that might be appropriate in a treatise, or law review or bar journal article, are not necessarily appropriate when made in an appellate brief.

As for the second, judges' criticism of other judges is not an accurate barometer for determining what amounts to appropriate conduct for a lawyer acting as an advocate. The fact that judges may accuse their brethren of "legalized larceny" does not mean that lawyers can do

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[215] *In re* Wilkins, 777 N.E.2d 714 (Ind. 2002) (*Wilkins I*).

[216] *Id*. at 718 (quoting Wilkins' brief in his disciplinary case).

[217] *Id*. at 720 (Boehm, J., dissenting).

likewise.[218] It should come as no surprise that lawyers and judges live and work by different rules. Beyond that, and as the *Wilkins II* court recognized, "occasional retorts to uncivil dialogue" are inappropriate no matter who the speaker may be.[219]

Further considering the *Wilkins I* and *Wilkins II* decisions, what might Wilkins have written without violating Rule 8.2(a)? Wilkins surely could have written: "Indeed, the opinion is so factually and legally inaccurate that one is left to wonder how the court of appeals could have found as it did." Alternatively, he might have tried: "Indeed, one is left to wonder how the court of appeals could find for the appellee given the facts in the record and contrary controlling case law." He could have branded the opinion "incomprehensible" or "incoherent."[220] He could have similarly criticized the decision as being "wrongheaded." Finally, Wilkins might have written: "The court of appeals' apparent determination to find for appellee Sports, Inc., while perhaps justified by reasoning or logic known to the court, is not supported by the facts in the record or law to which the court should have looked."

This is not to say that Wilkins should have filed briefs containing any of those alternative characterizations. Those alternatives still exemplify poor advocacy, even if relegated by an appellate lawyer to a footnote. Like the offending footnote, they add no value to the lawyer's argument, and all run the risk of irritating the court. Even good advocates, however, periodically make mistakes. Pointed criticism of a court's reasoning or harsh comments about the basis for a court's decision, even if tactically unwise, should rarely be declared unethical.

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[218] *In re* L.A. County Pioneer Soc'y, 257 P.2d 1, 14 (Cal. 1953) (Carter, J., dissenting on petition for reh'g) ("The record in this case presents one of the most outrageous examples of legalized larceny which has come under my observation.").

[219] *In re* Wilkins, 782 N.E.2d 985, 987 (Ind. 2003) (*Wilkins II*).

[220] *In re* Green, 11 P.3d 1078, 1083 (Colo. 2000) (stating that "if an attorney criticizes a judge's ruling by saying it was 'incoherent,' he may not be sanctioned").

IV. FRIVOLOUS APPEALS AND OTHER BAD FAITH LITIGATION

"It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals."[221] In this regard, many appellate lawyers would be well advised to heed the colorful advice of one federal court of appeals (itself but a quotation of a Nobel Peace Prize winner) that "[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."[222]

A. Model Rule 3.1 and Similar Restrictions Apply Equally to Appeals

Model Rule 3.1, which establishes lawyers' duty to advocate only meritorious claims and contentions, applies equally to litigation at all phases or stages. That rule provides, in pertinent part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."[223] Although Model Rule 3.1's use of terms such as "bring" and "assert" perhaps superficially suggests that the rule applies only at the outset of a proceeding in either a trial or appellate court, that is not the case. The Model Rule 3.1 duties are continuous; they exist throughout the life of a case. Thus, a lawyer must be prepared to abandon claims or issues that initially seemed to be valid but which are later determined to be frivolous. Whether a lawyer has a basis for bringing or continuing a proceeding or an issue therein that is not frivolous under Rule 3.1 is generally measured by an objective "reasonable attorney" standard.[224] Thus, a lawyer cannot avoid discipline under this

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[221] Polk County v. Dodson, 454 U.S. 312, 323 (1981).

[222] Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987) (quoting 1 Jessup, Elihu Root 133 (1938)).

[223] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2011).

[224] O'Brien v. Super. Ct., 939 A.2d 1223, 1231 (Conn. App. Ct. 2008); *In re* Disciplinary Action Against Hoffman, 670 N.W.2d 500, 506 (N.D. 2003). *But see In re* Disciplinary Proceedings Against Osicka, 765 N.W.2d 775, 784 (Wis. 2009) (applying a subjective standard).

standard by claiming, for example, to have been mistaken about what was actually settled law.[225] Nevertheless, as is clearly indicated by the language of the rule itself regarding arguments for "extension, modification, or reversal of existing law," not every meritless claim or contention is frivolous under this rule.[226] And, although the use of "good faith" suggests that the lawyer's efforts at, for example, reversing existing law could be viewed through a subjective lens, the standard used by courts means that determining whether a violation has occurred remains an objective one. For example, a lawyer cannot defend her conduct as involving a good faith attempt to offer a novel argument when a reasonable lawyer, knowing the facts, would conclude that the argument was frivolous.

The impact of this ethical obligation on appellate litigation means that a lawyer cannot undertake a doubtful appeal as a matter of reflex but must ensure through research and analysis of the record that pursuing an appeal would not be a frivolous act.[227] There are, perhaps, few examples that present a more compelling picture of undertaking a frivolous appeal as a matter of reflex than the appeal pursued by a Wisconsin attorney that resulted not only in an award of appellate sanctions under Federal Rule of Appellate Procedure 38 but ultimately also contributed to the attorney being suspended from the practice of law for two months.[228]

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[225] Thompson v. Sup. Ct. Comm. on Prof'l Conduct, 252 S.W.3d 125, 128 (Ark. 2007).

[226] *See, e.g.*, *In re* Houston, 675 S.E.2d 721, 723 n.1 (S.C. 2009) (finding that meritless racial profiling claim did not violate Rule 3.1).

[227] *See, e.g.*, Hilmon Co. v. Hyatt Int'l, 899 F.2d 250, 254 (3d Cir. 1990); Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987) ("The filing of an appeal should never be a conditioned reflex."); *In re* Zimmerman, 19 P.3d 160, 162 (Kan. 2001) (finding that lawyer's filing of notice of appeal of summary judgment ruling was Rule 3.1 violation when lawyer had admitted that he had no good faith basis for opposing summary judgment motion filed by opposing party).

[228] Jiminez v. Madison Area Tech. Coll., 321 F.3d 652 (7th Cir. 2003).

As was explained in *Jiminez v. Madison Area Technical College*,[229] William J. Nunnery's representation of Elvira Jiminez began with a workers compensation claim against her employer, Madison Area Technical College, based on Jiminez's assertion that college administrators had racially and sexually harassed her, causing her severe emotional distress. To support her claim, Jiminez produced a series of e-mails containing derogatory racial comments about her and discussing the sexual harassment visited upon her.[230] In response, the college provided sworn statements from each of the purported authors of the e-mails denying having written them and characterizing them as a "complete fabrication" and a "forgery." The college asked Nunnery to produce the originals of the e-mails. Nunnery did not do so and, ultimately, Jiminez's workers compensation claim was denied and she was subsequently fired by the college.[231]

Jiminez, still represented by Nunnery, sued the college for discrimination in federal court. In a subsequent amended complaint, Nunnery added the purported authors of the e-mails as defendants. After that complaint was dismissed for failure to state a claim, Nunnery filed a second amended complaint that expanded the factual allegations and that specifically referred to the challenged e-mails produced in the unsuccessful workers compensation action.[232] Jiminez insisted that the e-mails were authentic even though they were "plastic-laminated"; she had the documents laminated, she said, to "prevent them from being stolen."[233] The attorneys for the college, again, communicated to Nunnery that the individual defendants denied authoring any of

[229] 312 F.3d 652 (7th Cir. 2003).

[230] *Id.* at 653.

[231] *Id.* at 654.

[232] *Id.*

[233] *In re* Nunnery, 725 N.W.2d 613, 619 (Wis. 2007).

the e-mails that Jiminez was attributing to them. When Nunnery would not drop the claims against the individuals, the college moved for Rule 11 sanctions.[234]

The district court, after holding an evidentiary hearing, determined that sanctions should be imposed. The district court dismissed Jiminez's case and ordered Nunnery to pay more than $16,000 to the defendants for what the court described as "truly, and without competition, the most blatant case of a Rule 11 violation [it had ever] seen."[235] The district court also found the purported e-mails to be "obviously fraudulent documents" and found incredible Nunnery's claim that whether the emails were legitimate "was a judgment call" and that he could wait until taking "depositions to test the credibility of the various letters and e-mails."[236]

On appeal, the Seventh Circuit not only found that the district court's ruling was well within its discretion but also concluded that Nunnery's client had knowingly manufactured the false e-mail evidence to try to support her claim and "exploited the judicial process and subjected her former colleagues and employer to unnecessary embarrassment and mental anguish."[237] The Seventh Circuit affirmed the district court's dismissal of Jiminez's discrimination claims. The court did not finish there, however, because the college also filed a motion for sanctions for the filing of a frivolous appeal. The Seventh Circuit granted that motion and awarded the college its fees and costs incurred in defending the appeal, in an amount to be determined through further proceedings. In so holding, the Seventh Circuit described the appeal as "a veritable attack on our system of justice."[238] The Seventh Circuit's explanation of why frivolous appeal sanctions were so warranted paints an amazing picture of exactly what Nunnery signed off on in taking the

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[234] *Jiminez*, 321 F.3d at 654-55.

[235] *Id.* at 657.

[236] *Id.* at 655.

[237] *Id.* at 657.

[238] *Id.*

appeal: "The foreordination of Jimenez's failure on appeal could not have been more obvious. Not only did Jiminez cite to the wrong legal standard in her brief before this [c]ourt, she presented only *one page* of legal argument in her favor."[239]

Courts that determine that an attorney cooperated with a client in a frivolous appeal will not only impose statutory damages and penalties, but will also not hesitate to refer the attorney to disciplinary authorities, as the California Court of Appeals demonstrated in *In re Marriage of Gong and Kwong*.[240] In *Gong*, the court dismissed Terry Kwong's frivolous appeal, awarded sanctions of over $20,000, remanded to the trial court for a determination of the appropriate amount of reasonable attorney fees to awarded to Monica Gong for having to defend the appeal, and ordered the attorneys involved to forward a copy of the court's opinion to the State Bar of California.[241]

This dispute between former spouses arose after Mr. Kwong failed for several years to make required child support payments pursuant to a marital settlement agreement, a court order was entered to cause payments to be made to Ms. Gong directly from a partnership interest of Mr. Kwong's, and Mr. Kwong, represented by counsel, moved to halt those payments on the alleged basis that he had already paid $30,000 more than he owed.[242] Mr. Kwong's argument in that regard, however, was based entirely upon an effort to take advantage of the fact that some nine months elapsed between when the amount of the arrearages was determined by the trial court after a hearing and the date that the court's written order memorializing its ruling was entered. In short, Mr. Kwong, with the assistance of his counsel, argued that the use of the

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[239] *Id.* at 658.

[240] 77 Cal. Rptr. 3d 540 (Cal. Ct. App. 2008).

[241] *Id.* at 550.

[242] *Id.* at 545.

words "current" and "now" in the written order memorializing the court's ruling from nine months earlier had the effect of freeing him from any child support obligation during that nine-month period.[243] The court found Mr. Kwong's appeal to be "meritless and objectively frivolous" and pursued solely for the purpose of delay because the reading urged by Mr. Kwong went "against common sense" such that "no reasonable attorney would so interpret" the order.[244] The court, in addition to the disciplinary referral, offered a few choice words for Mr. Kwong's lawyers:

> An inference of willingness to assist Mr. Kwong's harassment of Ms. Gong and to abuse the court's processes could be drawn from his counsels' sophistry and their litigation tactics, which went beyond proper advocacy and common sense. Mr. Kwong's attorneys have taken a phrase or two from [the trial court's] order and fashioned from them an argument that subverts that court's intent. . . . As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purposes of delay, just because the client instructs him or her to do so. Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney's professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client.[245]

With respect to Model Rule 3.1, it is also important to note that the rule not only prohibits the pursuit of an appeal altogether where to do so would be frivolous, but additionally prohibits the pursuit of certain issues on appeal even though it would not be unethical to file an appeal as to one or more other issues. Further, and as noted earlier, the rule not only applies to the commencement of an appeal, but applies equally throughout the life of the appellate proceedings. Thus, a lawyer who acted perfectly ethically in originally undertaking an appeal can violate Rule

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[243] *Id.* at 546-47.

[244] *Id.* at 548 (citing Zimmerman v. Drexel Burnham Lambert Inc., 252 Cal. Rptr. 1151 (Cal. Ct. App. 1988)).

[245] *Id.* at 549-50 (quoting Cosenza v. Kramer, 200 Cal. Rptr 18 (Cal. Ct. App. 1984)).

3.1 by continuing to pursue an appeal if subsequent events make it apparent that there is no longer a "basis in law and fact for doing so that is not frivolous."[246]

B. Special Issues in Criminal Appeals

Because of the constitutional dimensions implicated in criminal proceedings, Model Rule 3.1 acknowledges that its requirements must be applied differently to lawyers defending criminal cases.[247] The last sentence of Model Rule 3.1 indicates that a lawyer "for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."[248] As further explained in a comment to Model Rule 3.1, a "lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that would otherwise be prohibited by this Rule."[249] Nevertheless, the constitutional right to counsel that necessitates greater lenience for criminal defense lawyers under Model Rule 3.1 does not extend to create a right to pursue a frivolous appeal. A lawyer must seek to withdraw from an appellate representation when there are no non-frivolous grounds for appeal.

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[246] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2011); *see, e.g.*, Brunswick v. Statewide Grievance Comm., 931 A.2d 319 (Conn. App. Ct. 2007) (finding that a reasonable lawyer would not have continued to pursue a fraud allegation after client was unwilling to furnish an affidavit in support); *In re* Caranchini, 956 S.W.2d 910, 916-17 (Mo. 1997) (disbarring lawyer who violated Rule 3.1 on multiple occasions by continuing to pursue claims well after it was clear there was no basis for doing so that was not frivolous, including one case in which the lawyer continued to rely on a forged document after its forged nature was clear).

[247] *See, e.g.*, Patterson v. N.Y., 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."); D.C. Bar Legal Ethics Comm., Op. 320 at 2 (May 2003) ("[L]awyers defending a criminal case are authorized to engage in conduct that, in other contexts, might seem inconsistent with the spirit of the Rules.").

[248] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2011).

[249] *Id.* cmt. 3.

The procedure for doing so varies significantly between jurisdictions as a result of two Supreme Court opinions. The first, *Anders v. California*,[250] outlined a procedure for simultaneously submitting a brief along with a motion to withdraw that references "anything in the record that might arguably support the appeal,"[251] a document that unsurprisingly has come to be known as an *Anders* brief. The second, *Smith v. Robbins*,[252] indicated that an *Anders* brief is just one of many constitutionally-acceptable ways that courts can permit a lawyer to withdraw in the event of a frivolous appeal, making clear that courts could devise their own rules that would prohibit withdrawal.[253]

Consequently, some states have elaborated and expanded upon the requirements for *Anders* briefs. Pennsylvania, for example, recently decreed that a lawyer filing such a brief is required to "(1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous."[254] Other states have deviated sharply from the very concept of an *Anders* brief. For example, Indiana prohibits a court-appointed attorney from filing such a brief and seeking to withdraw altogether and, instead, requires the attorney "to submit an ordinary appellate brief the first time—no matter how frivolous counsel regards the

[250] 386 U.S. 738 (1967).

[251] *Id.* at 744.

[252] 528 U.S. 259 (2000).

[253] *Id.* at 272-73.

[254] Commonwealth v. Santiago, 978 A.2d 349, 361 (Pa. 2009).

claims to be."[255] New Jersey has a special court rule applied to petitions for post-conviction relief prohibiting counsel from withdrawing based on a belief that the petition lacks merit.[256]

C. Statutory Prohibitions and Court Rules Regarding Frivolous Appeals

In addition to the ethical prohibition under Model Rule 3.1, appellate litigators in civil matters must be aware of a number of statutes and court rules. Many states have statutory law or court rules or both addressing courts' ability to award damages for the pursuit of frivolous appeals. In federal cases, at least two statutes and one court rule are worthy of note. Federal Rule of Appellate Procedure 38 provides discretionary authority to a court of appeals that determines an appeal to be frivolous to "award just damages and single or double costs to the appellee," as long as a motion under the rule is separately filed or the court first provides notice and a "reasonable opportunity to respond" before making such an award.[257] The federal statute permitting the imposition of penal sanctions for "multiplying proceedings unreasonably and vexatiously," 28 U.S.C. § 1927, applies to appellate proceedings just as it does proceedings before the trial court.[258] In addition, 28 U.S.C. § 1912 provides that when a judgment is affirmed on appeal, the court "in its discretion may adjudge to the prevailing party just damages for his delay and single or double costs."[259] While the word "frivolous" does not appear anywhere in section 1912, it is often used by federal courts in tandem with Rule 38 to render awards against

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[255] Mosley v. State, 908 N.E.2d 599, 607-08 (Ind. 2009) (describing the *Anders* brief approach as being "cumbersome and inefficient").

[256] State v. Rue, 811 A.2d 425, 437 (N.J. 2002) (discussing N.J. SUP. CT. R. 3:22-6 and explaining that denigrating or dismissing the claims of the client or negatively evaluating those claims is contrary to that rule).

[257] FED. R. APP. P. 38.

[258] 28 U.S.C. § 1927 (2008).

[259] 28 U.S.C. § 1912 (2008).

lawyers who prosecute frivolous appeals.[260] The term "just damages" has been interpreted both in section 1912 and Rule 38 to include the parties' reasonable attorneys' fees incurred in responding to the appeal.[261]

A high-profile example of the confluence of these various federal provisions permitting sanctions, as well as the ability of federal courts to directly impose their own discipline against attorneys, is demonstrated by two related opinions issued by the Ninth Circuit: one in which the court took the highly unusual step of appointing an independent prosecutor to evaluate what sanctions should be imposed against the attorneys involved,[262] and one that adopted the findings of the independent prosecutor as to sanctions and imposed discipline against the attorneys involved ranging from a six-month suspension to a private reprimand.[263] Perhaps even more amazingly, these opinions followed the court's appointment of a district judge as a special master to inquire into the attorneys' conduct

In *Girardi v. Dow Chemical Co. (In re Girardi),*[264] four attorneys, including Tom Girardi and Walter Lack, who had collaborated on a number of past matters including what is commonly thought of as the "Erin Brockovich" case, were found to have filed and continued to pursue obviously frivolous litigation causing the defendants significant expense. After obtaining a Nicaraguan judgment against a nonexistent Dole Foods entity, the attorneys filed an action in California seeking to enforce the foreign judgment that attached a document purporting to be issued by the Nicaraguan court but that had been corrected to name the correct legal entity and that, worse yet, was not actually a court document but a notary's affidavit that described and

[260] *See, e.g.*, Searcy v. Donelson, 204 F.3d 797, 798 (8th Cir. 2000).

[261] *See, e.g.*, Lyddon v. Geothermal Props. Inc., 996 F.2d 212, 214-15 (9th Cir. 1993).

[262] Girardi v. Dow Chem. Co. (*In re* Girardi), 528 F.3d 1131, 1132 (9th Cir. 2008).

[263] Girardi v. Dow Chem. Co. (*In re* Girardi), 611 F.3d 1027 (9th Cir. 2010).

[264] 611 F.3d 1027 (9th Cir. 2010).

translated the foreign writ.[265] The defendants removed the action to federal court and argued the discrepancy in the documentation. The attorneys for the plaintiffs continued to argue that the documents they provided were the authentic Nicaraguan court documents and repeatedly made those same misstatements in a number of filings. They also supported their submissions with at least one fraudulent affidavit.

The district court dismissed the enforcement action, which it characterized as an "'attempt to enforce a $489.4 million judgment against a non-party based on an affidavit that purports to be a translation of a writ of execution.'"[266] The attorneys who brought the enforcement action then appealed that ruling. The special master found significant fault with that decision, describing it as being done without first taking appropriate measures to evaluate whether the case had any continued viability. The attorneys delegated the drafting of the appellate brief to a junior associate who had less than two years of experience. The junior associate continued to describe the affidavit/translation in that brief as the actual writ of execution.[267] The attorneys then went further and opposed the defendant's motion to supplement the record on appeal with the actual writ of execution that they had obtained through discovery in another matter. At some point thereafter, the junior associate circulated a memorandum to the other lawyers "expressing his concerns about the viability of their position, noting that the firm risked exposure to a motion under Federal Rule of Appellate Procedure 38."[268] Lack and another one of the target lawyers, Paul Traina, discussed the junior associate's concerns and ultimately persuaded him to draft a further reply brief in support of their appeal.[269] The special

[265] *Id.* at 1029-32.

[266] *Id.* at 1056 (quoting the district court).

[267] *Id.* at 1032-33, 1056.

[268] *Id.* at 1033.

[269] *Id.* at 1033, 1058.

master's recommendation was that the attorneys be required to pay fees and costs of up to $390,000. Instead of acting on the special master's report itself, the Ninth Circuit appointed a California law professor, Rory Little, as an independent prosecutor to determine what sanctions should be imposed against the lawyers.[270]

Professor Little's report filed with the Ninth Circuit in May 2009 concluded that the special master's findings as to the state of mind of each of the lawyers involved were "'accurate and provable by clear and convincing evidence,'" and indicated that the lawyers involved did not dispute that they had "'acted at least recklessly in failing to detect those falsities and permitting them to appear in their opening appellate brief and to stand uncorrected even through the date of oral argument in July 2005.'"[271] The Ninth Circuit after reviewing all the material before it aptly summarized the situation as follows:

> [T]he history of the enforcement proceedings includes several crucial moments where a reasonable attorney would have, at a minimum, inquired further about the bona fides of the document that was the basis of the action he was prosecuting. At some point, failing to do so becomes willful blindness.[272]

The Ninth Circuit concluded that each of the attorneys involved deserved discipline for their roles in the pursuit of the frivolous litigation, but distinguished the appropriate discipline to be imposed pursuant to Federal Rule of Appellate Procedure 46 against the various lawyers. As to Girardi, the Ninth Circuit found that although he took "almost no active part in the actual proceedings to enforce the Nicaraguan Judgment," his practice of permitting lawyers with the Lack firm to sign his name to briefs in this case was reckless conduct and that the "recklessness

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[270] Girardi v. Dow Chem. Co. (*In re* Girardi), 528 F.3d 1131, 1132 (9th Cir. 2008) (announcing that special prosecutor would be appointed by separate order); Girardi v. Dow Chem. Co. (*In re* Girardi), 529 F.3d 1199, 1199-1200 (9th Cir. 2008) (appointing University of California Hastings College of the Law Professor Rory K. Little as independent prosecutor).

[271] *In re Girardi*, 611 F.3d at 1034.

[272] *Id.* at 1036.

inhere[d] in his mode of practice."[273] The court opted to formally reprimand Girardi "for his recklessness in determining whether statements or documents central to an action on which his name appears are false."[274] Finding that their efforts before the Ninth Circuit to "attempt to salvage their case became indistinguishable from a knowing submission of false documents," the Ninth Circuit concluded that suspension was an appropriate sanction for Lack and Traina, but limited their suspensions to six months in light of their long and excellent records of successful practice with no prior disciplinary incidents.[275] As for the junior associate in Lack's firm, whom the Ninth Circuit never named, it treated his inexperience as a mitigating factor and opted to issue a private reprimand against him "for allowing his superiors to overcome his sound instincts and for his role in drafting briefs that contained false statements."[276]

V. LAWYERS' ETHICAL DUTIES TO AVOID DELAY AND EXPEDITE LITIGATION

Following immediately on the heels of the prohibition against the pursuit of frivolous claims or contentions, Model Rule 3.2, entitled "Expediting Litigation," requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."[277] Facially, this rule appears to focus solely on when lawyers have to "expedite," i.e., take actions that would cause litigation to move through the courts more rapidly than it would under ordinary circumstances, but the reference in the comment to Model Rule 3.2 to "dilatory practices" underscores that "expedite" is not truly being used in its traditional, limited sense.[278] The Model Rule 3.2 duty to make reasonable efforts to expedite litigation encompasses the duty not to

[273] *Id.* at 1038-39.

[274] *Id.* at 1039.

[275] *Id.*

[276] *Id.*

[277] MODEL RULES OF PROF'L CONDUCT R. 3.2 (2011).

[278] *Id.* cmt. 1 ("Dilatory practices bring the administration of justice into disrepute.").

engage in improper delay. This ethical obligation applies on appeal just as it does at the trial court level.[279] Thus, in addition to the risks discussed above, the attendant delay resulting from pursuit of frivolous appeals or frivolous contentions on appeal can trigger discipline for a Rule 3.2 violation.[280]

Lawyers' duty to expedite litigation under Rule 3.2 is often discussed concurrently with the ethical duty to generally be diligent and prompt in handling client matters imposed by Model Rule 1.3.[281] There are important differences between the Rule 3.2 and Rule 1.3 duties, however. The most important difference is that Rule 3.2, consistent with the fact that Rule 1.3 already requires lawyers to diligently and promptly represent clients, recognizes clients' interests as limiting any duty that could be imposed on lawyers to expedite proceedings. An ethics opinion issued by the State Bar of Arizona Ethics Committee provides an example of a circumstance where the client's interest meant that a lawyer could appropriately cause some delay in the entry of a judgment by not approving the form of the judgment drafted and prepared by the opposing party.[282] In Opinion 90-16, the Arizona Committee concluded that a lawyer who was "aware of another pending case in which the ruling on appeal, when rendered, could justify reconsideration or reversal of the court's decision in this case" could refrain from approving the form of

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[279] *See, e.g.*, *In re* Cherry, 715 N.E.2d 382, 385 (Ind. 1999) (imposing 60-day suspension against lawyer who "simply did not get around to filing" petition for post-conviction remedies on client's behalf for more than five years); *In re* Vanderbilt, 110 P.3d 419, 422, 425 (Kan. 2005) (suspending county attorney for one year for, among other offenses, violating Rule 3.2 by failing to file briefs in three criminal appeals); *In re* White, 699 So. 2d 375, 376, 378 (La. 1997) (suspending lawyer from practice for one year and imposing two-year supervised probation period thereafter for failure to file brief despite receiving extension); *In re* Disciplinary Proceeding Against Lopez, 106 P.3d 221, 223 (Wash. 2005) (handing down 60-day suspension against lawyer for repeated failure to meet deadline for filing opening brief in federal appeal despite receiving multiple extensions).

[280] *See, e.g.*, *In re* Zohdy, 892 So.2d 1277, 1282 (La. 2005) (imposing three-year suspension against attorney for conduct, including pursuit of frivolous appeal, that was effort to delay a class action settlement "in hopes of obtaining an attorney's fee").

[281] MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011) ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

[282] State Bar of Ariz. Ethics Comm., Op. 90-16 (Nov. 1990).

judgment proposed by the opposing party without violating Rule 3.2.[283] The reasoning for that conclusion was two-fold. First, the interests of the lawyer's client in seeking "to avoid having to pay fees to move for a new trial or to appeal until after there is a ruling on the appeal in the other case" appeared to provide sufficient justification for the lawyer to decline approval.[284] Second, the Arizona Committee simply did "not believe that a lawyer commits an ethical violation if he takes advantage of time limits provided for" in the rules and pointed to the fact that Arizona's Rules of Civil Procedure provided an alternate path that a prevailing party could take to obtain entry of judgment even in face of "inaction" by the opposing counsel.[285]

At least as to the first justification, the Arizona Committee's analysis is difficult to reconcile with the language in Rule 3.2's comment explaining that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."[286] The Arizona Committee's second justification, however, carries significant weight (perhaps enough to override its seemingly flawed first justification) as existence of an alternate procedure delineated by rule for obtaining entry of judgment can fairly be read to mean that the "delay" under consideration was not "otherwise improper."

Lawyers' ability to stretch in defending against an alleged Rule 3.2 violation on the basis that delay was in the client's interests is not limitless.[287] A Fifth Circuit opinion affirming a district court's disbarment order, for example, readily demonstrates that lawyers who engage in improper efforts, including the filing of a frivolous appeal, "for the purpose of delaying an

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[283] *Id.* at 1.

[284] *Id.* at 1, 2.

[285] *Id.* at 2.

[286] *Id.* at 1; MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt. (2011).

[287] MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt. (2011) ("Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.").

inevitable judgment against their clients" will find no solace in arguing that their clients' interests were furthered by delay.[288]

Appellate deadlines are extremely important, and lawyers who miss a deadline for filing a notice of appeal, or who subsequently miss briefing or other deadlines established by rules or court orders, can visit devastating consequences on their clients.[289] Given the consequences for clients, the liability risks for lawyers in this area are heightened both in terms of exposure to malpractice claims and professional discipline flowing from grievances by motivated former client. A lawyer who is prosecuted by disciplinary authorities over missed deadlines is likely to face charges tied to both Rules 1.3 and 3.2. That is exactly what happened in *In re Disciplinary Proceeding Against Lopez*.[290]

In re Lopez is a remarkable case because, in spite of receiving a remarkable number of reprieves from a federal court demonstrating a seemingly inexhaustible degree of patience with the lawyer's dilatory behavior, a lawyer seemingly was dead set on getting disciplined. Alfredo Lopez represented Hugo Guzman in federal criminal proceedings that ended in a guilty plea and the imposition of a sentence of 70 months in prison; Guzman, unhappy with that sentence, had Lopez file a notice of appeal on his behalf.[291] Lopez's initial deadline for filing the opening brief on appeal before the Ninth Circuit was July 29, 1997, which he missed. This resulted in a notice of default from the Ninth Circuit providing fourteen days to correct the failure and file a motion

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[288] Nasco, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 708 (5th Cir. 1990).

[289] *See, e.g.*, *In re* Disciplinary Action Against Pierce, 706 N.W.2d 749, 755 (Minn. 2005) (detailing plight of client who was arrested by sheriff for failing to report to prison after appeal had been dismissed when lawyer failed to file a brief, failed to file a motion seeking reinstatement of appeal after dismissal, failed to inform his client that appeal had been dismissed, and failed to respond, or even send to client, prosecutor's motion seeking order for client to report to prison); Binkley v. Medling, 117 S.W.3d 252, 258-59 (Tenn. 2003) (affirming dismissal of appeal because of failure to timely file notice of appeal).

[290] 106 P.3d 221 (Wash. 2005).

[291] *Id.* at 223.

for relief from default. Lopez complied and moved for relief and for an extension to file the opening brief by March 20, 1998, explaining that his delay was caused by "an extremely busy trial schedule, both in and out of the State of Washington."[292] Though it granted the extension, the Ninth Circuit included a warning in its order that "further requests for extension of time for filing the opening brief are strongly disfavored."[293]

Nevertheless, this dance continued with Lopez failing to file a brief by the new extended deadline, the Ninth Circuit issuing a default order, and Lopez moving for further extensions of time to file an opening brief based on his busy schedule twice more. Eventually, the Ninth Circuit issued a show cause order on March 10, 2000, raising a possible monetary sanction against Lopez and possible dismissal of the appeal for failure to prosecute.[294] By that time, Guzman had hired new counsel, but no one had bothered to inform the court. Lopez had sent Guzman's file to the new lawyer and asked the new lawyer to advise the Ninth Circuit of the change in counsel. Guzman's new lawyer did not do despite having received Lopez's request well over a year before the show cause order issued.[295]

Lopez never responded to the Show Cause Order, and, on June 28, 2000, the Ninth Circuit entered an order sanctioning Lopez the paltry sum of $500; the Ninth Circuit also sent its sanction order to the Washington State Bar Association ("WSBA") which led to grievance proceedings against Lopez.[296] The WSBA charged Lopez with several disciplinary violations, including infractions based on his repeated failure to comply with the Ninth Circuit's deadlines. The Washington Supreme Court ultimately concluded Lopez violated Rule 1.3 and Rule 3.2:

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[292] *Id.* at 224.

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.* at 225.

> Lopez was nearly six months beyond the first deadline when the Ninth Circuit issued its first default notice. Lopez was nearly four months beyond the second deadline when the Ninth Circuit entered an order of default. He was almost three weeks beyond the third deadline when he transferred Guzman's file to [replacement counsel].[297]

Based largely on Lopez's own representations to the Ninth Circuit in his motions for relief as to the reasons for his delay, the court discounted Lopez's argument in the disciplinary proceedings that he had not violated Rule 1.3 or Rule 3.2 because the scope of his representation of Guzman was limited to filing a notice of appeal. As a result, Lopez was suspended for sixty days.[298]

In addition to missing deadlines, lawyers handling appellate proceedings can violate Rule 1.3, Rule 3.2, or both through delay in handling a matter where there are no true deadlines. This is amply demonstrated by the decision in *In re Cherry*.[299] Indiana lawyer, Hugh Cherry, was retained in August 1989 by the family of an inmate who had been convicted of a number of criminal offenses. Cherry was engaged to represent the inmate in pursuing post-conviction remedies and was paid a total fee of nearly $4000.[300] Although neither the inmate nor his family instructed Cherry to delay pursuing post-conviction relief for any reason, Cherry did not even meet with his client to discuss post-conviction remedies until March 1995, almost four years after the Indiana Supreme Court had affirmed the convictions. Cherry would not meet with his client again until late in 1996 and did not file a petition seeking post-conviction relief until January 1997.[301] The record before the court reflected that Cherry "had been repeatedly

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[297] *Id.* at 227.

[298] *Id.* at 230, 234.

[299] 715 N.E.2d 382 (Ind. 1999); *see also In re White*, 699 So.2d at 376, 378 (suspending lawyer from practice for one year and imposing two-year supervised probation period thereafter for failure to file brief despite receiving extension); *In re Pierce*, 706 N.W.2d at 755 (disbarring lawyer as sanction for variety of ethical violations, including violations of Rule 1.3 and Rule 3.2 for failing to file a brief leading to the dismissal of client's appeal).

[300] *In re Cherry*, 715 N.E.2d at 383-84.

[301] *Id.* at 384.

informed of [his client's] desire promptly to prosecute the contemplated [post-conviction remedy] action."[302] Finding no "legitimate reason" and "no substantial purpose" for the delay, the court described Cherry's conduct as merely "not get[ting] around to filing it for five and one-half years . . . while his client's conviction stood and the client waited, knowing that a possible avenue of legal redress lingered unexplored."[303] The court held that Cherry's conduct violated both Rule 1.3 and Rule 3.2, and suspended him from practice for sixty days.[304]

VI. ISSUE OR POSITIONAL CONFLICTS OF INTEREST

More ink has been spilled discussing the relevant ethical analysis when one lawyer or law firm is asked to take adverse positions simultaneously on the same issues in different cases for different clients before different courts then would seem to be justifiable based on how rarely the issues seems to have arisen in the case law.[305] Ethics bodies from a number of jurisdictions have issued a variety of opinions over the years reaching a variety of differing conclusions as to when issue or positional asymmetry is severe enough to pose a conflict of interest.[306]

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[302] *Id.*

[303] *Id.* at 385.

[304] *Id.* at 384-85.

[305] *See, e.g.*, Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 U. FLA. L. REV. 383 (1999).

[306] *See, e.g.*, State Bar of Ariz. Ethics Comm., Op. 87-15 at 3-4 (July 1987) (opining that even when cases are in same appellate court and same employment law issue is involved in each case, law firm can advocate opposing sides of the issue with client consent); State Bar of Cal., Standing Comm. on Prof'l Responsibility & Conduct, Op. 1989-108 (1989) (opining that even though before the same federal judge, same law firm can take opposing positions on an issue in separate matters); D.C. Bar Legal Ethics Comm., Op. 265 (1996) (finding there to be no reason for distinguishing between trial courts and appellate courts when analyzing ability to take opposing positions); State Bar of Mich., Prof'l Ethics Comm., Op. CI-1194 (April 1998) (lawyer cannot get consent to conflict, and must withdraw from both representations, where cases are consolidated before highest appellate court and positions are directly opposite); Me. Bd. of Overseers of the Bar, Prof'l Ethics Comm'n, Op. 155 (Jan. 1997) (urging caution as to an attorney seeking to take opposite positions on the same issue before the same judge); State Bar of N.M., Ethics Advisory Opinions Comm., Op. 1990-3 at 2 (1990) (opining that law firm may not take diametrically opposed positions on the same issue in a child neglect case in front of the same court whether trial or appellate level); Ass'n of the Bar of the City of N.Y., Comm. on Prof'l & Judicial Ethics, Op. 1990-4 (May 1990) (addressing only whether taking both plaintiffs' cases pro bono and defendants' cases for paying clients before the same human rights commission is appropriate and concluding it was); Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 89-27

Yet, the mere fact that there is limited case law on the subject is not necessarily indicative of the likelihood that such a scenario may arise in the real world. Issue or positional conflicts of interest are the kinds of conflicts that are both difficult to capture in even the most sophisticated law firm conflicts systems and, unless raised by the lawyers involved, are often unlikely to be discovered by the clients affected. Further, issue or positional conflicts are often treated, and resolved or avoided in the first place, as "business conflicts" in which a primarily defense-based firm, for example, is unwilling to take a plaintiff's employment law case for fear of how it may be perceived by the firm's business clients. Nevertheless, given the nature of this type of conflict of interest, it is most likely to arise, if at all, with respect to lawyers engaged in appellate practice and is worthy of some further discussion.

The ABA's Standing Committee on Ethics and Professional Responsibility addressed issue conflicts for the first time in 1993.[307] In Formal Opinion 93-377, the Committee examined a scenario in which "a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different and unrelated pending matter which is being litigated in the same jurisdiction."[308] The Committee's ultimate conclusion, looking to language of a comment to then-Model Rule 1.7, was that a lawyer in such a position, if not immediately aware of the problem so as to be able to avoid taking on the second representation, could reasonably conclude that her choice was to either withdraw from one of the two representations or, after disclosing

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(1990) (opining that as to environmental issues, same law firm could take opposing positions on behalf of different clients before same court, whether trial or appellate, but only with consent of both clients).

[307] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-377 (1993).

[308] *Id.* at 1.

fully to both clients the potential impact that obtaining one desired ruling would have on the other, could obtain consent from each client to continue the representations.[309]

The current version of Model Rule 1.7, which did not exist at the time of Formal Opinion 93-377, dedicates an entire comment to the topic of lawyers taking inconsistent legal positions on behalf of different clients at the same time. The comment acknowledges that the general rule is "that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest."[310] But the comment explains that taking inconsistent legal positions can be a Model Rule 1.7(a)(2) "material limitation" conflict of interest in certain circumstances and identifies relevant factors in determining whether a material limitation is sufficient to require advising the clients of the risk and obtaining informed consent.[311] Those factors are "where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer."[312]

The Restatement (Third) of the Law Governing Lawyers[313] takes a similar position on the appropriate general rule, highlighting that "if the rule were otherwise law firms would have to

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[309] *Id.* at 3, 5. In this regard, the ABA Formal Opinion provides some additional guidance to the lawyer or firm in attempting to determine which representation should be dropped, stating that where it is possible to do so "the lawyer should determine which of the representations would suffer the least harm as a consequence of the lawyer's withdrawal and then withdraw from that matter." *Id.* at 5 n.6.

[310] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2011).

[311] A material limitation conflict occurs where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interest of the lawyer." *Id.* R. 1.7(a)(2).

[312] *Id.* R. 1.7 cmt. 24.

[313] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

specialize in a single side of legal issues."[314] Likewise, the Restatement acknowledges that there can be circumstances in which an issue or positional conflict constituting a material limitation will arise and sets outs an array of factors largely tracking those in the Comment to the Model Rule.[315]

The most apparent situations in which viable issue conflicts of legitimate concern can arise involve appellate proceedings. Yet, even in that context, opinions as to what sort of controversy crosses the line vary greatly. For example, an Arizona ethics opinion indicates that, provided client consent is obtained, the same law firm can simultaneously advocate opposite sides of the same employment law issue before the same appellate court.[316] Yet, a New Mexico ethics opinion concluded that a firm could not take diametrically opposed positions in the same appellate court with respect to child neglect cases.[317]

There are very few reported opinions dealing directly with issue or positional conflicts. One such opinion involves one of the cleanest and most obviously understood types of issue conflict. In *Williams v. State*,[318] the Delaware Supreme Court concluded that a lawyer acted appropriately in seeking to withdraw from one of two death penalty appeals he was handling before that court. The inconsistency in the positions required of that lawyer could not have been more apparent: one case required the lawyer to argue that the trial court should not have given "great weight" to the jury's 10-2 recommendation in favor of the death penalty; the other case

[314] *Id.* § 128 cmt. f.

[315] *Id.*

[316] State Bar of Ariz. Ethics Comm., Op. 87-15 (July 1987).

[317] State Bar of N.M., Ethics Advisory Opinions Comm., Op. 1990-3, at 2 (1990).

[318] 805 A.2d 880 (Del. 2002).

required the lawyer to argue that the trial court should have given "great weight" to a jury's 10-2 vote against the death penalty.[319]

Advanced Display Systems, Inc. v. Kent State University[320] presents a scenario at least arguably properly classified as a positional or issue conflict of interest arising in another area where such concerns more frequently appear on lawyers' radar screens: litigation over intellectual property and, more specifically, patent infringement litigation. *Advanced Display* involved the interplay of two pieces of litigation, the first being a patent infringement action by Advanced against Kent State and a number of related entities. In that case, Advanced, through its counsel, was advancing the position that two of the related Kent State entities were separate, distinct entities.[321] While that litigation was pending, however, counsel for Advanced filed his own separate defamation lawsuit against the same two related Kent State entities over statements within a *Texas Lawyer* article about him that had been republished by one of the two Kent State entities at its website. To maintain the suit against both entities, however, the lawyer claimed that one of the entities was the alter ego of the other.[322] Based on those inconsistent positions, Kent State moved to disqualify Advanced's lawyer in the patent infringement litigation, but the motion was denied. As the district court explained, the two positions were not inherently contradictory after all:

> While equity may require application of the alter ego doctrine in one case, it may not in another. Thus, [counsel for Advanced] may permissibly argue that KDI is the alter ego of KDS in his defamation lawsuit without necessarily implying that the separateness of the two corporations should be disregarded for all purposes.[323]

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[319] *Id.* at 881.

[320] Nos. 3-96-CV-1480-BD, 3-96-CV-1608-BD, 2001 WL 1524433 (N.D. Tex. Nov. 29, 2001).

[321] *Id.* at **1-3.

[322] *Id.* at **4-5.

[323] *Id.* at *6.

While true issue or positional conflicts seem to have been historically rare (if the lack of reported opinions addressing the subject is a fair indication), the modern explosion of access to information combined with lawyers and law firms becoming increasingly specialized in their focus arguably suggest the possibility that issue and positional conflicts of interest will more frequently bubble to the surface in the future. Unfortunately, identifying such conflicts before they are manifest can be an exceedingly difficult task for lawyers and law firms given that such conflicts will often elude automated conflict-checking procedures. Quite simply, these conflicts are rarely apparent from the kinds of information that are universally captured by lawyers and law firms when opening new files and running conflicts, such as names of parties and other key players. Lawyers who specialize in appellate litigation and law firms with separate appellate practice teams may be more likely to identify and address issue or positional conflicts involving competing appeals in advance, as opposed to having them brought to their attention by the clients involved. Fortunately, however, there at least appears to be a clear consensus among those authorities that have addressed this question that this type of material limitation conflict is an inherently consentable one under Model Rule 1.7(a)(2). Thus, in situations where the conflict is brought to the lawyer's or law firm's attention in the midst of the competing matters, the lawyer or law firm will at least be free to seek the affected clients' consent to continued representation.

VI. CONCLUSION

Appellate advocates, like all lawyers, must appreciate their ethical obligations. Zealous advocacy does not excuse lawyers' ignorance of their professional responsibilities in appellate courts any more than it does in trial courts. Lawyers briefing and arguing appeals must be candid with courts. They must avoid false and misleading statements of fact and law, and must not mislead through silence when they ought to speak. Lawyers' duty of candor also compels

them to disclose directly adverse authority in the controlling jurisdiction, even if they believe it to be factually distinguishable or erroneous. Lawyers who plagiarize secondary sources and even other lawyers' pleadings or briefs may violate various ethics rules.

Beyond honoring their duty of candor, appellate lawyers are wise to curb their zeal when criticizing courts. While it is true that a party cannot appeal from a lower court decision without criticizing it in some form or fashion, advocates must be careful about how far they go in their criticism. Ethics rules forbid lawyers from knowingly or recklessly making false statements about judges' integrity or qualifications. Appellate lawyers must also remain vigilant about their ethical obligations not to pursue frivolous appeals. The decision to appeal is not one to be made reflexively but, rather, requires thoughtful consideration and a diligent review of the record to ensure a ground for appeal that will satisfy the lawyer's ethical obligations under Rule 3.1, as well as under relevant state or federal court rules and statutes governing frivolous appeals and vexatious litigation.

Finally, appellate lawyers must be attentive to potential issue or positional conflicts of interest. Fortunately, such conflicts are rare and can be cured by client consent.

JUDICIAL ETHICS AND THE INTERNET:

MAY JUDGES SEARCH THE INTERNET IN

EVALUATING AND DECIDING A CASE?

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JUDICIAL ETHICS AND THE INTERNET: MAY JUDGES SEARCH THE INTERNET IN EVALUATING AND DECIDING A CASE?

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The United States Supreme Court has described the Internet as "a vast library including millions of readily available and indexed publications"[1] with content as "diverse as human thought."[2] Accessing this vast library has become simple for anyone owning a computer, thanks to the development of search engine like Google and Yahoo. To the curious individual, these search engines provide alluring doorways to swift answers, offering a wealth of easily obtainable information.[3] Given the enormous popularity of the Internet as a "library at-your-fingertips," it may not be surprising to see references to search engines and Web pages popping up more and more in judicial opinions. As such references increase, however, so do candid concerns over whether it is appropriate for judges to explore the Internet in deciding their cases.[4] Raised eyebrows over the practice are turning into a compelling controversy – one that judges, state judicial disciplinary rule makers, and bar associations alike will want to evaluate.

I. Courts and Judges Turn to the Internet

In 2002, the California Supreme Court decided a case involving the use of stun belts in the courtroom on criminal defendants.[5] The court reversed the conviction of a defendant who had been compelled to wear a stun belt while testifying.[6] In its opinion, the court reviewed various features of stun belts, including how they operate and what types of injury they may inflict, by citing to magazine articles, newspaper articles and a student comment.[7] The decision was countered by a forceful dissent, which upbraided the court for using the Internet to delve into unnecessary factual inquiries: "[W]e could have waited for a case that raised these questions on an adequate record. Instead, the majority . . . rush[ed] to judgment after conducting an embarrassing Google.com search for information outside the record . . ."[8]

In 2001, the Seventh Circuit Court of Appeals affirmed the conviction of a drug dealer who was caught in a sting operation.[9] The drug dealer allegedly used code lingo to convey the prices for given amounts of cocaine, and the prosecution had asserted that the dealer's references to "Eighteenth Street" constituted a demand for $1,800.[10] The prosecution's assertion was supported by, among other things, the fact that no Eighteenth Street existed in the city.[11] One dissenting judge attacked the majority's decision after having conducted her own search on the Internet for maps. She noted that although "someone consulting the Internet map source MapQuest" would not find an Eighteenth Street in the city, someone consulting MapBlast!, an alternative Internet map source, would succeed in finding an Eighteenth Street.[12]

These cases illustrate the apparent willingness of judges to consult the Internet and indulge in a little independent fact-finding when evaluating a case. This willingness is manifest in opinions being issued from courts across the nation, including courts in New York. In 2000, federal district and state courts in New York issued approximately forty-five opinions referencing Internet sites. In 2004, those same courts issued approximately 140 opinions referencing Internet sites,[13] and the number will likely continue to increase.[14]

Two recent opinions, one from a federal court in New York and one from a New York civil court, demonstrate how the Internet is influencing the decisions of judges in that state. In the first case, *Rodriguez v. Schriver*, a magistrate judge reviewed the conviction of an Hispanic defendant to see whether the prosecutor had unlawfully exercised peremptory challenges to exclude Hispanic jurors.[15] The prosecutor testified that of the prospective Hispanic jurors, one was seated as a regular juror.[16] The judge conducted a Google search on the Internet to examine the construction and origin of the seated juror's name, ultimately producing doubt as to whether

the seated juror was indeed Hispanic.[17] In the end, the judge vacated the defendant's conviction on other grounds.[18]

In the second case, *N.Y.C. Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co.*, a civil court was asked to defend its extensive use of Internet resources by a defendant insurance company that lost a motion to dismiss for lack of jurisdiction.[19] The defendant insured U-Haul vehicles, one of which was involved in an accident in New York.[20] In deciding that the court had jurisdiction over the defendant, the judge had voluntarily gathered factual information from a state governmental Web site (which reported that the defendant was licensed to do insurance business in the state), the defendant's company Web site (which reported that the company operates in 49 states), and U-Haul's company Web site (which reported a connection to the defendant as well as the existence of multiple U-Haul facilities in the specific county at issue).[21] The defendant attacked the court's reliance on factual information gleaned from the Internet, and the court saw the matter as one of first impression: "[The defendant] appears to be the first in the nation to challenge a court's use of the internet to deflate the sails of a party's arguments."[22]

The court forcefully denied any impropriety in its actions and listed several justifications for its use of Internet resources. First, regarding the court's use of a governmental Web site, the court praised at length the creation of Web sites by governmental entities:

> Legislative bodies, courts, governmental agencies, and public entities have commendably made information available on web sites that have dramatically facilitated the quick location of information. Just as computerized research of Westlaw and Lexis have made resort to more time-consuming conventional research secondary, factual information and data that, in the past, would have taken days and hours to retrieve, are now available in a matter of seconds. Technological breakthroughs, including the immediate scanning of important documents and the tapping of a few strokes on a computer keyboard, speed fact-finding [sic], ensure that documents will not be lost, misplaced, or stolen, and are highly reliable. For a researcher not to employ information placed on a governmental web site, by a civil servant, for the benefit of the public would, indeed, be negligent and ridiculous. For a judge to ignore these new

> technological changes, made available by government and encouraged by court systems, would be to blind oneself.[23]

Second, regarding the court's use of company Web sites, the court reasoned that information placed on those Web sites constituted party admissions and thus were fair game for consideration.[24] Third, the court emphasized that no member of the judge's staff had conducted a personal investigation because the court did not send anyone out to inspect U-Haul facilities or inquire about insurance, and the court did not obtain its information via random Internet searches.[25] Fourth, the court took comfort in the great number of other courts that have cited Internet materials, noting that "federal and state courts, throughout the country, readily and without apology, will refer to a Web site whenever necessary or helpful to make a point."[26] Fifth, the court offered a distinction between private and public computer use: "[T]he research on the Web sites was done not on some private personal computer, but on Internet access provided by the Office of Court Administration to the undersigned and every other Judge of this State, reflecting a policy that courts utilize emerging technology in dispensing justice."[27] Finally, the court dismissed the defendant's argument that the court had acted as plaintiff's advocate, stating that its decision was not based solely on information obtained from the Internet.[28]

Despite the court's comprehensive defense of its use of the Internet, its decision was reversed on appeal.[29] The appellate court complained that the lower court made findings of fact "based not upon the submissions of counsel but rather upon its own Internet research."[30] The appellate court chided the lower court for "initiating its own investigation into the facts when, based upon the insufficient submissions of plaintiff, the court should have dismissed the complaint."[31] One appellate judge dissented, however, saying that the lower court's "use of the

Web site of the New York State Department of Insurance . . . was proper" because it was akin to the court taking judicial notice of matters of public record.[32]

Collectively, these cases, and the increasing number of cases like them, raise myriad questions about the proper role of the Internet in the judicial decision-making process. How freely should judges access Internet resources? As used in judicial opinions today, is the Internet a trusted library, a convenient expert witness, or a troublesome intruder in the adversarial process? As discussed in the following paragraphs, judicial reliance on the Internet raises a number of discrete concerns.

II. Concerns Raised by Judicial Use of the Internet

While the Internet is an invaluable research tool, it is not clear that it is a reliable or appropriate tool for bolstering judicial opinions. Three points to consider in evaluating judicial use of the Internet are (1) authoritativeness and accuracy; (2) fairness to the parties; and (3) permanency.

A. Authoritativeness and Accuracy

There is a significant risk of misinformation when using the Internet. The Internet retains its popularity, in part, because the opportunity to publish and add to its content is largely unrestricted. Yet this open invitation to publish also operates to discredit the authoritativeness and accuracy of Internet materials. "[A]nyone with an Internet service provider and a quarter to call it can set up a Web page that looks as official as a 1040 form, without the quality control that used to come from editors, fact checkers, and large publishing houses. There are few barriers to bad information on line."[33]

Internet search engines do not distinguish between material published by genuine experts and that published by high school students, leaving the searcher to sort fact from fiction. In

addition, it may be difficult to locate impartial presentations of information on the Internet, as many publishers use the Internet as a vehicle for political or economic gain. Some of these publishers choose Internet addresses that are confusingly similar to the addresses of other, more official, Internet sites.[34] In short, there is an undeniable element of unreliability to Internet research, and judges should perhaps be more reluctant to move away from more traditional, trusted sources. Even The Bluebook recognizes that "[m]any internet sources . . . do not consistently satisfy traditional criteria for cite-worthiness."[35]

Some courts have already declared distrust of Internet materials. In *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, a Texas federal judge refused to consider evidence offered by a plaintiff to demonstrate that the defendant owned a certain vessel.[36] The evidence consisted of data the plaintiff gathered off the United States Coast Guard's online vessel database, and the court rejected it as inherently untrustworthy:

> While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. . . . Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing . . .[37]

Of course, not all Internet sites are created equal, and some naturally lend themselves to more credibility than others. Governmental sites, for example, reflect more trustworthiness than commercial or private sites, the assumption being that governmental entities are impartial reporters of likely accurate information. New York courts accordingly refer to federal and state governmental sites more often than other types of sites,[38] as do appellate courts nationwide.[39]

At times, however, New York courts have found other Internet sources useful: information about alcoholism on the National Council on Alcoholism's Web site aided a court in determining that a man was an alcoholic and therefore should not have custody of his son,[40] an article about learning disabilities on a university professor's Web site aided a court in determining that a school did not respond properly to a student's misbehavior,[41] and a petsmart.com article provided another court with background information on the docking of dogs' tails.[42]

Given the potential for misinformation in Internet research, the New York Bar Association Committee on Professional Ethics has issued the following caution to attorneys: "To the extent that the attorney in performing legal research for clients relies on information obtained from searching of Internet sites, the attorney's duty under Canon 6 to represent the client competently requires that the attorney take care to assure that the information obtained is reliable."[43] No similar caution, however, has apparently been issued to judges.

B. Fairness to the Parties

Fairness to the parties is a major concern. Parties, after all, cannot predict when a judge is going to independently use the Internet to gather supplemental information. Nor can parties predict what searches the judge might conduct on the Internet, what sites the judge might view, or how much deference the judge will afford the retrieved information. Concerned attorneys might find themselves making preemptive perusals of Internet sources in an effort not to be caught off guard by the court.

Furthermore, parties do not receive notice of the court's intention to rely on Internet materials in making a decision or an opportunity to contest the accuracy or relevancy of those materials. This lack of notice and an opportunity to respond is especially problematic when

courts use information from the Internet to evaluate or resolve the parties' substantive factual disputes. The appellate court in *N.Y.C. Med. & Neurodiagnostic, P.C.* highlighted this problem:

> In conducting its own independent factual research, the [lower] court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality.[44]

A party against whom Internet materials have been used may feel that the court, as an uninvited advocate, has improperly championed the succeeding party's cause. Indeed, critics of judicial use of the Internet have urged the adoption of a "don't Google the defendant" rule to prevent such a result.[45]

Moreover, the ease with which information can be retrieved from the Internet may encourage courts to sidestep important evidentiary rules. Parties wishing to submit evidence to the court, including evidence obtained from the Internet, must satisfy longstanding rules of authentication and hearsay. Many courts have approached submissions of Internet evidence warily, and scholars have consequently produced treatises and articles explaining how parties with Internet materials can successfully conform to evidentiary rules.[46] A court displaces the rules, however, by consulting sources outside of the record not proven to be reliable by sworn affidavit or live testimony. Doubts arise when a court "substitutes its own questionable research results for evidence that should have been tested in the trial court for credibility, reliability, accuracy, and trustworthiness."[47]

This is not to say that courts are prohibited from taking judicial notice of certain facts when rendering a decision. The Internet, however, does not appear to be an acceptable provider of such facts. In New York, a "court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable

accuracy."[48] Under the Federal Rules of Evidence, a court may take judicial notice of facts that are "not subject to reasonable dispute" because they are "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[49] As discussed above, courts would be hard-pressed to cite the Internet as a source of indisputable accuracy, although government Web sites with statutory authority to collect and report specific information would be the best candidates for such treatment.[50]

In sum, judges who access the Internet to obtain supplemental information for a case risk overstepping their roles and skirting fairness to the parties.

C. Permanency

The Internet is by nature an unstable, ever-changing medium, which makes citation to specific Web pages problematic.[51] The contents of Web pages are easily and frequently altered. In a short time, the content of a cited page may evolve into something very different from what the court originally cited. This may frustrate future legal researchers and mislead them as to what the court actually considered in deciding the case. In addition, some Internet pages require subscriptions or passwords for access, further complicating review by others.

Other Internet pages may be relocated or may disappear altogether, rendering the links provided in judicial opinions worthless. This troublesome phenomenon has been referred to as "link rot."[52] In 2002, one researcher found that a high percentage of court Internet citations referred to Web pages that were no longer accessible.[53] Of all the citations made in 1997 cases, 84.6 percent contained invalid links, and of all the citations made in 2001 cases, 34 percent already contained invalid links.[54]

Given the problem of impermanence in Internet citations, courts may want to reevaluate their reliance on Internet materials. "[Courts should] strive to cite authority in its most permanent manifestation, even if that means resorting to a book or periodical in traditional print format, using the Internet source simply as a convenient parallel citation."[55]

III. Guidance from Codes of Judicial Conduct

Are judges prohibited under canons of judicial conduct from independently accessing the Internet? Not expressly. The Code of Conduct for United States Judges does not address Internet searches by judges, and neither does the American Bar Association's Model Code of Judicial Conduct, which has been adopted by New York. The Model Code does, however, contain a relevant comment in Canon 3 ("A judge shall perform the duties of judicial office impartially and diligently").[56] The commentary to that canon states, "A judge must not independently investigate facts in a case and must consider only the evidence presented."[57] This comment suggests that judges who obtain information from the Internet and apply the information in resolving factual disputes may be acting inappropriately.

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has recently proposed a revision to the Model Code that more specifically restricts judges from accessing the Internet. The Commission's 2004 draft of the Model Code states within its rule 2.09 that "a judge shall not independently investigate facts in a case."[58] The commentary to that rule provides as follows: "The prohibition against a judge investigating the facts of a case independently or through a member of the judge's staff extends to information available in all mediums including electronic access."[59] The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics and Committee on Government Ethics jointly responded positively to the Joint Commission's draft: "Because facts obtained on the Internet and

in other electronic media are often incomplete or incorrect, we support this important principle."[60]

The proposed revision to the Model Code would thus prohibit inquisitive judges from using the Internet to investigate the facts of a case. The revision, therefore, makes a step towards addressing the concerns raised above. At the same time, however, the revision leaves some ambiguity as to whether judges are completely prohibited from searching the Internet. For example, may judges still use the Internet to find background information for an opinion? Is the factual information fair game so long as it is not applied directly to resolving the factual dispute at hand? Should there be some allowance for references to governmental Web sites? Also, the Model Code does not distinguish between trial and appellate judges. Appellate courts traditionally enjoy greater leeway in the breadth of their considerations because they must set precedent for future decisions and often make policy determinations. Are they restricted to the same extent as trial courts? Further revisions and debate may be needed to clarify the matter.

IV. Recommendations

Judges, litigators, and bar associations should be aware that judicial citations to the Internet are becoming more prevalent. They should also be aware that judicial searching and citing of Internet materials raises concerns of accuracy, fairness, and permanency. Judges should exercise caution in accessing factual information on the Internet, taking care not to let questionable Web site materials improperly influence case outcomes. Those bodies charged with making and applying state judicial rules should assess the need for clearer rules. Practicing attorneys should question the propriety of decisions revealing extensive use of Internet materials outside of the record. Bar associations should evaluate the proposed revisions to the Model Code

and consider more broadly the question of limiting the influence of the Internet in judicial decision making.

It may be naïve to think that courts will cease consulting such an accessible and vast storehouse of information. And some may view such use of the Internet as helping to better inform courts and keep litigants honest.[61] A solution that recognizes the potential benefits of using the Internet, while addressing at least some of the concerns raised above, is to treat judicial Internet searches as ex parte communications under codes of judicial conduct. The proposed revised Model Code provides the following relevant guidelines:

> A judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except . . . [a] judge may obtain information and opinions from a disinterested expert in a proceeding before the judge if, before the record is closed, the judge gives notice to the parties of the person consulted and the substance of the advice obtained and affords the parties reasonable opportunity to respond.[62]

Following these guidelines, a judge who intends to rely on materials obtained by searching the Internet must first inform the parties of the substance of the materials, and then offer the parties an opportunity to respond. Thus, before a decision is rendered, litigants would be aware of the Internet information and be able to contest its accuracy and relevancy.

The emergence of new technology often correlates with the emergence of new legal issues. Learning about and discussing this new legal issue will help ensure that the Internet is not afforded too large a role in the judicial decision-making process.

Endnotes

1 Reno v. ACLU, 521 U.S. 844, 853 (1997).

2 *Id.* at 852 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa 1996)).

3 *See* Molly McDonough, *In Google We Trust?*, A.B.A J., October 2004, at 30 (describing Google as "an irresistible and indispensable ultimate answer-finder").

[4] *See id*. 30-31; *Google is Court's Favorite Search Engine*, C-NET NEWS, May 2004.

[5] *People v. Mar*, 52 P.3d 95 (Cal. 2002).

[6] *Id.* at 97.

[7] *Id*. at 103.

[8] *Id.* at 116.

[9] United States v. Harris, 271 F.3d 690 (7th Cir. 2001).

[10] *Id.* at 692-94.

[11] *Id.*

[12] *Id.* at 703. A search on the Lexis online legal database reveals that between 2000 and 2004, forty-seven decisions nationwide have cited to MapQuest. (Search conducted May 4, 2004).

[13] Information obtained by conducting searches for "http" on the Lexis online legal database, May 4, 2004.

[14] *See* William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273, 1296 (2001) (predicting that citations to Internet materials are certain to become more common).

[15] No. 99 Civ. 8660 (FM), 2003 U.S. Dist. LEXIS 20285 (S.D.N.Y. Nov. 12, 2003); *rev'd on other grounds*, 392 F.3d 505 (2d Cir. 2004).

[16] *Id*. at *22.

[17] *Id.* at *22 n.12.

[18] *Id.* at *48.

[19] N.Y.C. Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co., 3 Misc. 3d 925, 774 N.Y.S.2d 916, 2004 N.Y. Misc. LEXIS 337 (2004).

[20] *Id.*, 3 Misc. 3d at 926, 744 N.Y.S.2d at 917, 2004 N.Y. Misc. LEXIS at *2.

[21] *Id.*, 3 Misc. 3d at 925, 774 N.Y.S.2d at 916, 2004 N.Y. Misc. LEXIS at *11.

[22] *Id.*, 3 Misc. 3d at 926-27, 774 N.Y.S.2d at 917-18, 2004 N.Y. Misc. LEXIS 337 at *1-2.

[23] *Id.*, 3 Misc. 3d at 928-29, 774 N.Y.S.2d at 919, 2004 N.Y. Misc. LEXIS at *6-7.

[24] *Id.*, 3 Misc. 3d at 930, 774 N.Y.S.2d at 920, 2004 N.Y. Misc. LEXIS at *9.

[25] *Id.*, 3 Misc. 3d at 930, 774 N.Y.S.2d at 920, 2004 N.Y. Misc. LEXIS at *9-10 ("The facts secured by this Court, furthermore, were *not* derived by framing term requests on any of the modern, popular search engines—such as Google, MSN Search, Yahoo Search, or Ask Jeeves—and, based on the information derived therefrom, used to fashion a factual argument to sandbag counsel. Rather, the Court, on its own initiative, explored the Web site of a party to this litigation and that of its sibling corporation.").

[26] *Id.*, 3 Misc. 3d at 931, 774 N.Y.S.2d at 921, 2004 N.Y. Misc. LEXIS at *11-12.

[27] *Id.*, 3 Misc. 3d at 931-32, 774 N.Y.S.2d at 921-922, 2004 N.Y. Misc. LEXIS at *13.

[28] *Id*. at *14. An additional justification seems to be that the parties did not brief the case well, and the court was consequently dissatisfied with the parties' submissions. *See* NYC. Med. & Neurodiagnostic, P.C., 2004 N.Y. Misc. LEXIS 337 at *4.

[29] NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co., No. 2003-1472 QC, 2004 N.Y. Misc. LEXIS 2813 (N.Y. App. Div. Dec. 22, 2004).

[30] *Id.* at *4. The appellate court's reversal was based also on the lower court's failure to make specific findings under section 404(a) of the New York City Civil Court Act. *Id.* at *5.

[31] *Id.* at *9.

[32] *Id.* at *11 (Pesce, P.J., dissenting) ("[I]n my opinion, it was a proper exercise of discretion for the court below to have sua sponte referred to a matter of public record, in order to ascertain the fact of defendant's status as an insurer. There is no logical reason not to include within the category of public records, such records when they are available from reliable sources on the Internet.").

[33] Tina Kelley, *Whales in the Minnesota River*, N.Y. TIMES, March 4, 1999, at G1; *see also* Reno, 521 U.S. at 853 ("Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.").

[34] *See* Tina Kelley, *Whales in the Minnesota River*.

[35] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 18.2.1 (Colom. L. Rev. Ass'n et al. eds., 17th ed. 2000).

[36] 76 F. Supp. 2d 773 (S.D.Tex. 1999).

[37] *Id.* at 774-75. The Seventh Circuit Court of Appeals expressed similar concerns in *United States v. Jackson* in which a defendant appealed her convictions of fraud. 208 F.3d 633 (7th Cir. 2000). The defendant argued that the trial court should have allowed into evidence various Web site postings of white supremacist groups purportedly claiming responsibility for the acts leading to the defendant's conviction. The court approached the evidence warily, noting that the defendant, who was a skilled computer user, could have slipped the postings herself onto the groups' Web sites.

[38] *See, e.g.*, 64th Assocs., L.L.C. v. Manhattan Eye, Ear & Throat Hosp., 813 N.E.2d 887, 889 n.6 (N.Y. 2004); Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp., 813 N.E.2d 587, 599 (N.Y. 2004); People v. Cahill, 809 N.E.2d 561, 608 nn.11-12 (N.Y. 2003); Reynolds v. Fraser, 781 N.Y.S.2d 885, 888-89 (Sup. Ct. 2004); Nextel of N.Y., Inc. v. Assessor Of Spring Valley, 771 N.Y.S.2d 853, 862 n.31 (Sup. Ct. 2004).

[39] Colleen M. Barger, *Accessing the Law: On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROC. 417, 428-29 (2002).

[40] *In re* Custody/Visitation Proceeding Rory H. v. Mary M., 2003 N.Y. Slip Op. 51600U, 7-8 (N.Y. Fam. Ct. 2003).

[41] *In re* Doe, 753 N.Y.S.2d 656, 659 (Fam. Ct. 2002).

[42] Hammer v. Am. Kennel Club, 758 N.Y.S.2d 276, 279 (App. Div. 2003).

[43] NYSBA Comm. On Prof'l Ethics, Op. 709 (Aug. 16, 1998).

[44] 2004 N.Y. Misc. LEXIS 2813 at *9.

[45] Molly McDonough, *In Google We Trust?,* A.B.A J., October 2004, at 31.

[46] *See, e.g.*, 5-2 MB Fed. R. Evid. Manual I § I (Internet Evidence); Daniel R. Murray & Timothy J. Chorvat, *Stepping it Up to the Next Level: From the UETA to the URE and Beyond*, 37 IDAHO L. REV. 415 (2001).

[47] Coleen M. Barger, 4 J. APP. PRAC. & PROC. at 436.

[48] People v. Jones, 539 N.E.2d 96, 98 (N.Y. 1989).

[49] Fed. R. Evid. 201(b).

[50] *See* Note 32, *supra*.

[51] *See* Coleen M. Barger, 4 J. APP. PRAC. & PROC. at 438-45.

[52] *Id.* at 438.

[53] *Id.* at 438-39.

[54] *Id.*

[55] *Id*. at 441.

[56] MODEL CODE OF JUD. CONDUCT, Canon 3(B)(7) (1990) (amended 1999).

[57] *Id.* at cmt.

[58] Model Code of Jud. Conduct R. 2.09(b) (Proposed Official Draft May 2004).

[59] *Id.* at cmt. 8.

[60] ABCONY Joint Subcommittee comments, August 3, 2004, available through the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct's Web site at http://www.abanet.org/judicialethics/resources/comm_rules_abcny_080304.pdf.

[61] *See* Molly McDonough, *In Google We Trust?,* A.B.A J., October 2004, at 31.

[62] MODEL CODE OF JUD. CONDUCT R. 2.09(a)(2) (Proposed Official Draft May 2004). *Compare with* MODEL CODE OF JUD. CONDUCT, Canon 3(B)(7)(b).

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MIXING BUSINESS WITH ETHICS: THE DUTY TO REPORT MALPRACTICE BY TRIAL COUNSEL

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Mixing Business with Ethics: The Duty to Report Malpractice by Trial Counsel*

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Four out of five appellate lawyers think they are smarter than trial lawyers. (The fifth is not being honest.) Appellate lawyers take pride in finding arguments that trial counsel did not advance, although such moments of intellectual superiority may vanish quickly as trial counsel explain the "overlooked" argument was in fact considered and rejected for strategic reasons. But what about that other category of non-advanced arguments—those where trial counsel have no explanation, or offer a patently inadequate explanation, for not advancing the argument?

In such cases, appellate lawyers may find themselves in an awkward position fraught with potential conflicts of interest. The duties of candor and competence running to the client seemingly compel disclosure of trial counsel's omission, if material. But the personal and financial interests of appellate counsel, who want to protect an outside referral source (if trial counsel belongs to a different firm), or want to avoid a malpractice claim (if trial counsel belongs to the same firm as appellate counsel), seemingly push appellate counsel to find a way around disclosure.

We know the rules of professional conduct trump practical business considerations, right? It is not a close call, right? Wrong. Do you really think an appellate lawyer is going to throw trial counsel under the bus for one client in one case? Won't an appellate lawyer find a way to stay within the ethical prescripts without doing harm to his or her financial interests if at all possible? Imagine how *you* would react if the trial counsel who screwed up is a senior rainmaker in *your* own firm and represents a long-established client with substantial repeat business for *your* firm? Under these circumstances, wouldn't you, as appellate counsel, be more apt to view your colleague's omission as "strategic" or otherwise defensible, or at least view the omission as not material to the trial outcome, and otherwise "pooh-pooh" and downplay the omission, and find a comfortable way not to say anything either to the client or the court?

Such honest and hard questions call for a serious discussion of the ethical rules while acknowledging the real world impact of those rules and the reality that civil appellate litigation is a business.

In Part I, we identify and discuss the controlling ethical rules as stated in the American Bar Association ("ABA") Model Rules of Professional Conduct. In Part II we analyze how these ethical rules might be applied in a hypothetical scenario. Finally, in Part III we discuss "best practices" for the integration of the ethical rules into the tripartite relationship between appellate counsel, trial counsel, and client.

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As a preliminary matter, we need to clarify who we mean by the "client." In the typical case appellate counsel is retained directly by the party represented at trial. That party is the "client" for purposes of appellate counsel's ethical duties. In some cases trial counsel controls every aspect of the appellate engagement—picks appellate counsel, makes the financial arrangements, and may even sign the appellate retainer agreement. But even in that circumstance, the lawyer handling the appeal has ethical obligations running to the party, at least where appellate counsel is listed as counsel of record for that party. In other words, we think appellate counsel rarely if ever can avoid answering the difficult questions presented here by claiming trial counsel is the client.

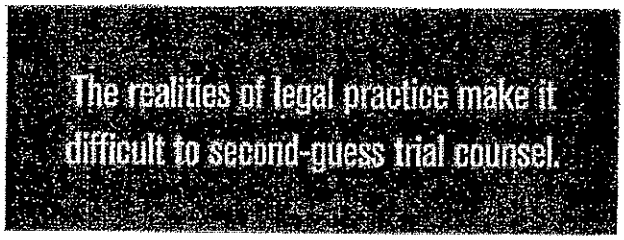
I. Relevant Applicable Ethical Rules: Where to Look For Guidance

In 1981, the ABA for the first and only time addressed the issue of appellate counsel's duty to report to the client perceived malpractice on the part of trial counsel. The ABA Standing Committee on Ethics and Professional Responsibility examined the duty in the narrow context of a criminal appeal, and the duty of a public defender who represents indigent criminal defendants. In that context, where appellate counsel is provided by the state for purposes of handling the criminal appeal, including reviewing the record to potentially assert a claim based on ineffective assistance of counsel, the ABA stated that "[t]he Committee's view is that the Disciplinary Rules of the Model Code neither prohibit nor require the advice."[1] The potential claim for civil damages was deemed to be beyond the scope of the public defenders' representation.[2] The Committee nevertheless believed it might be proper to inform a criminal defendant of a possible civil malpractice claim against his trial counsel, finding support for that conclusion in Ethical Consideration (EC) 2-2, which recognizes an ethical obligation to assist laypersons to recognize non-obvious legal problems.[3] The ABA Committee noted that a lawyer's malpractice may or may not amount to a violation of DR 6-101, which addresses incompetence, inadequate preparation and neglect by attorneys, and, thus, may or may not rise to the level of a reportable violation under DR 1-103(A).[4] That Disciplinary Rule states that "a lawyer possessing unprivileged knowledge of a violation of DR 1-102 [including DR 1-102(A)(6) concerning fitness to practice law] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." The Committee did not elaborate in its informal opinion as to what factors would distinguish a reportable case of malpractice from a non-reportable case.

Current ABA Model Rule 8.3, together with its official comments, as well as ABA Formal Op. 335 n.1 (1974) and

ABA Informal Op. 1273 (1973) construing DR 6-101, support the conclusion that recurring neglect—multiple episodes of malpractice—will trigger the mandatory reporting duty because in that circumstance the acts of malpractice call into substantial question the attorney's fitness to practice law.[5] In other words, where an otherwise competent and honest lawyer commits a discrete act of malpractice, such as blowing the statute of limitations in a single case, that conduct should not be viewed as a violation of the competence standard embraced in Rule 1.1.[6]

The Illinois State Bar Association weighed in with its own ethics advisory opinion, concluding that civil appellate counsel have a duty to disclose *to the client* a trial lawyer's potential malpractice because the failure to do so could damage the client.[7] The Illinois opinion was rendered in a hypothetical setting where plaintiffs' counsel, in a wrongful death action, failed to name a potential defendant within



the statute of limitations.[8] The Illinois State Bar Committee on Professional Ethics did not base this duty in the attorney competence rule or the client communication rule. Instead the Committee cited to the general proscription, found in Illinois Rule 7-101(a)(3), that "a lawyer shall not prejudice or damage his client during the course of a professional relationship."[9] The Illinois State Bar Board of Governors, in affirming the Commission, did rely on the communication rule, Illinois Rule 1.4(b) ("a lawyer shall explain a matter to the extent necessary to permit a client to make informed decisions regarding the representation"), as well as Rule 2.1 ("a lawyer shall exercise independent professional judgment and render candid advice.")[10]

Thus, while no ABA rule directly addresses the duty of appellate counsel to tell clients about malpractice committed by trial counsel, appellate counsel must be aware that an attorney disciplinary body might recognize such a requirement within the applicable ethics rules. Appellate counsel should consult ethics opinions and rulings where licensed to determine if such a duty has been recognized. In addition, appellate counsel should consider the further unwelcome prospect that a court might recognize a common-law duty to report trial counsel's malpractice so as to permit the client to sue appellate counsel for malpractice for not disclosing trial counsel's malpractice—notwithstanding the statement in the Scope section of the Model Rules of Professional Conduct that "[v]iolation of a Rule should not itself give rise to a . . . presumption . . . that a legal duty has been breached." In this way appellate counsel may end up named as a co-defendant with trial counsel, or even take the place of trial counsel, in a civil suit seeking damages.

The following three ABA Model Rules appear to have the greatest bearing on the existence of a duty to tell clients about malpractice: Rule 1.1 (Competence); Rule 1.4 (Communication); and Rule 1.7 (Conflict of Interest: Current Clients). In addition, Rule 1.2, governing the scope of the representation, has an important role to play. We touch on each Rule below.

Rule 1.1 Competence

Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Even if appellate counsel is not required to report a violation of this Rule by trial counsel to a grievance committee under Rule 8.3, the question remains whether a disciplinary body will conclude appellate counsel must report the malpractice to the client. In the context of an appeal, the competence of trial counsel will be front and center in terms of the trial record, especially in making evidentiary objections and otherwise preserving errors. Appellate counsel is in a natural position to review the adequacy of the record made by trial counsel and to determine if meritorious arguments were not pressed at all, or were made and abandoned, and, perhaps, even to ask trial counsel, "Why?"

Of course, the appellate lawyer's training and experience to evaluate an appeal is substantially different from the expertise needed to properly evaluate a legal malpractice claim. The realities of legal practice make it difficult to second-guess trial counsel, who often function under serious financial constraints and other client directives that may account for the missing argument. If the case involves a specialized area of the law, the difficulty of assessing trial counsel's performance may be compounded. And not every error or omission by trial counsel is significant or material to the outcome and not every appealable issue will or should necessarily be raised in an appeal. As noted by the Supreme Court in *Jones v. Barnes*[11], effective advocacy includes "winnowing out weaker arguments on appeal" to avoid "the risk of burying good arguments" and to avoid not fully setting out good arguments where there are often page and time limitations. In short, whether trial counsel met the requisite level of competence at trial, and whether any failing by trial counsel materially affected the outcome of the trial and might impact the appeal, are all highly-nuanced questions to be answered by a malpractice attorney, not appellate counsel.

Even so, some acts of trial counsel are so obviously unintended, and so far below the standard of competent representation, that appellate counsel may safely conclude malpractice occurred. Such gross malpractice likely will have a negative impact on the appeal, as in the case of trial counsel's failure to present critical evidence or preserve a critical argument. If that is the case, what if anything must the appellate lawyer tell the client, especially when there is

little hope of having those issues considered for the first time on appeal? If a truly material omission took place at trial, isn't the client entitled to know that happened, and to understand the prospects, however slim, for raising the issue for the first time on appeal? But is that type of disclosure the same thing as telling the client malpractice occurred? What if the client asks: "Did trial counsel commit malpractice?"

Rule 1.4 Communication

As noted above, some authorities find within the ethical requirements to keep the client reasonably informed a duty to report malpractice by prior counsel. As set out in Rule 1.4:

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The communication requirement includes providing sufficient information to the client to enable the client to make informed decisions. For trial counsel, basic strategy decisions, such as whether to pursue a particular argument, must be discussed with the client. Rule 1.4 does not require that all matters must be addressed with the client; rather, attorneys must "reasonably consult with the client," "keep the client reasonably informed" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions."

For appellate counsel staring at a record that evidences malpractice by trial counsel, the most relevant section is Rule 1.4(a)(2), which requires that the client be consulted about the means by which the client's objectives are to be met. If the client's objective is viewed simply as a successful appeal (whether as appellant or respondent), nothing in Rule 1.4 or its accompanying Comment clearly compels the unsolicited disclosure of a missed argument by prior counsel where it is too late to assert that issue on appeal. But if appellate counsel is evaluating which issues to address on appeal, and whether to assert a non-preserved argument knowing the low probability of succeeding on that issue, Rule 1.4 may compel disclosure of trial counsel's omission, at least to the extent of reporting the fact of that omission, and discussing strategy for the appeal in light of that omission. But even where appellate counsel tries to state "just the facts" about the omission, the client may well press appellate counsel for an opinion as to whether the omission was material and would support a claim for malpractice. Rule 1.4(a)(4) requires the disclosure of information related to trial counsel's error if specifically requested by the client and the information sought is within the scope of the representation. Similarly, Rule 1.4(b) requires disclosure sufficient "to permit the client to make informed decisions regarding the representation."

Rule 1.7 Conflict of Interest: Current Clients

The conflict of interest rule bears on the question of appellate counsel's duty to disclose as well. Rule 1.7(a)(2) provides that a "lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer." Rule 1.7(b) lays out the requirements for obtaining client consent to permit the attorney to represent the client notwithstanding the conflict.

Appellate counsel may have a vested interest in protecting a regular referral source—trial counsel—and thus may have a conflict of interest with the client when it comes to reporting trial counsel's malpractice. Because an attorney typically is not allowed to avoid a conflict by making a private resolution to act impartially, Rule 1.7 seems to require the appellate lawyer to decline the representation or to disclose the potential for conflict and obtain the client's waiver of the conflict and consent to the representation. But even then, informed consent requires full disclosure of the nature and extent of appellate counsel's reliance on trial counsel for business, and informed consent may not be sufficient to avoid discipline should the disciplinary body conclude the personal-financial conflict of interest of appellate counsel is nonconsentable or find that the appellate attorney behaved improperly in obtaining the client's consent.

Managing this conflict becomes more than difficult—it becomes impossible—when trial counsel and appellate counsel belong to the same firm. In that case, appellate counsel has a significant and direct financial interest in not disclosing malpractice. But in that circumstance, the law squarely requires the firm to disclose the malpractice to the client.[12]

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

Given the messy, overlapping ethical problems that foreseeably arise when appellate counsel discover malpractice by trial counsel, many experienced appellate lawyers choose to expressly limit the scope of the representation, altogether disclaiming any obligation to assess trial counsel's performance or communicate any findings or opinions in that regard. An example of one such provision, contained in the standard engagement letter used by an appellate boutique, is reproduced here:

> Because our experience is limited to handling appellate matters, [firm] will not, and expressly disclaims any duty to, provide the Client with advice regarding legal-malpractice claims against other lawyers currently representing Client . . . The Client understands that, unless otherwise agreed in writing, [firm] is not undertaking any duty to advise the Client about these matters, and the client should retain separate counsel to address these matters.

Rule 1.2(c) sets forth the applicable ethical requirements for limiting the scope of representation: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[13] There appears to be widespread recognition that appellate counsel may ethically carve out from their engagement any duty to assess or report malpractice committed by trial counsel. We are not aware of any tribunal that has found a restriction on the scope of appellate representation to be in violation of public policy or otherwise unethical or unenforceable. In talking with appellate lawyers around the country, one experienced appellate lawyer questioned whether appellate counsel would behave ethically if they obtained a written limitation to avoid disclosing malpractice committed by a valued referral source. One malpractice loss consultant has voiced similar concerns:

> A lawyer's fiduciary obligation of loyalty along with the RPC's on competence, diligence, and client communication impose a duty to inform a client on appeal of all aspects of the case. An appellate lawyer may limit the scope of representation to preclude representing the client in a collateral malpractice case against the trial lawyer, but should advise of malpractice even if outside the scope of representation. Failure to do so in today's legal environment could provoke a bar complaint or malpractice claim against the appellate lawyer.[14]

In reaching this conclusion, the loss consultant criticizes ABA Informal Op. 1465 (1981) as a "lawyer-friendly" opinion typical of many ethics opinion that "relieve lawyers of unpleasant duties."[15] But in concluding that appellate counsel should not be allowed to limit the scope of representation to avoid disclosing trial counsel's malpractice, the loss consultant seems to be imposing his own personal sense of what the rule of disclosure should be, rather than accepting what the formal and informal ethics opinions permit. And he also reaches this contrary view apparently without considering the benefits to clients when appellate counsel limit the scope of representation up front, including promoting cooperation and teamwork with trial counsel.[16]

Assuming Rule 1.2(c) permits appellate counsel to carve out a duty to report malpractice by trial counsel, trouble still lurks in its application. For example, does Rule 1.7, governing conflicts of interest, require appellate counsel to specifically disclose that financial relationship when seeking to limit the scope of representation? Are there perhaps other ways in which a limitation on the scope of representation could be rendered unreasonable and therefore subject appellate counsel to discipline? We think one way appellate counsel can ensure trouble is by seeking to limit the scope of representation *after* discovering evidence of trial counsel's malpractice. Presumably appellate counsel would be motivated to seek that limitation to avoid having to make the uncomfortable disclosure. But if appellate counsel does not disclose to the client the reason for seeking that limitation, appellate counsel almost assuredly will violate Rule 8.4, which prohibits counsel from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."

II. Application of Rules in Hypothetical Conflict: *The Missing Statute of Repose*

Andrew Applegate is an appellate guru who works in a small boutique that does nothing but appeals. His long-time friend, Tony Torteless, is an established trial lawyer at a mid-sized litigation firm. Tony's practice is heavily geared to commercial litigation but he occasionally handles products liability defense cases for a few of his larger clients. In one such products case, Tony defended Clarke Compactor Co., a long-time manufacturer of commercial trash compactors. The plaintiff alleges the Clarke trash compactor lacked adequate guarding. The at-issue compactor was manufactured 22 years ago.

Tony Torteless moved for summary judgment based on the statute of limitations, which was denied. Tony did not move for summary judgment based on a statute of repose. Tony did not even consider the possibility of asserting a statute of repose defense because the forum state's laws provide no such defense. In truth, Tony had never heard of a statute of repose, although his associate, who prepared Clarke's answer from a cut-and-paste of product liability answers filed in other cases, had. The answer Tony filed on behalf of Clarke contained a statute of limitations affirmative defense that oddly included language taken from a statute of repose defense. Tony was oblivious to this pleading curiosity. The case proceeded to trial with a jury verdict in plaintiff's favor for $2.5 million.

Tony calls up Andrew to handle the appeal. As they have done many times in the past, the engagement is reduced to a simple retainer letter between Andrews' firm and Tony's client (Clarke), with Tony having all client contact and managing the appeal. The agreement says nothing about the scope of the representation other than Andrew's firm will handle the "appeal" from the judgment in the specific case.

In reviewing the file, Andrew notes an interesting set of facts concerning the compactor's history. The machine had been manufactured out of state 22 years ago, and was used in that other state for 20 years before being sold as used equipment and moved to the forum state. Andrew was particularly intrigued to learn that the plaintiff had lived out of state for most of that period, and in fact had been employed by the compactor's prior owner, and had actually "come with" the

compactor to maintain it for its new owner, moving to the forum state. Andrew wrote his Law Review note on choice-of-law issues in tort cases. He thinks the case presents a strong choice-of-law argument, one that favors application of the non-forum state's law. Andrew is admitted to practice in both the forum state and the non-forum state and knows a 20-year statute of repose for industrial machinery, such as the compactor, exists in the non-forum state.

The first thing Andrew does is to call Tony to find out if the choice of law/statute of repose argument was advanced, and if so, how it fared in the trial court. Tony is not happy to get the call. "Cr*p!" is his one word response.

Andrew believes the analysis is pretty straight forward under a governmental interests balancing test to determine the applicable law, but he is not optimistic that the appellate court will allow this issue to be raised for the first time on appeal. The forum state's appellate courts generally bar appellants from raising new arguments on appeal, although the intermediate appellate courts sometimes bend over backwards to permit an exception under an ill-undefined "interests of justice" standard. Andrew thinks that if Clarke Compactor can show plaintiff had no ability in the trial court to change any of the facts underlying the choice of law analysis (for example, by amplifying his contacts with the forum state and/or diminishing his connections to the non-forum state) the appellate court might address the statute of repose defense on the merits. But the betting line is at least 4:1 against.

Tony asks Andrew not to say anything to the client contact at Clarke Compactor, at least in the short run. Tony instructs Andrew to undertake specific research to determine if the choice-of-law argument is as strong as Andrew thinks, and also to better gauge the receptivity of the appellate court should Clarke Compactor raise that defense on appeal. Tony reminds Andrew that the relationship with Clarke Contractor could be scuttled over a malpractice claim, and that any significant damage to that relationship would end the relationship between Tony's firm and Andrew's firm.

Analysis of Andrew's duty to inform Clarke

Andrew likely will be required to tell the client if his research confirms that the statute of repose was available and would have applied to knock out the claim had Tony raised it below. Such a disclosure appears to be called for by Rule 1.4(a)(2) and Rule 1.4(b). In addition, Tony's ignorance about the statute of repose suggests he was not competent to handle the product liability case. His incompetent representation might be viewed as a violation of Rule 1.1, but the better view is that this Rule is only violated by recurring neglect, not by such "one-off" acts of malpractice.[17] Accordingly, Andrew does not appear to have a duty under Rule 8.3(a) to report Tony's malpractice to a disciplinary body.

Andrew is not in a position to seek a mid-course limitation on the scope of representation from Clarke, to be relieved of the duty to communicate about trial counsel's performance in the course of handling the appeal, at least not without first disclosing the results of his research and making a full disclosure about the importance of Tony's firm as a source of business for his firm. In the absence of those disclosures, any request by Andrew to narrow the representation to avoid saying anything critical about Tony's performance may well be viewed as dishonest and deceitful and a misrepresentation under Rule 8.4. Indeed, Andrew might even have to reveal to Clarke that Tony threatened to pull business from Andrew's firm if Andrew reported Tony's botched defense to Clarke. We note that Tony's remonstration to Andrew to not report the malpractice could, in itself, constitute an ethical violation,[18] which would independently trigger a reporting requirement to the disciplinary body under Rule 8.3.

Of course, if Andrew actually opens his kimono to make some or all of these disclosures, Clarke will be angry with Tony and Tony will be furious with Andrew. The only thing keeping Tony from being sued for malpractice is the thin hope of getting the appellate court to reach the statute of repose defense.

These messy prospects provide Andrew with a strong incentive to find an alternative to making a full disclosure. Andrew could try to withdraw from the representation under Rule 1.16 ("Declining or Terminating Representation"), relying on subsection (b)(1), which permits optional withdrawal

These messy prospects provide a strong incentive to find an alternative to making a full disclosure.

where it "can be accomplished without material adverse effect on the interests of the client." But if Andrew thinks he can drop out of the case without telling Clarke why, he may only be trading a bad outcome for something worse. Andrew may find himself before a disciplinary body, or even a jury, with Clarke claiming it could have pursued its remedies against Tony Torteless if Andrew had just come clean. Andrew could get tagged with both a disciplinary violation and a malpractice verdict if Clarke can show that Andrew had a common-law duty to disclose Tony's malpractice to Clarke, and that Clarke was prejudiced by Andrew's non-disclosure. Andrew also may be vulnerable to a charge that he engaged in dishonest or deceitful conduct within the meaning of Rule 8.4 if he obtains Clarke's consent to the optional withdrawal without disclosing his conflict of interest and evidence of Tony's malpractice. Andrew certainly cannot say anything affirmatively misleading to Clarke about his reasons for seeking the voluntary termination.

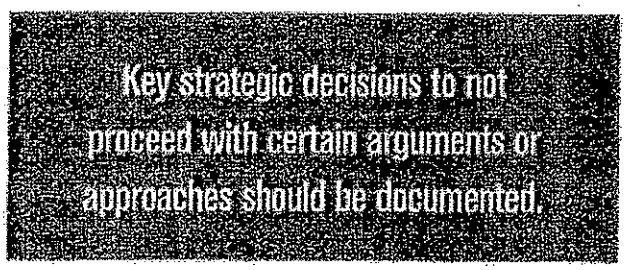
If Andrew remains in the case, he may decide to take a shot at the statute of repose argument knowing full well that he is unlikely to win and that he may, in the process, create a

very bad record for Tony, especially if the appellate court acknowledges the merit of the defense but declares its unavailability to Clarke because of trial counsel's failure to raise the defense below. The appellate court opinion would be Exhibit A in Clarke's malpractice action against Tony.

III. Best Practices: How to Avoid Such Messy Conflicts (and what to do if they arise)

Appellate counsel unknowingly may step into a serious ethical thicket should they discover evidence of trial counsel's malpractice in the record without having addressed that possibility at the outset in the engagement letter—i.e., if appellate counsel did not specifically limit the scope of the representation to exclude any duty to report malpractice by trial counsel. Absent such an agreement at the outset, once malpractice has been discovered, there is no easy way to satisfactorily resolve the conflicts of interest presented by the appellate attorney's divided loyalty to the trial counsel, wanting to protect a valued referral source, and the client. At that point, the hard questions find only hard answers.

Given the luxury of time and foresight, appellate counsel can avail themselves of a sound prophylactic measure: a limitation on the scope of representation as permitted by Rule 1.2. Arguably, in order to ethically limit the scope, appellate counsel should disclose to the client the existence of a



significant referring relationship between trial counsel and appellate counsel, one that might tempt appellate counsel to downplay or minimize an omission by trial counsel. Such a relationship may not be apparent to the client. Even without such an established referral relationship, appellate counsel's interest in securing future cases from that trial firm, or other trial firms, creates a potential conflict of interest. Appellate counsel would do well to tell the client that the appellate firm has a strong interest in maintaining cordial relations with the trial bar and cannot afford to develop a reputation for second-guessing trial counsel, and seek to limit the scope of the representation accordingly.

While clients are free to reject any limitation on the scope of representation—and appellate lawyers are free to decline the engagement—appellate counsel have several legitimate arguments (beside attorney self-interest) for requesting such a limitation. First, the client's interests are promoted during the appeal if trial counsel cooperates with appellate counsel. Cooperation includes helping appellate counsel with assembling the record, sharing research files, and pinpointing potential grounds for appeal with record citations early in the process. Such cooperation may disappear (along with some of the files) if trial counsel thinks appellate counsel is on a malpractice witch-hunt. Second, if appellate counsel were to undertake such a double duty, prosecuting the appeal while simultaneously investigating a malpractice case, appellate counsel may be conflicted, knowing that a victory on the appeal eliminates the malpractice action or at least reduces the recoverable damages. Trial counsel, on the other hand, can latch on to that potential conflict by questioning appellate counsel's strategy on the appeal—suggesting to the client that appellate counsel's financial interest in prosecuting the malpractice action (perhaps on a contingent-fee basis) is skewing the appellate strategy. Likewise, defense counsel in the malpractice action can argue that the appellate strategy—where appellate counsel had one eye on the malpractice action—did not minimize damages and thus did not mitigate damages. Third, the dual role is almost impossible to perform since it requires separate expertise in appeals and legal malpractice. Few lawyers are qualified to undertake both evaluations; the client is better served by having a legal malpractice lawyer evaluate a potential malpractice action. In short, the client's interests are furthered when appellate counsel tells both the client and trial counsel, up front, that the appellate lawyer's job is not to criticize how trial counsel conducted the trial but to prove what trial counsel did was right.

Even where the scope of the representation is limited to keep appellate counsel from having to report trial counsel's malpractice, appellate counsel may well find themselves signaling potential malpractice by pursuing issues on appeal that highlight omissions by trial counsel or otherwise naturally suggest trial counsel dropped the ball. But communicating with the client about the appeal strategy, and what arguments may be rejected on appeal because not raised or preserved below, is different from answering client questions about malpractice, and is a far cry from assuming the role of advocate prosecuting a malpractice action. Normal client communications about appeal strategy will not alienate most trial counsel.

For trial counsel, the best approach is to protect the record. All key strategic decisions, such as whether to pursue a particular theory of the case or not seek to exclude certain evidence, should be discussed with the client, keeping in mind that client's level of sophistication. Key strategic decisions to not proceed with certain arguments or approaches should be documented. Ideally, trial counsel would consult with appellate counsel before and during trial—not when it is too late to change course. Working closely with trial counsel during trial can avoid messy conflicts later. Ultimately, however, appellate counsel's duty to the client trumps any duty to a colleague. Where this higher obligation to the client is unworkable or undesirable given business realties, appellate counsel should either decline the engagement or establish a written limitation on the scope of the representation—with appropriate disclosure of the lawyer's personal/financial interests—to avoid facing divided loyalties and conflicts of interest down the road. If these steps are not taken, and

appellate counsel discovers malpractice by trial counsel, the appellate counsel may be required to tell the client about the malpractice, and may also be required to withdraw if the conflict of interest is nonconsentable, in which case appellate counsel should assist in making a seamless transition to new appellate counsel.

For law firms that routinely represent clients both at trial and on appeal, there is no way to limit the scope of representation to avoid disclosing the trial attorney's malpractice. These firms need to stand ready to make things right for the client in the event appellate counsel discovers malpractice on the part of the trial attorney. This includes making full disclosure of the malpractice, offering to continue representing the client with proper written consent, and seeking to undo the harm through litigation and, failing that, providing appropriate compensation through payment of malpractice damages.

Conclusion

Appellate counsel and trial counsel should function as a team in representing the client's interests on appeal, with cooperation the hallmark of that joint undertaking. The client's interests are furthered when trial counsel supports the work of appellate counsel, without the baggage of worrying that appellate counsel is examining the record for potential malpractice claims. Appellate counsel is in a position to maximize the cooperation and promote the interests of all three participants in the appeal—client, appellate counsel, and trial counsel—by limiting the scope of the representation, specifically by carving out any duty to evaluate or report evidence of malpractice by trial counsel. If the client wants to have the record reviewed for potential malpractice claims, separate counsel should be retained for that discrete purpose. This arrangement allows all of the client's interests to be protected without undermining the appeal. In the absence of such an up-front limitation on the scope of representation, however, appellate counsel may well be located between a rock and hard place, whip-sawed between personal-financial interests and ethical duties, with no easy resolution.

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Endnotes

1. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1465 (1981).

2. *Id.*

3. The ABA Committee also referred to DR 1-103(A), which requires lawyers to report disciplinary violations committed by other attorneys. The Committee's purpose in doing so is not clear. Perhaps the Committee meant to suggest that whenever trial counsel's malpractice rises to the level of reportable violation under DR 1-103(A), appellate counsel must inform the client as well as the disciplinary body.

4. *Id.*

5. *See generally* C. WOLFRAM, MODERN LEGAL ETHICS § 5.1, Ch 5, at 190 & n. 34 (1986) ("To date, the enforcement of competence standards has been generally limited to relatively exotic, blatant or repeated cases of lawyer bungling"); L. Griffin, *What Do Clients Want? A Client's Theory of Professionalism*, 52 EMORY L.J. 1087, 1092 (2003) ("most cases imposing discipline under Canon 6 involved conduct that was either outlandish or prolonged, frequently coupled with other violations."); *E.g.*, Covington v. Smith, 582 S.E.2d 756 (W. Va. 2003) (referring lawyer to disciplinary counsel for repeatedly neglecting prosecution of case in violation of Rule 1.1 competence standard and failing to advise clients about impending dismissal in violation of Rule 1.4 regarding client communications); *Matter of* Discipline of Laprath, 670 N.W.2d 41, 64 (S.D. 2003) (disbarring attorney for "blatant and repeated bungling demonstrating 'a continuing pattern of gross incompetence'") (quoting *Matter of* Disciplinary Action Against Nassif, 547 N.W.2d 541, 543 (N.D. 1996)).

6. *See, e.g.*, Iowa Supreme Court Bd. of Prof. Eth. and Conduct v. Parker, 558 N.W.2d 183, 185 (Iowa 1997) (lawyer's failure to file certain income tax returns was attributable to a belated appreciation of what was required rather than neglect of a client's known interests: "As such it may give rise to a claim of malpractice but was not such neglect of a client's interests that warrants the taking of disciplinary action."); Committee on Legal Eth. of W. Va. Bar v. Mullins, 226 S.E.2d 427 (W. Va. 1976) ("Charges of isolated errors of judgment or malpractice in the ordinary sense of negligence would normally not justify the intervention of the ethics committee."). *But see* C. Pierce and M. Hall, *Reporting Our Colleagues for Discipline to Save Our Clients from Deportation: An 'Ineffective' System*, http://www.cpvisa.com/article_5Lozada.html (last visited June 11, 2009) (edited version appears in April/March 2008 AILA's Immigration Law Today) (criticizing law governing deportation proceedings where defense counsel, who claim ineffective assistance of prior counsel, must report prior counsel to disciplinary body); J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L.J. 677, 686-87 (1989) ("better view" requires appellate counsel to tell clients about trial counsel's malpractice, with author assuming appellate counsel are required to report malpractice to the appropriate court or disciplinary body).

7. Ill. Adv. Op. 88-11, 1989 WL 550797 (Ill. St. Bar Ass'n 1989).

8. *Id.*

9. *Id.*

10. *Id. See* S. Wistotsky, *Appellate Malpractice*, 4 J. APP. PRAC. & PROCESS 577, 594 (2002) (supporting duty to disclose to client, relying principally on the Rules of Professional Conduct involving attorney competence and client communication) and N. Moore, *Implication of Circle Chevrolet*, 28 RUTGERS L.J. 57, 64, 70-75 (1996) (same).

11. Jones v. Barnes, 463 U.S. 745, 750-55 (1986).

12. *See* N.Y. Eth. Op. 275 (N.Y. St. Bar Ass'n Comm. Prof Eth. (1972); P.A. Eth. Informal Op. 97-56, 1997 WL 816656 (P.A. Bar Ass'n Comm. Leg. Eth. Prof. Resp. 1997).

13. *See* Medina, 43 SW L.J. at 689 & n. 49; N. Moore, *Implication of Circle Chevrolet*, 28 RUTGERS L.J. at 71 & n. 75; Charles T. Frazier, Jr., *Ethics on Appeal: The Ethics of Reviewing, Assessing, and Citing the Record*, APPELLATE ADVOCACY, Nov. 2004 at 12.

14. D. L. O'Roark, Jr., *Appealing Ethics: Professional Responsibility and Risk Management for Appellate Lawyers*, BENCH & BAR

(Continued on page 27)

Endnotes

1. Terry Carter, *The Ratings Games*, A.B.A. J., Jan. 2007; David D. Dodge, *Some Months Ago*, ARIZONA ATTORNEY, Jan. 2008, at 8.

2. Super Lawyers, http://www.superlawyers.com.

3. Best Lawyers in America, http://www.bestlawyers.com.

4. Super Lawyers, Explanation of the Selection Process, http://www,superlawyers.com/about/ advertising.html.

5. Super Lawyers, Information on How to Advertise Being Chosen as a Super Lawyer, http://www. superlawyers.com/aboutadvertising.html.

6. *E.g.*, *In re* Opinion 39 of the Committee on Advertising, A-30/31/32-08 (Dec. 17, 2008); Phila. Bar Ass'n Prof'l Guidance Comm., Ethics Op. 2004-10 (Dec. 2004); Ariz. Comm. on the Rules of Prof'l Conduct, Ethics Op. 05-03 (July 2005).

7. *See generally* William W. Yavinsky, *Current Development 2006-2007, A Comparative Look at Comparative Advertising: Why Efforts to Prohibit Evaluative Rankings Spark Debate from Buffalo to Buenos Aires*, 20 GEO. J. LEGAL ETHICS 969, 973-74 (2007).

8. *In re* Opinion 39 of the Committee on Advertising, A-30/31/32-08 (Dec. 17, 2008).

9. Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct (Feb. 1, 2008), *available at* http://www.abanet.org/cpr/professionalism/state-advertising.pdf.

10. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

11. Bates v. State of Virginia, 433 U.S. 350 (1977).

12. Central Hudson Gas and Electric Co. v. Pubhs Serv. Commission, 447 U.S. 557 (1980).

13. 447 U.S. 557 (1980).

14. *In re* R.M.J., 455 U.S. 557, 566 (1980).

15. 455 U.S. 191, 206-07 (1982).

16. 455 U.S. 191, 203-04 (1982).

17. 455 U.S. 191, 203 (1982).

18. 496 U.S. 91 (1990).

19. 496 U.S. 91, 99-106 (1990).

20. 496 U.S. 91, 109-10 (1990).

21. 496 U.S. 91, 110-11 (1990).

22. Iowa Comm. on Ethics & Practice Guidelines, Advisory Op. 07-04 (Aug. 8, 2007).

23. Mich. State Bar Comm. on Prof'l & Judicial Ethics, Informal Op, RI-341 (June 8, 2007).

24. *Id.*; Ariz. Comm. on the Rules of Prof'l Conduct Ethics Op. 05-03 (July 2005).

25. Conn. Statewide Grievance Comm., Advisory Op. 07-0076-A (Oct. 5, 2007).

26. N.J. Comm. on Att'y Adver., Advisory Op. 39 (July 17, 2006).

27. Special Master Report from the Supreme Court of New Jersey on Advisory Opinion No. 39 (July 2008).

28. *In re* Opinion 39 of the Committee on Advertising, A-30/31/32-08 (Dec. 17, 2008).

29. Mary Pat Gallagher, N.J. *Court Weights Proposed Easing of Super Lawyer Ban*, 197 N.J.L.J. 1009 (2009).

30. N.J. R. PROF'L COND. R. 7.1(a)(3)

31. *Id.*

32. N.J.R. PROF'L COND. R. 7.1(a)(3) Official Comment.

Mixing Business with Ethics: The Duty to Report Malpractice by Trial Counsel

(Continued from page 9)

MAGAZINE, January 2002 (Kentucky Bar Association) (available on line at http://www.lmick.com/pdfs/bbjan02.pdf), at 7. Dulaney L. O'Roark, Jr. is described as a "loss consultant" and frequent contributor to the Kentucky Bar Association's Bench and Bar Magazine. Mr. O'Roark serves as a loss consultant to Lawyers Mutual Insurance Company of Kentucky, billed as "the only professional liability insurance company created by lawyers by Kentucky lawyers for Kentucky lawyers."

15. *Id.*

16. *See* discussion *infra* Part III..

17. *See* discussion *supra* Rule 1.1 Competence.

18. *See* Committee on Prof. Eth. & Conduct of the Iowa St. Bar v. McMullough, 468 N.W.2d 458 (Iowa 1991) (attempting to negate another lawyer's reporting obligation is an ethical violation).

WHAT WOULD YOU DO? A PRACTICAL EXERCISE IN APPELLATE ETHICS

by

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What Would You Do? A Practical Exercise in Appellate Ethics

Scenario One

You are seeking review by the New York Court of Appeals of a decision from the Appellate Division, First Department, on the basis that the case raises issues of general importance and the First Department's decision conflicts with decisions from both the Third and Fourth Departments. You are understandably very frustrated by the First Department's opinion in the case and thus write the following passage in your petition for review: "The court's opinion is a dog's breakfast of result-oriented reasoning, cavalier disregard of apparently inconvenient facts in the record, and almost comical misapprehension of the straightforward holdings in *Richmond* and *Bryans.*" (*Richmond* and *Bryans* are the cases from the Third and Fourth Departments that favor your client.)

In response, you receive from the New York Court of Appeals an Order to Show Cause, directing you to explain why this passage does not violate New York Rule of Professional Conduct 8.2(a), which states in pertinent part that "[a] lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge[.]" The "judge" in this case is the panel of four First Department judges from whose opinion your client is appealing.

Question One: Have you violated Rule 8.2(a)?

Question Two: What if you instead wrote either (a) "The court's opinion is an unfortunate combination of incomplete reasoning, a failure to appreciate key facts in the record, and a misunderstanding of the holdings in *Richmond* and *Bryans,*" or (b) "Given the lying, incompetent ass-holes who authored this opinion, any review will be an improvement even if you [meaning the New York Court of Appeals] only graduated from the eighth grade."

Scenario Two

You are preparing a merits brief to be filed with the New York Court of Appeals on behalf of the respondent. The issue in the case is a relatively obscure aspect of insurance law and there are no New York cases on the subject. No New York federal court has considered the issue. In your research, you locate a Kansas case, *Matula v. Stalwart Casualty Co.,* 836 P.2d 1214 (Kan. 2005), that is exactly on-point and strongly supports your position. Indeed, the facts of *Matula* are nearly identical to those in your case and the Kansas Supreme Court's reasoning is compelling. Upon further research, you also find *Callenbach v. Intrepid Indemnity Co.,* 113 Cal. Rptr. 3d 692 (Cal. Ct. App. 2010). Again, the facts in *Callenbach* are almost identical to those in your case, but the *Callenbach* court decided the issue in a manner directly adverse to your position. *Callenbach* directly contradicts *Matula.* There is no way to harmonize or reconcile *Matula* and *Callenbach.* This is a simple split of authority.

In your brief, you explain that there is no New York law on-point. Fortunately, you say, there is well-reasoned Kansas authority to which the court may look for guidance. You cite and discuss the decision in *Matula,* and urge the New York Court of Appeals to adopt the *Matula* court's reasoning. You make no mention of *Callenbach.* In her reply brief, your adversary cites and discusses *Callenbach,* and accuses you of violating four New York Rules of Professional Conduct in failing to disclose that case in light of your reliance on *Matula:* (1) Rule 3.3(a)(1), which states that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal"; (2) Rule 3.3(a)(2), which provides that a lawyer shall not knowingly "fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"; (3) Rule 8.4(c), which prohibits conduct involving "dishonesty, fraud, deceit or misrepresentation"; and (4) Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice."

Question One*:* Have you violated any of these rules as your adversary claims?

Question Two: Would the answer be any different if the *Matula* court had cited *Callenbach* and explained why it considered *Callenbach* to be unpersuasive?

Question Three: What if the timing were the other way around, so that *Matula* was decided first, and the *Callenbach* court discussed the case and rejected the *Matula* court's reasoning?

Question Four: What if *Callenbach* was a Second Circuit case applying New York law rather than a California case?

Scenario Three

You have been engaged by Great Plains Industries to handle the appeal of a product liability case that your friend, John Webster, tried in the Western District of New York. Webster has a track record of success and is widely-regarded as a fine trial lawyer. His firm also handles appeals, but, after a $9.9 million loss, Great Plains wants a fresh perspective. In reviewing the record and talking with Webster—who could not have been more gracious—you identify a key evidentiary issue on which you think the district court erred and you also believe the court submitted a fatally flawed jury instruction. Upon further study, however, you fear that Webster preserved neither error for appeal. He did not make an offer of proof on the evidentiary issue and, while he objected to the erroneous instruction, he did not propose an alternative instruction. Your only hope now, you believe, is review for clear error. As between the Second Circuit reversing for clear error and you winning the lottery, you think the latter is more likely. You think the world of Webster and don't want to hurt him, but what do you tell Great Plains' general counsel?

Question One: Do you have a duty to tell Great Plains that, in your opinion, Webster is potentially guilty of professional negligence?

Question Two: Would the analysis or outcome be any different if Webster were your partner rather than practicing in a different law firm?

Question Three: Would the analysis or outcome be different were Webster a regular source of appellate referrals for you rather than a friend?

Question Four: Do you have a duty to report Webster to the New York Bar Association on the theory that he is incompetent?

Scenario Four

You are arguing an appeal in the Fourth Department. You were fortunate enough to have tried and won the case below in Monroe Country State Supreme Court. You are splitting your argument time with your co-defendant, who is represented on appeal by experienced appellate lawyer. After you argue, counsel for your co-defendant launches into her argument. To your horror, she materially misstates the facts in the record. You glance over your shoulder at your associate who is sitting in the first row of seats behind the bar and see that she is equally alarmed. Your co-counsel is telling the court "facts" that are not in the record and mischaracterizing others that are. You have the benefit of actually having tried the case below, while your co-counsel was brought in on appeal. Is she simply confused about the facts? Even if she was not trial counsel, she surely read the transcript and record in preparing her client's brief and in readying herself for oral argument. But you would never know it from what she is telling the court. To your further amazement, the plaintiff's lawyer does not touch these material misstatements in his rebuttal argument; his rebuttal is focused on a point on which the presiding justice of the five-judge panel had questioned him intensely during his earlier argument.

You return to your office and huddle with your associate and with the chair of your appellate practice group to decide what, if anything, you should do about your co-counsel's misstatements to the court. In analyzing your options, you consult New York Rule of Professional Conduct 3.3(a)(1), which provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"; Rule 4.1, which states that in the course of representing a client "a lawyer shall not knowingly make a false statement of fact or law to a third person"; and Rule 8.4(c), which prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Question One: Do you have a duty to correct your co-counsel's material misstatements to the court?

Question Two: If you conclude that the misstatements must be corrected, is it reasonable for you to implore your co-counsel to correct the misstatements

herself and allow her some limited amount of time in which to do so before you will be required to act?

Question Three: Assuming your co-counsel's argument aids your client, must you obtain your client's consent to the correction, regardless of whether you make it yourself or urge your co-counsel to correct on her own?

Question Four: If you are able to correct your co-counsel's misstatements, must you report her to disciplinary authorities under Rule 8.3(a), which states that a lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation"?

Scenario Five

You have just finished an emotionally draining oral argument. You expected a hot bench, but you did not expect the Chief Judge, who you have known since law school and whom you consider to be a true friend, to be so hostile to your position. Still, you regret some of your comments during oral argument. At one point you told the Chief Judge that he was "imagining issues." In another exchange, you criticized him for offering a hypothetical "pulled from the ether." Finally, when he rebuked you for answering his question with a question of your own, you responded: "This is oral argument, your honor, and I am entitled to test your assumptions just as you test mine."

Feeling a shade remorseful afterwards, you decide to extend an olive branch to the Chief Judge by sending him a bottle of what you believe to be his favorite red wine. You enclose this note in the box: *In old Westerns, barroom fights often ended in a round of drinks. In the future, I'll do my best to keep my opinions to myself. Holster your gun, Chief.* The Chief Judge swiftly returns your bottle of wine—unopened.

Question One: Did your oral argument remarks violate New York Rule of Professional Conduct 8.2(a), which provides that a lawyer "shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge"?

Question Two: What about sending that bottle of wine?

Scenario Six

You are appealing your client's criminal conviction in the Western District of New York, and, despite your normally forgiving view of others whose conduct disappoints you, you are convinced that the Assistant United States Attorneys who prosecuted your client acted unethically throughout the length of the case. In your Second Circuit brief you accuse the AUSAs of "distorting the truth," "manipulating and misrepresenting facts," "suppressing the truth," "repeatedly failing to fulfill their duties as impartial ministers of justice," "suborning perjury by government witnesses," and "preening when they should have been proving." The Government files a motion for sanctions on the basis that your accusations of wrongdoing by "conscientious officers of the court" constitutes "conduct that is prejudicial to the administration of justice" in violation of New York Rule of Professional Conduct 8.4(d).

Question: Is your conduct sanctionable?

Scenario Seven

You are local counsel for a lawyer in a case before the New York Court of Appeals. The lead lawyer is very unhappy with the underlying decision of the Appellate Division, Third Department. You are convinced that one passage criticizing the lower appellate court is over-the-top, and you accordingly persuade him to tone down his rhetoric. The end result is this: "Indeed, the opinion is so factually and legally infirm that the Appellant can only wonder whether the Third Department was determined to find for the Respondent and then reasoned backwards to reach that unsupportable conclusion."

In response, you receive from the New York Court of Appeals an Order to Show Cause, directing you to explain why this passage does not violate New York Rule of Professional Conduct 8.2(a), which states in pertinent part that "[a] lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge." The judge in this case is the panel of five judges from the Third Department whose opinion your client is appealing.

Question One: Have you violated Rule 8.2(a)?

Question Two: Assume that before you filed the brief, you had the offending language reviewed by a retired appellate court judge who is now in private practice and she told you that in her opinion the language did not violate Rule 8.2(a). Can you assert advice of counsel as a defense to any alleged Rule 8.2(a) violation?

Question Three: Is your status as local counsel (rather than lead counsel) a basis for defending your alleged misconduct?

Scenario Eight

Your jurisdiction requires that all briefs use 14-point font and also sets a page limit on briefs. You prepare a brief that exceeds the page limit. After some ruthless editing, you are still slightly over the page limit. You thus highlight the entire brief and then type "Ctrl [", which reduces the font size to 13-point. The different in type size is nearly indistinguishable and you are now slightly under your page limit.

Alternatively, you practice in a jurisdiction that imposes word counts on all briefs. After feverish editing, you are still slightly above the allotted word count. Unfortunately, it is too late to move for an enlargement of the word limit. Accordingly, you go through all of your case citations and collapse the courts and dates in parentheses rather than leaving spaces between them. For example: (11thCir.2001) and (Ga.Ct.App.2010) instead of (11th Cir. 2001) and (Ga. Ct. App. 2010). Your computer's Word Count function thus counts the citations as one word rather than three. And your brief is now the exact length in terms of word count permitted by your jurisdiction.

Question: Have you violated any rules of professional conduct?

Scenario Nine

You represent an appellant in the New York Court of Appeals in a case that started in the Western District of New York, but took a detour on appeal when the Second Circuit found it raised a novel issue of state law and certified the question for the New York Court of Appeals. Unfortunately, there is a case from the Appellate Division, Fourth Department, that initially appears to foreclose the principal argument you hope to make: *Richmond v. Hutchinson Industries, Inc.,* 829 N.Y.S.2d 362 (N.Y. App. Div. 4th Dep't 2007). You are mindful of your duties under New York Rule of Professional Conduct 3.3(a)(2), which states that a lawyer shall not knowingly "fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Upon a careful reading of *Richmond,* however, you reasonably conclude that the troubling language is dicta. You cautiously check with one of your most respected partners who agrees that the language is dicta.

Question One: Must you cite *Richmond* in your brief given that the language that seems to make it directly adverse is mere dicta?

Question Two: Can you omit any mention of *Richmond* on the basis that it is a decision from the Fourth Department and your case is in the New York Court of Appeals?

Scenario Ten

You successfully moved to dismissed a lawsuit, filed in the Western District of New York, based on the absence of diversity of citizenship, the only premise alleged in the complaint for federal subject matter jurisdiction. Your motion was supported by a client affidavit that attested to the corporate defendant's state of incorporation (Delaware) and principal place of business (New York). During oral argument in the Second Circuit, a member of the panel questions the client affidavit saying a simple review of the corporation's website identified Connecticut as its "primary" office where most of its employees work, and directly challenges the adequacy of the client affidavit: "Doesn't that raise a factual issue that the district court should address?"

Question One: Did the Second Circuit judge engage in any improper conduct by visiting the client's website?

Question Two: Would your answer be different if the circuit judge had not gone to your client's website but undertaken a general search to see where the company has listed its corporate headquarters?

Question Three: What if the jurisdictional issue was not the location of the principal place of business but rather the corporate defendant's state of incorporation. Can a judge conduct an on-line search of New York State Department of State records (and similar official government sites in other states) to determine a corporate defendant's state of incorporation?

Question Four: Would the analysis be different if the judge said nothing during oral argument but disclosed his internet investigation in the court's opinion?

APPELLATE ETHICS

by

ALAN J. PIERCE, ESQ.

Hancock Estabrook, LLP
Syracuse

Relevant Cases

1. ***People v. Lassalle***, 20 NY3d 1024 (2013)

Defendant, facing multiple felony charges, pleaded guilty to one count of robbery in the first degree. He was adjudicated a second felony offender and was sentenced to 15 years' imprisonment, to be served concurrently with another sentence. At his 2006 plea, he was not advised that his sentence included five years of postrelease supervision. Defendant now maintains that he received ineffective assistance of appellate counsel when his attorney did not brief that issue in his 2008 direct appeal (*see People v. Louree*, 8 N.Y.3d 541 [2007]; *People v. Catu*, 4 N.Y.3d 242 [2005]).

On the present record, defendant has not shown that there was no strategic or other legitimate basis for appellate counsel's failure to raise what would have been a dispositive argument against the plea bargain (*see People v. Rivera*, 14 N.Y.3d 753, 754 [2010]; *People v. Turner*, 5 N.Y.3d 476, 480 [2005]). For all that appears in this record, counsel did not make the argument because defendant did not want to withdraw his plea if the other ground for his appeal proved unsuccessful. We note however that where a defendant in a coram nobis points to a clear error on the face of the County Court record, there are avenues to more fully explore potentially meritorious claims (*see e.g. People v. D'Alessandro*, 13 N.Y.3d 216, 220–221 [2009]; *People v. Bachert*, 69 N.Y.2d 593, 600 [1987]). If a new coram nobis petition is filed, the Appellate Division should consider whether those avenues should be followed.

2. ***People v. Brun***, 15 NY3d 875 (2010).

The order of the Appellate Division should be reversed, defendant's application for a writ of error coram nobis granted, the Appellate Division's January 2009 order of modification (58 A.D.3d 862, 872 N.Y.S.2d 188 [2d Dept.2009]) vacated, and the matter remitted to the Appellate Division for a de novo determination of the People's appeal.

Pursuant to the Rules of the Appellate Division, Second Department, on a People's appeal to that court, if a defendant was represented by assigned counsel at the trial court,

> such assignment shall remain in effect and counsel shall continue to represent the defendant as the respondent on the appeal until entry of the order determining the appeal and until counsel shall have performed any additional applicable duties imposed upon him by these rules, or until counsel shall have been otherwise relieved of his assignment (22 NYCRR 671.3[f]).

Here, although he informed defendant of the People's appeal, defendant's assigned trial counsel failed to represent defendant on that appeal. The Appellate Division, apparently unaware that defendant had been represented by assigned trial counsel, determined the People's appeal, noting no appearances by defendant (58 A.D.3d 862, 872 N.Y.S.2d 188 [2009]).

Defendant thereafter applied for a writ of error coram nobis, alleging that he had been deprived of counsel on the People's appeal in violation of section 671.3(f). The Appellate Division denied the writ, stating that defendant "failed to establish that he was denied the effective assistance of appellate counsel" (64 A.D.3d 611, 612, 881 N.Y.S.2d 331 [2d Dept.2009]).

[1] [2] Because defendant's trial counsel failed to comply with the terms of 22 NYCRR 671.3(f), defendant was deprived of appellate counsel to which he was entitled. Accordingly, the Appellate Division should have granted defendant's application for a writ of error coram nobis. Although a writ of error coram nobis generally raises the claim that defendant received ineffective assistance of appellate counsel, the writ is also a proper vehicle for addressing the complete deprivation of appellate counsel that occurred here.

3. ***Dombrowski v. Bulson***, 19 NY3d 347 (2012).

The Court unanimously reversed the Fourth Department, which had held that a plaintiff who has been wrongfully convicted as a result of his criminal defense attorney's malpractice could recover compensatory damages for loss of liberty, emotional damages and other losses directly attributable to his imprisonment. The court instead agreed with the First Department's conclusion in *Wilson v. City of New York*, 294 AD2d 290 (1st Dep't 2002), that the prohibition against awarding nonpecuniary damages in malpractice actions arising out of civil representation also applies to criminal representation.

Plaintiff spent over five years in prison following his conviction for attempted rape, sexual abuse and endangering the welfare of a child. His petition to the County Court to vacate the conviction due to ineffective assistance of counsel was denied without a hearing. He then sought a writ of habeas corpus in federal court. A Magistrate Judge in the Western District of New York held an evidentiary hearing, concluded that defendant's errors made it difficult for the jury to reliably assess the victim's credibility, and conditionally granted the petition unless the People commenced further proceedings within 60 days, which they did not do.

Dombrowski's malpractice complaint was dismissed by Supreme Court on the grounds that nonpecuniary damages are not recoverable in a malpractice action and

that plaintiff had not suffered any pecuniary damages because he had continued to receive Social Security disability benefits while imprisoned. In reversing, the Fourth Department observed that the risk of imprisonment due to attorney malpractice is the "primary risk" in most criminal cases, and analogized the cause of action for criminal malpractice to those for false arrest and malicious prosecution, for which damages for loss of liberty are recoverable in New York. The Appellate Division also noted that the trend in other states was to allow for nonpecuniary damages for criminal malpractice, even in states that, like New York, do not allow such damages for civil malpractice.

Chief Judge Lippman's opinion for the Court observed that criminal attorney malpractice requires a showing that the plaintiff has "at least a colorable claim of actual innocence – that the conviction would not have resulted absent the attorney's negligent representation," but is not an intentional tort, unlike false arrest and malicious prosecution (which require a showing of actual malice). The crux of the decision, however, concerned policy issues. Specifically, the court expressed concern that a contrary ruling could have "devastating consequences for the criminal justice system" and discourage the "already strapped defense bar" from representing indigents in criminal cases. As a result, it held that nonpecuniary damages are not available in New York to a former client who was the victim of his criminal defense lawyer's malpractice.

APPELLATE ETHICS

By: Patricia Morgan, 2009

Retired Chief Clerk,

Appellate Division, Fourth Department

ETHICS IN APPELLATE PRACTICE

I. "CIVILITY" should govern all dealings with the Appellate Division

A. Suggestions for dealing with Clerk's Office staff at the Appellate Division, Fourth Department

1. Telephone contact with Court staff:

a. Read the Court rules and other information on the Court's website (www.courts.state.ny.us/ad4) before calling and asking questions.

b. Avoid asking for strategic or legal advice. The Clerk's Office staff may answer procedural questions and answer factual questions. The staff is prohibited, however, from giving legal or strategic advice.

c. Please contact staff attorneys directly to inquire about an appeal/motion rather than having a paralegal, secretary or other support staff member call on your behalf.

2. Filing with the Appellate Division:

a. Shipping and receiving is open from 9 a.m. until 5 p.m. Monday through Friday, to accept filings, unless it is a Court holiday. Security is required to screen all filings with the Appellate Division, including x-raying all filings.

b. The shipping and receiving staff are not permitted to remain in the building after 5 p.m., so please arrive at the courthouse with sufficient time for the staff to process and screen the filing before 5 p.m.

c. Please remember that the Appellate Division staff has no control over the Post Office, UPS, or Fed Ex. If you ship your filing to the Appellate Division using one of those services and the filing does not arrive when promised, that is not our fault.

d. A filing is not complete until all of the documents arrive at the courthouse. Staff may not accept and hold a partial filing until the rest of the filing arrives.

3. **On the day of your oral argument:**

a. Please check in with the receptionist by 10 a.m.

b. The calendar is called at 10 a.m., and, although, for the most part, the cases are called in the order listed on the calendar, additional submissions, or traffic and weather issues may result in cases being called earlier than anticipated. Staff members have been specifically instructed to avoid estimating the time that a particular case will be heard, so please do not ask.

c. If you have reserved time for oral argument and decide not to attend, please call the Clerk's office in advance and advise us that you will be submitting. Also, please call the Clerk's office if at all possible when you are delayed. If staff knows that you're delayed, we can inform the Court and sometimes, in the discretion of the Presiding Justice or Justice Presiding, they will postpone calling your case. If we don't know, and the case is called, the case is deemed submitted and oral argument is not permitted.

d. On the other hand, if you have indicated on your brief that you are submitting, and you decide that you want to argue, you must obtain the permission of the Court. Because your opponent may have decided to submit based upon your submission, the Court will not allow you to argue unless you have requested permission with sufficient notice to your opponent.

e. Please check whether you are scheduled to argue in Courtroom I or Courtroom II. Although our receptionist will make every effort to remind you which courtroom you are in when you sign in, it is your responsibility to know where you are supposed to be.

B. Dealing with other parties

1. Stipulating to or settling the record:

a. Appellants - begin the process with sufficient time to allow respondents to review the proposed record and make suggestions for additions or deletions. It is appellant's obligation to put together the record and respondent is not obligated to stipulate to the record. If you cannot obtain a stipulation to the record, you must make a motion before the trial court to settle the record.

b. Respondents - do not unreasonably withhold your stipulation to the record. Although there is no obligation to stipulate to the record, it speeds up the process and saves money if the parties can agree. Do not insist on including items in the record that are not appropriate, such as items that were not before the trial court, or memoranda of law that are not considered properly to be part of the record. Our experience indicates that trial courts do not look favorably upon avoidable or unnecessary motions to settle the record on appeal. Also, you should be aware that Rule 3.2 of the Rules of Professional Conduct is directed to lawyers using tactics that have no substantial purpose other than to delay, prolong or cause needless expense.

c. All parties to the appeal must actually sign the stipulation. You may not authorize a printer to sign a stipulation on your behalf.

II. Ethical considerations in brief writing

A. Statement of facts:

1. "Pay Fidelity to the Record." The facts should be recited with precision and without exaggeration. Note that Rule 3.3 of the Rules of Professional Conduct provides that lawyers shall not knowingly make false statements of fact.

2. Acknowledge facts that are not in your favor - if you don't, your opponent may point them out or the Court will discover them, and your credibility will suffer.

3. Include page citations to the record for every fact.

4. Do not rely on any facts that cannot be found in the record. The Court is bound by the record and cannot consider matters outside the record.

5. Don't sacrifice clarity for the sake of sounding like a lawyer. Refer to parties in a manner least likely to confuse the reader (ex: use "plaintiff" rather than "plaintiff-respondent-cross-appellant").

6. Avoid editorializing in the factual statement (ex: don't say things like "defendant's papers inadequately opposed the motion" or "the trial court incomprehensibly denied the motion").

B. Legal argument:

1. Use citations to cases that support your contentions. Make sure the case says what you say it says. Do not paraphrase or exaggerate the holdings of the cases upon which you rely.

2. Acknowledge case law that is not in your favor and attempt to distinguish it. Note that Rule 3.3 of the Rules of Professional Conduct requires disclosure of controlling legal authority that is directly adverse to your position.

3. If the case law that is not in your favor cannot be distinguished in any way, you must acknowledge that fact. At that point, your argument should focus on why the precedent should be changed for policy reasons.

4. When quoting from cases or statutes, do not omit language from the quote that is not in your favor. The Court will "fill in the blanks" and your credibility will suffer.

III. Ethical considerations for oral argument

A. Obligations from the date of submission of your brief until the date of oral argument:

1. The Court does not render advisory opinions. Consequently, if the case is withdrawn or discontinued prior to oral argument, the rules of the Court require counsel to inform the Court promptly and withdraw the appeal (22 NYCRR 1000.18 [b]).

2. If the passage of time renders your appeal or any issue therein moot, or if there is a settlement of an appeal or proceeding or any issue therein, the rules of the Court require that counsel promptly notify the Court (22 NYCRR 1000.18 [c]).

3. If case law issues from a Court whose precedent is legally binding upon the Appellate Division, Fourth Department, the Court should be notified and your opponent copied on the communication.

B. At oral argument:

1. Know your record but be aware that the Court is familiar with the facts of your case. Lengthy factual recitations are generally not permitted.

2. When you are unable to answer a factual question asked by a member of the panel, acknowledge that you do not know the answer and offer to make a post-argument submission. Do not run the risk of misstating facts or incorrectly characterizing facts in the record.

3. Do not attempt to present arguments to the Court that were not included in your brief.

4. Answer the questions put to you by the Court when the questions are asked. Do not attempt to avoid the question until later in your presentation.

5. Do not denigrate your opponent or the trial judge. Remember that Appellate Division Justices are all Supreme Court Justices, and the trial judges are their colleagues.

6. Do not: interrupt a Justice before he or she has finished their question; raise your voice; show disrespect for a member of the Court; interrupt your adversary, or make faces or exaggerated "stage gestures" in reaction to anything your adversary says; or, leave your cell phone or pager on in the courtroom.

   NOTE that Rule 3.3 of the Rules of Professional Conduct provides that in appearing before a tribunal, a lawyer shall not engage in undignified or discourteous conduct or engage in any conduct intended to disrupt the tribunal.

Patricia L. Morgan, Esq., Clerk of the Court
Appellate Division, Fourth Department
September, 2009

CLARITY AND CANDOR ARE VITAL IN APPELLATE ADVOCACY

by

Hon. David O. Boehm

Retired Associate Justice
Supreme Court, Appellate Division, Fourth Department

Senior Counsel
Harris, Beach LLP
Rochester

View From the Bench

Clarity and Candor Are Vital in Appellate Advocacy

BY DAVID O. BOEHM

Many lawyers deplore what, in their view, is the superficial treatment of their appeals in our state intermediate appellate courts. They cite what they regard as the short and cursory, sometimes inscrutable, written memoranda that fall regrettably short of explaining the thinking behind the court's decision. Full opinions that provide a comprehensive discussion of the issues and the rationale behind the determination, they say, are too few and far between.

This criticism is voiced not only by the lawyers for the parties but also by lawyers who were not engaged in the case. They complain that they are unable to discern from reading the decision what the cases are about, and that the decision is no help as a guide for what may be similar cases.

Although not every case merits extended discussion, the criticisms are not without some substance, and, if it is any consolation, there are appellate judges who share them. They are acutely aware of the quality of the work produced by their courts and are not at all happy when the product does not meet their own high expectations. Such deficiencies are not, however, entirely of their own making.

Let me refer to my own experience. In the Fourth Department, as in others, the judges are required to complete their assigned cases on or before a deadline. The average term is two weeks. The deadline is generally four weeks from argument. That four-week period is the interval between one term and the next. Some terms are separated by only three weeks, and then the deadline is reduced accordingly. Each judge is responsible for writing on 20 to 25 cases every term, not including the preparation of dissents. When there were vacancies on the bench, the workload of each judge naturally increased, and during such times there were anywhere from 36 to 43 cases to deal with in four weeks. That's a total of 28 days, including Saturdays and Sundays, or more than one case a day to review and write on.

Working nights and weekends made it possible to get the work done on time, but it did little to enhance the quality. Unfortunately, such a schedule only enhanced the stress and pressure on the judges and their law secretaries. I know of one case where a law secretary, after only three months, told his judge that he was under such strain that he could not sleep and asked to be relieved. He had been that judge's law secretary for eight years on the trial bench and handled that responsibility without a problem. But there the time that was needed to properly research and prepare a decision was not circumscribed by an inflexible deadline.

The unremitting task before appellate judges is to finish the work and meet the deadline. Then it immediately becomes necessary to leap into the briefs and reports for next term's cases; not only into those cases assigned to you but into every case calendered for the five or six days in which you sit, running anywhere from 100 to 130 cases. That burden does not leave much time for deep reflection or thoughtful elegance of language. And, hard as we try, given the pressure and the haste, judges occasionally overlook something that should not have been overlooked. But then, even Homer nodded, and he had a lifetime to finish his work.

This lamentation is not intended to invite sympathy, it is intended to make a point that is perhaps best illustrated by the *New Yorker* cartoon of a judge telling the lawyer arguing before him: "Learned counsel should use

smaller words. Learned counsel should remember that the judge was not an A student."

Applying Thoreau's Suggestion

Appellate counsel should follow Thoreau's suggestion and "simplify." Simplify the brief and the thoughts and the language in it. Make them easily comprehensible so that the judges, hard-pressed as they are, may read while they run. The purpose of this discussion is to give some tips on how to do this.

I would first point out that the members of the court usually receive the briefs well before oral argument and have read them before going on the bench. It is not surprising, therefore, that they come on the bench with some predisposition regarding the merits of a case. Oral argument is important, but rarely, except in close cases, is it sufficient to overcome the impact of a well-written and persuasive brief. As Chief Justice William H. Relinquist said in his remarks to the Appellate Practice Institute of the American Bar Association on May 29, 1998: "[A]n ability to write clearly has become the most important requisite for an American appellate lawyer."[1]

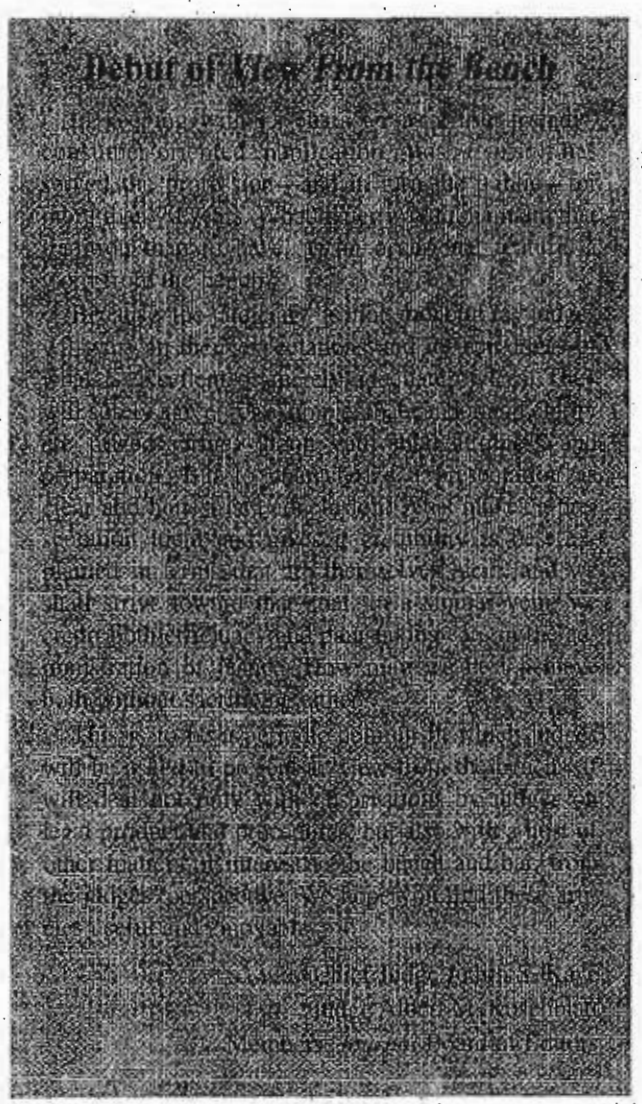
In those same remarks, Chief Justice Rehnquist said:

> If oral advocacy is an art, brief writing can be called a combination of art and science. When a case first lands on an appellate lawyer's desk, it more often than not is a confusing and complicated jumble of facts, lower court rulings, procedural questions, and rules of law. The brief writer must immerse himself in this chaos of detail and bring order to it by organizing—and I cannot stress that term enough—by organizing, organizing and organizing, so that the brief is a coherent presentation of the arguments in favor of the writer's client.[2]

I would add the word "clear" to Justice Rehnquist's "coherent." Here are some suggestions to achieve the goals of coherence and clarity.

Not all judges are blessed with the vision of their youth. Make the brief easy to read. Don't use small type. Double space the lines. Use only one side of the page. Clean, uncluttered space makes the brief more legible and easier to read; thus, easier to comprehend.

The old language rules are fundamental and always apply. Correct spelling, correct punctuation and, above all, correct grammar are essential. Those are the structures on which sentences are erected. An error jars the process of absorbing the meaning of a sentence. Serious errors may utterly collapse the argument you are carefully striving to construct, because the focus of the reader shifts to the error. It's like being with someone who has a smudge on his face; the smudge distracts you from what he is saying. Such errors also reflect on the intelligence of the author and, consequently, on the validity and strength of the argument. Those unnecessary mental interruptions stand in the way of the effort to achieve comprehensibility.



One way to make your brief interesting is to keep its contents on the level of a conversation, rather than that of a lecture. And because good and correct English, like good manners, is necessary for all conversation, I refer you to some excellent guides that will help you to avoid loutish gaucheries of language. They include *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*, both by Bryan A. Garner; *The Careful Writer* by Theodore Menline Bernstein; a good thesaurus such as *Roget's 21st Century Thesaurus* edited by Barbara Ann Kipfer; and, always, the small but enduring text, *The Elements of Style* by William Strunk and E.B. White.

Not only will these guides help you to avoid errors of language, they will also provide considerable help in fa-

cilitating unhampered understanding of what you are endeavoring to put forward. As the guides suggest, write short, declarative sentences. Use active rather than passive sentences; they have more punch. Avoid lengthy, complex sentences, abstruse language and long Latinate words. And, as Mark Twain admonished, "As to the adjective, when in doubt strike it out." Do not try to impress the court with your erudition. Your effort should be directed solely toward persuading the court of the merit of your case by clear, comprehensible argument, framed in clear, comprehensible language.

Setting Forth the Facts

In setting forth the facts, avoid like the plague a witness-by-witness recital of testimony. Such a recital frequently includes testimony that is neither relevant nor material to the issues on appeal. It imposes upon the judge the burden of separating the wheat from the chaff, a burden that is not welcomed. Nor does it advance the goal of facilitating comprehension. Refer to or quote the testimony of a specific witness only when it is useful. Otherwise, condense the testimony into a narrative that provides a concise and clear foundation for the legal argument.

Make the factual recital coherent, comprehensive and, that word again, comprehensible. The more complicated or technical the evidence is, the more you must endeavor to make its recital clear. And try to make the narrative interesting. You don't have to be a John Grisham or Scott Turow, but strive to engage the judge's interest from the moment he or she opens the brief. You ordinarily begin the brief with the facts. If you have not set them forth clearly, the judge, after wrestling unsuccessfully to understand them, will turn to the respondent's brief with the hope that the facts are clearer there. Do not allow this to happen. Further, it is a good idea to incorporate at the beginning a summary of the issues and your argument. It provides a quick familiarity for the judge.

A not very pleasant, but necessary, requirement is that you include all evidence that is material, even though it may be unfavorable. It is not easy, but do it. An admirable quality in an appellate lawyer is candor, and the court appreciates being advised of all the proof that is material to the case without discovering it for the first time in the respondent's brief. When that happens, the reaction takes the form of a question: Why didn't the appellant disclose this evidence? The further advantage of such disclosure is that it gives you the opportunity to deal with the unfavorable evidence first. But don't be rattled if you are unable to distinguish or minimize it. You have demonstrated the consolable grace of disclosing something that should have been disclosed, and would have been disclosed in any event. In the process, you have added to your credibility. As noted by a federal court in Missouri, "Facts do not cease to exist because they are ignored."[3]

Such candor governs references to case law, as well. In *Cicio v. City of New York*,[4] the court reminded counsel that the function of an appellate brief is to assist the court, not to mislead it. "Counsel have an affirmative obligation," the court pointed out, "to advise the Court of adverse authorities, though they are free to urge their reconsideration."[5] Lord Birkenhead termed this the "obligation of confidence."[6]

Candor is not only an obligation. It also has honesty's special engaging quality of encouraging open and unencumbered communication. It encourages the listener to give sympathetic attention to what you are saying. That attentive ear is precisely what you want from the court. Thus, candor is foremost among the essential elements of appellate success.

Earlier, I likened a brief to a conversation with the court. Being courteous and pleasant is a requisite for all conversations. Don't be belligerent, sarcastic or bombastic. People recoil from a contentious, disagreeable person, and judges are people. It is better, perhaps even advantageous, to be offended against; you will earn the sympathy and respect of the court by keeping your composure and not responding in kind to *ad hominem* attacks or abusive comments.

A sense of humor is not inappropriate. It can lighten up the weight of a turgid paragraph or two, and is useful as an amiable response to a nasty thrust by your adversary. Wit in its place can shine, but don't be a wise guy.

Organizing the Brief

The Fourth Department has a 70-page limit for an appellant's brief. Don't even come close, unless the case absolutely demands it, and very few do.

Don't write a law review article. The court is familiar with the legal principles that appear in its cases term after term. For example, the court has more than a passing acquaintance with a motion for summary judgment, what is required to support it and what will defeat it. The

judges are not strangers to *Alvarez v. Prospect Hospital*,[7] and *Zuckerman v. City of New York*.[8]

It is not necessary to inform the court at length of the leading cases in frequently appealed areas of the law, such as, under the Labor Law, *Rocovich v. Consolidated Edison Co.*[9] and *Ross v. Curtis-Palmer Hydro-Electric Co.*[10] There are many similar "leading" cases in other areas of the law. If your own research does not enlighten you regarding how long and how often such cases have been referred to, the court certainly will. It's okay to cite to them in passing, but don't exhaust time and space by reintroducing the court to them. Going on at length indicates your own unfamiliarity with well-traveled passages of the law.

It is a good idea, however, to briefly recite the facts of cases that strongly support your position or that give a damaging blow to your adversary's. It is an effective way of showing the kinship of those cases with your case. A good rule of thumb is to cite only those authorities that have direct precedential value. If you have direct authority, don't bother with cases that are only marginally supportive. Avoid citing a horde of cases; they may demonstrate ardent and exhaustive research but hardly good judgment. In other words, don't string cite.

And while on the subject, be careful about the cases that you do cite. It hardly needs mention that you do not cite a case that is inapplicable, or that you quote language taken out of context. Doing so is inexcusable and obviously reflects adversely on both your credibility and competence. It also wreaks havoc with your argument.

There may be a legitimate place for footnotes, but there is no place for them in the Fourth Department; Rule 1000.4(f)(6) of the Uniform Rules of Court forbids them. Before the prohibition was added to the rules, some lawyers were getting around the page limit by including voluminous footnotes in microscopic type. It was a vain effort, however, because the judges had neither the time nor the inclination (nor the eyesight) to wade through those swamps of verbiage. Such footnotes remind one of the rule of legal housekeeping—when you have too much junk to fit in the house, the cellar becomes the place to put it.

There is a further reason to avoid footnotes. Their usage has been called, with good reason, the Ping-Pong Ocular Syndrome. A footnote jerks the smooth flow of argument to an abrupt stop by the command that you immediately transfer your attention from the text to the footnote. The interruption is hardly worth it. What ordinarily appears in a footnote is a reference that, without injury, could have been incorporated into the main text or, in most cases, omitted entirely. Occasionally, but only occasionally, a literary footnote or a humorous footnote may have its place. Those occasions fall within what I call the Zuckerman Exception, named after a polymath friend, who is an accomplished appellate advocate and skilled footnote practitioner. But otherwise, I suggest that you avoid using them. They are bothersome and do not abet argument, they disrupt it.[11]

I hope these few admonitions and suggestions will be of some value in achieving the prize that every advocate seeks: to have, as in ancient Rome, the victor's garland hung upon your door.

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1. Reprinted in the *Journal of Appellate Practice and Process*, Vol. 1, No. 1, 3 (Winter 1999).
2. *Id.* at 4.
3. *Siegfried v. Kansas City Star Co.*, 193 F. Supp. 427, 432 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir. 1962).
4. 98 A.D.2d 38, 40, 469 N.Y.S.2d 467 (2d Dep't 1983).
5. *Id.* at 40.
6. *Glebe Sugar Refining Ltd. v. Trustees of Port and Harbours of Greenoch*, 2 App. Cas. 66 (House of Lords 1921); *see La Cucina Mary Ann, Inc. v. State Liquor Auth.*, 150 A.D.2d 450, 451, 541 N.Y.S.2d 220 (2d Dep't 1989); The Lawyer's Code of Professional Responsibility, Disciplinary Rule 7-106(B)(1).
7. 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).
8. 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).
9. 78 N.Y.2d 509, 577 N.Y.S.2d 219 (1991).
10. 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).
11. For a good discussion of the subject, see Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647 (1985).

ETHICAL CONSIDERATIONS FOR

APPELLATE COUNSEL

by

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ETHICAL CONSIDERATIONS FOR APPELLATE COUNSEL

By: David O. Boehm[1]

A. Generally - Loyalty to Client and Obligations to Court

"A lawyer is bound by the applicable ethics rules to observe the sometimes conflicting duties of loyalty to the client, candor to the tribunal, and fairness in dealing with third parties. Resolution of these conflicting duties is not always simple or easy, and the lawyer's obligation in this regard presupposes autonomy on his part, in order to be able to make his decisions in accord with ethical responsibilities and not in lock step with the directives of a client/principal. The frequency of sanctions under Fed. R. Civ. P. 11 and comparable state provisions signals a shift toward regarding lawyers as independent decision makers, not the mere hired agents of their clients. See generally, *Patterson, Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L. J. 909(1980)." (ABA/BNA "Lawyers' Manual On Professional Conduct", 31: 302-303).

However, although the lawyer is in charge of procedural decisions, the client has the final say over matters that would directly affect the ultimate resolution of the case, such as whether to settle, and whether to proceed with or discontinue an appeal (*Hawkeye - Security Insurance Co. v. Indemnity Insurance Co.*, 260 F2d 361 [CA10 1958]; *State v Pence*, 53 Hawaii 157, 488 P2d 1177 [1971]; *In re Grubbs*, 403 P2d 260 [Okla Crim App 1965]). Lawyers have been disciplined for making decisions beyond their authority (see, e.g. *Silver v. Califomia State Bar*, 13 Cal 3d 134, 58 P2d 1157 [1974] [lawyer dismissed

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client's appeal without client's consent]; *In re Paauwe*, 294 Or 171, 654 P2d 1117 [1982] [lawyer appealed without consent of client]).

Nevertheless, counsel does not have the constitutional duty to raise on appeal every non-frivolous issue requested by defendant (*Jones v. Barnes*, 463 U.S. 745 [1983]).

B. Obligations Prescribed by Court Rules

Probably the two most important rules dealing with lawyer's conduct in state courts are *DR 7-102 (A)(2) (22 NYCRR §1200.33) and DR 7-106 (B)(1) (22 NYCRR §1200.37).* The *Uniform Rules for Trial Courts (*see especially *130-1.1 [a], [c] [i] [ii])* are not directly applicable to appellate practice, but may be useful in their application to counsel's conduct generally.

DR 7-102 provides: "In the representation of a client, a lawyer shall not: [k]nowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

DR 7-106 provides: "In presenting a matter to a tribunal, a lawyer shall disclose: [c]ontrolling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel."

Similar provisions are contained in the Federal Rules of Civil Procedure, such as *Rule 11, Rule 38, and 28 USC §1912.* Their application will be discussed under frivolous appeals.

C. Candor: Duty to Notify Court of Settlement/Termination and to Disclose Unfavorable Law.

In preparing your brief a not very pleasant but necessary requirement is that you include all evidence that is material, even though it may be unfavorable. It is not an easy thing to do, but do it. An admirable quality in an appellate lawyer is candor and the Court appreciates being advised of all of the relevant proof that is material to the case without discovering it for the first time in the respondent's brief. When that happens the reaction takes the form of a question: Why didn't the appellant disclose this evidence?

The further advantage of such disclosure is that it gives you the opportunity to deal with the unfavorable evidence first. But don't be unhappy if you are unable to distinguish or minimize the impact of such unfavorable evidence. You have at least demonstrated the admirable quality of disclosing something that should have been disclosed and would have been disclosed in any event. In the process you have added to your own credibility. As noted by a Federal Court in Missouri, "Facts do not cease to exist because they are ignored" (*Siegfried v. Kansas City Star Company*, 193 F Supp 427, 432, affd 298 F 2d 1).

Such candor governs references to case law as well. Appellant counsel have an affirmative obligation to advise the Court of adverse authorities. The Second Department has been especially critical of failure to do so. In the case of *Matter of LaCucina Mary Ann, Inc. v. State Liquor Authority* (150 AD 2d 450, 451) the Court stated: "[W]e remind counsel for the appellants of his affirmative obligation to advise the Court of authorities adverse to his position." Because counsel had also represented the State Liquor Authority in a prior appeal involving the same issue and nevertheless failed to inform the Court of the previously decided case, the Court chastised counsel, saying "there can be no excuse for the failure to bring the holding to the court's attention [citation omitted]".

In an earlier case, the Second Department was even more direct. That case involved a motion by plaintiff to serve a late notice of claim that was only one day late. This application was granted by Supreme Court and the City of New York appealed. The Appellate Division affirmed, citing numerous prior cases holding that the amendments to sections 50-e of the General Municipal Law were to be liberally construed and that all the requisites for late filing had been met in this case. The court scolded the city's counsel, stating:

> None of these cases are cited in the city's brief submitted to this court. This is most disturbing and clearly inexcusable because the city was a party [to prior cases permitting late notice]. Had even a modicum of thought and research been given to this case, it would have been self-evident to the city that its position was untenable and this court and the taxpayers would have been spared the cost of a frivolous appeal.
>
> The function of an appellate brief is to assist, not mislead, the court. Counsel have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration (see, *Code of Professional Responsibility, DR 7-106[B][1]; EC 7-23;* see also *Thode, The Ethical Standard for the Advocate, 39 Texas L Rev 575, 585-586; Uviller, Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 600 Hofstra L Rev 729). . . .

> We trust that this case will serve as a warning that counsel are expected to live up to the full measure of their professional obligation [some citations omitted]
>
> *Cicio v City of New York*, 98 AD 2d 38, 40.

Lord Birkenhead termed the necessity for candor as the "obligation of confidence" (*Glebe Sugar Refining Ltd. v Trustees of Port and Harbours of Greenoch*, 2 AC 66 [House of Lords, 1921]).

In *Petti v Pollifrone*, (170 AD 2d 494, 495) the court criticized the appellate counsel, even though he was successful in his appeal, because his brief "showed the same lack of thought and effort as was evidenced at the trial level." It reminded counsel, quoting *Matter of Cicio v City of New York* (supra) that the "function of an appellate brief is to assist, not mislead."

Candor is not only an obligation. It also has honesty's special engaging quality of encouraging open and unencumbered communication. It encourages the court to give sympathetic attention to your arguments. By your candor the court knows that you can be trusted. Such attention is precisely what you want from the court. Thus, candor is probably foremost among the essential elements of appellate success.

D. Matters Dehors the Record

Needless to say one should not include in the appendix or record on appeal documents, transcripts of depositions in whole or in part, material ruled inadmissible by the trial court, unless marked for identification or incorporated in an offer of proof, or any other material not part of the record below. This practice has been repeatedly condemned.

In *City of New York v Grosfeld Realty Co.* (173 AD 2d 436, 437), the court stated: "We note with disfavor the attempt on the part of the appellant's attorneys to submit on this appeal an affidavit specifically rejected by the Supreme Court and, therefore, not properly part of the record on this matter."

In *Broida v Bancroft* (103 AD 2d 88, 93), the court noted: "It is axiomatic that appellate review is limited to the record made at nisi prius and, absent matters which may be judicially noticed, new facts may not be injected at the appellate level" (see also, *Buley v Beacon Tex - Print, Ltd.*, 118 AD 2d 630).

And in *Merl v Merl* (128 AD 2d 685, 686), the court rebuked counsel for injecting matters into the brief dehors the record, mischaracterizing events and fabricating facts and issues. The court stated: "We admonish counsel that such attempts to mislead the court are in direct derogation of their professional obligations and will not be tolerated" (citing matter of *Peterson v New York State Department of Correctional Services* 100 AD 2d 73, 78, n 5.) Appellant was therefore denied costs.

Sanctions were awarded when an attorney improperly supplemented papers before the appellate court and persisted in continuing this practice, thereby "flouting . . .well-understood norms of . . . practice" (*Rosenman Colin Freund Lewis & Cohen v. Edelman*, 165 AD 2d 533, 536-537 [1st Dept 1991]).

E. Sanctions for Frivolous Appeals (Subjective and Objective Tests)

Lawyers are ethically prohibited from bringing claims, asserting defenses or pursuing appeals that are frivolous or that would serve only to harass or maliciously injure another person or entity.

Under both the Model Rules of Professional Conduct, our Rule 3.1, and the Model Code of Professional Responsibility, our Disciplinary Rule 7-102[A][2], a claim, defense, or appeal is not considered to be frivolous, even if unwarranted under existing law, if it can be supported by a good faith argument for the extension, modification or reversal of existing law. Infractions of the rules on meritorious claims can result in professional discipline, ranging from a reprimand to disbarment. Counsel may also be sanctioned under various statutes, court rules and the inherent judicial power of the courts. These include: Fed. R. App. P. 38 and 28 USC §1912, which address frivolous appeals.

The question arises whether, in determining frivolous conduct, to apply what has been designated as an objective or subjective test. It is doubtful that the decision as to what test to apply has been settled in New York.

There is a good discussion of this issue in a New York County Supreme Court case, *Principe v Assay Partners* (154 M 2d 702). Although the case did not arise out of an appeal, the criteria used by Supreme Court would be equally applicable to appeals. There, in a deposition, one attorney called another attorney "little lady", "little mouse" "young girl"and "little girl". The Court awarded sanctions for such conduct, $500.00 to the Client's Security Fund and $500.00 to the other party's attorney.

In doing so, the Court raised the issue of whether to apply an objective test or a subjective test. It noted: "Under a subjective test, the actor's intention becomes critical and a finding of 'a clean heart and an empty head' forecloses inquiry" (154 Misc 2d at 708). The Court adopted the objective test by considering the attorney's conduct against that of a reasonable attorney, pointing out that "[a]n 'objectively reasonable' test has been adopted for the application of rule 11 of the Federal Rules of Civil Procedure by the United States

Supreme Court in *Business Guides v Chromatic Enters.*, (498 US 533, 550-551 [1991]). Part 130 contains the same or similar operative words as are present in rule 11, which imply a certification that a paper is not 'interposed for any improper purpose, such as to harass'" (154 M 2d at 708).

The court then went on to define "frivolous conduct," as follows: "It is not ignored that part 130 requires a determination that the behavior at issue was 'undertaken primarily . . . to harass' and was not in good faith. Because a good-faith test implies a standard uncertain in application and slippery in nature, this court adopts the following language as a bright line standard for testing the bad-faith aspect of frivolity: '[F]rivolous . . . means that the [behavior or] legal claim can be supported by no colorable argument, is unsupported by precedent, logic, or other rational argument, and lacks any significant support in the legal community . . . . The court, upon examination of circumstantial evidence [in the record], is adequately equipped to characterize misconduct . . . as constituting bad-faith.' (Committee on Federal Courts, *Comments on Federal Rule of Civil Procedure 11 and Related Rules,* 46 Record of Assn of B of City of NY, 267, 293 [1991])." (154 M 2d at 708-709).

However, in *Matter of Levin v Axelrod* (168 AD 2d 178, 182 [3d Dept 1991]), the Third Department declined to impose sanctions on the petitioner, applying as to him a subjective standard, i.e. that there was nothing in the record "to suggest that petitioner actually was aware of the frivolous nature of his appeal and elected to pursue it anyway." The court also applied a subjective standard to petitioner's attorney, i.e. that he "knew or should have known that the appeal was frivolous" (Id.).

22 NYCRR sub part 130-1 empowers an appellate court to award costs and/or impose sanctions against the party and/or his attorney for engaging in frivolous conduct at the appellate level (see, *Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church v 198 Broadway*, 76 NY 2d 411). In that case the Court of Appeals defined frivolous conduct with respect to a motion, but the same definition would seem to be applicable to appeals, as well. "The motion is 'frivolous' within the meaning of rule 130-1.1(a) of the Uniform Rules for Trial Courts, since it is 'completely without merit in law or fact' and 'cannot be supported by a[ny] reasonable argument for an extension, modification or reversal of existing law, '(22 NYCRR 130-1.1[c][1]) . . . .

"The . . . motion is also 'frivolous' in that it was evidently 'undertaken primarily to delay or prolong the resolution of the litigation' (McKinney's 1990 New York Rules of Court [22 NY CRR] §130-1.1[c][ii]). In reaching this conclusion, we have considered, as part of 'the circumstances under which the conduct took place' (22 NYCRR 130-1.1[c]), the extended history of this litigation and the numerous post-judgment efforts respondent has made to overturn the judgment" (76 NY 2d at 414).

Sanctions of $2500 were awarded against the party, but the court left "for another day" the question as to when attorneys should be sanctioned for frivolous conduct.

There is no uniform definition of "frivolous" but Courts usually regard something as frivolous when it lacks factual or legal merit (see e.g. *Florida Bar v Thomas* 582 So. 2d 1177 [Florida 1991]). *The Restatement of the Law Governing Lawyers* describes a "frivolous" position as one "so lacking in merit that there is no substantial possibility that the tribunal would accept it" (Comment d to § 170 [Tent. Draft No. 8, 1997]). Although lawyers may contend that claims may never be considered truly "frivolous" because of the

changeable character of the law, the courts have approved sanctions against lawyers for what were regarded as frivolous claims (see generally, *Bone, Modeling Frivolous Suits* 145 U.Pa.L. Rev. 519 [1997]; Cann, *Frivolous Law Suits-The Lawyer's Duty to Say "No,"* 52 U.Col.L. Rev. 367 [1981]).

A key issue is whether the lawyer's conduct should be judged under a subjective test (did the lawyer actually believe the litigation was without merit), (see *Principe v. Assay Partners*, supra) or whether the conduct should be judged by an objective test (would a reasonable lawyer know this action had no basis in fact and law) (see, *Matter of Levin v Axelrod*, supra). The move has been toward an objective standard especially in the federal court system where many decisions have established that under the Federal Rule of Civil Procedure 11 good faith is not a criterion upon which a lawyer's conduct will be judged. Federal Rule of Civil Procedure 11 requires that pleadings cannot be "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The *Restatement of the Law Governing Lawyers* establishes an objective test by which a frivolous position is one that "a lawyer of ordinary competence" would recognize as lacking in merit (Comment d to § 170 [Tent. Draft No. 8, 1997]). Under the objective approach the Court will assess the frivolousness by examining the merits of the position in light of governing legal authority (see, e.g., *Florida Bar v. Richardson* 591 So. 2d 908, 910 [Florida 1992]).

The older subjective standard focuses on the lawyer's intent and the presence or absence of good faith. Sanctions are not imposed under this standard if the lawyer believes in good faith that the claim has merit (see, *Matter of Levin v Axelrod, supra*;

Robertson's Case, 626 A. 2d 397 [New Hampshire 1993]; *Barnes v. Texas State Bar* 888 S.W. 2d 102 [Texas App. 1994]).

Although the fact that an appeal is lost may not be viewed as frivolous, there are cases holding that an appeal may be frivolous even though the underlying action may not be (*Clark v. Maurer*, 824 F. 2d 565 [7th Cir. 1987]; *AIG Hawaii Insurance Co. Inc. v. Batman* 923 P. 2d 395 [Haw. 1996]).

A lawyer has an affirmative obligation to research the law and analyze the record to determine if an appeal would be frivolous (*Hilmon Co. v. Hyatt International* 899 F. 2d 250, 254 [3d Cir. 1990]). It has been held that an appeal is frivolous if it is totally without merit, based on an objective standard (*Hilmon Co. v. Hyatt International*, supra; *Quiroga v. Hasbro, Inc.* 943 F. 2d 346 [7th Cir. 1991]; *Arizona Tax Research Association v. Department of Revenue*, 787 P. 2d 1051 [Ariz. 1989]; *Wittekind v. Rusk*, 625 N.E. 2d 427 [Illinois App. 1993]).

An appeal may also be regarded as frivolous where the brief fails to identify any arguable error or fails to challenge the finding below (*Clark v. Maurer* 824 F. 2d 565 [7th Cir. 1987]). A lawyer's good faith in pursuing an appeal does not make it nonfrivolous where the argument is devoid of "any possible foundation in reason or history or precedent" (*In re Reese*, 91 F. 3d 37 [7th Cir. 1996]). Recently the Court of Appeals, Second Circuit, dismissed the complaint of a plaintiff attorney, appearing pro se, for lack of a federal question or jurisdiction. The District Court had adopted the report of the magistrate who held that plaintiff's complaint presented "no non-frivolous claims," but declined to impose sanctions, in part because plaintiff was "not sophisticated." Both plaintiff and defendant appealed. The Second Circuit modified by granting defendant's motion for sanctions

awarding $1,000 in attorney's fees and double costs, and otherwise affirmed. It noted that this was not plaintiff's first frivolous appeal and, despite the District Court's "clear warning," he pursued his appeal with a brief that, among other things, failed to cite any case law to support his argument (*Moore v Time, Inc.*, _____ *F 3d* _____, New York Law Journal, July 13, 1999).

See, also Hunt and Magnuson, *Ethical Issues On Appeal*, 19 William Mitchell L. Rev. 659, 664-670 (1993); Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 S.W. L.J. 677, 680-84 (1989).

Discipline under Model Rule 3.1 may not only result from pursuing a meritless appeal but also from or asserting issues on appeal that do not have a nonfrivolous basis (see *People v. Fitzgibbons*, 909 P. 2d 1098 [Colo. 1996]; *In re Becker* 620 N.E. 2d 691 [Ind. 1993]).

Rule 11. Under Federal Rule 11 a lawyer who signs and files a pleading, motion or other paper certifies that the paper is well grounded in fact or likely to have evidentiary support after discovery or further investigation; is supported by existing law or by a nonfrivolous argument for a change in the law or establishment of new law; and is not presented for an improper purpose such as harassment or delay. Every state has some rule or statute patterned on Rule 11 which is designed to serve the similar purpose of deterring frivolous litigation. Amendments to Rule 11 were made in 1933 to add a "safe harbor" mechanism requiring that a lawyer first be given the opportunity to retreat from a position that is without merit.

It should be noted that Rule 11 does not apply to appellate proceedings (see *Cooter & Gell v Hartmarx Corp.* 496 US 384 [1990]).

28 USC §1927 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

Frivolous litigation is one type of misconduct that frequently triggers sanctions under section 1927. The Second Circuit has held that a lawyer violates section 1927 only if he acts with intentional bad faith (*Oliveri v. Thompson*, 803 F. 2d 1265 [2d Cir. 1986]). But bad faith can be inferred "when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay" (*People v. Operation Rescue* 80 F. 3d 64, 72 [2d Cir. 1996]). Section 1927 differs from Rule 11 in a number of important ways. It is more sweeping in scope, embracing a wide range of misconduct at pre-trial, trial and appellate stages. Furthermore, it does not contain a "safe harbor" provision.

28 USC §1912 provides that when a Court of Appeals or the Supreme Court affirms a judgment, "the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

Federal Rule of Appellate Practice 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

Section 1912 does not restrict its application to frivolous appeals as does Rule 38. However, they have consistently been construed together to authorize awards for frivolous appeals, even without a specific finding of delay, and are cited together as justification for

assessing fees or an award of damages and costs on appeal. Under both, "[a]n appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit "(*Indianapolis Colts v Mayor & City Council of Baltimore*, 775 F. 2d 177, 184 [7th Cir. 1985]). Further, sanctions may be awarded for frivolous arguments even where the entire appeal is not frivolous (*Tomczyk v. Blue Cross & Blue Shield of Wisconsin*, 951 F. 2d 771 [7th Cir. 1991]).

Sanctions may be imposed under the Statute, Rule 11 and Rule 38 against the lawyer, the client, or both (see *Hilmon Co. v. Hyatt International* 899 F. 2d 250 [3rd Cir. 1990]).

It should be noted that a frivolous motion for sanctions is itself sanctionable (see, *General Electric v. Speicher*, 877 F. 2d 531 [7th Cir. 1989]; *Shelley v Shelley*, 180 M2d 275).

A lawyer who is sanctioned during litigation may also face disciplinary proceedings for misconduct (see *In re Marin* 250 AD 2d 997, 673 NY Supp. 2d 247 [1998]).

Criminal Cases

A criminal defendant's right to counsel does not include the right to pursue a groundless appeal. When representing a client on appeal, an attorney should seek to withdraw if there are no nonfrivolous grounds supporting the appeal (see, *People v. Crawford* 71 AD 2d 38). The U. S. Supreme Court has held that an appointed lawyer may not seek to withdraw on the ground that the appeal would be frivolous without also submitting a brief that refers to "anything in the record that might arguably support the appeal" (*Anders v. California*, 386 US 738, 743 [1967]).

LEGAL WRITING ETHICS

by

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BY GERALD LEBOVITS

Legal-Writing Ethics — Part I

Ethics permeate every part of a lawyer's professional life, including legal writing.[1] Few law schools teach ethics in the context of legal writing for more than a few moments here and there, but all should.[2] A lawyer's writing should embody the profession's ethical ideals. Courts and disciplinary or grievance committees can punish lawyers who write unethically. This article notes some of the ethical pitfalls in legal writing.

Rules Lawyers Must Know

Most lawyers know the American Bar Association's Model Rules. Law students in ABA-approved law schools learn them,[3] and New York State Bar applicants study them to pass the Multistate Professional Responsibility Examination (MPRE). But New York, together with California, Iowa, Maine, Nebraska, Ohio, and Oregon, has not adopted the Model Rules. New York lawyers must be familiar with the New York State Bar Association's Lawyer's Code of Professional Responsibility, first adopted in 1970 and last amended in 2002, which differs from the Model Rules.[4]

The State Bar's Code is divided into three parts: the Disciplinary Rules as adopted by the four departments of the New York State Supreme Court's Appellate Division, the Canons, and the Ethical Considerations. The Disciplinary Rules set the minimum level of conduct to which lawyers must comport, or face discipline. The Canons contain generally accepted ethical principles.[5] The Ethical Considerations provide aspirations to which lawyers are encouraged to strive but that are not mandatory.[6] The Disciplinary Rules, the Canons, and the Ethical Considerations, together with court rules, guide lawyers through ethical issues that affect their writing as advocates and advisors.

New York's Disciplinary Rules are promulgated as joint rules of the Appellate Division,[7] which is charged with disciplining lawyers who violate the Disciplinary Rules. A lawyer whose writing falls below the standards set in the Disciplinary Rules might face public or private reprimand, censure, or suspension or disbarment. The Disciplinary Rules are not binding on federal courts in New York State.[8] But because the federal district courts in New York have incorporated by reference the Disciplinary Rules into their local rules,[9] federal courts will discipline lawyers who violate them.

Courts, too, can sanction lawyers for misconduct.[10] To avoid being sanctioned for deficient legal writing, lawyers must know the pertinent law and facts of their case, the court's rules about the form of papers, and the Disciplinary Rules.[11] Court-ordered sanctions differ from disciplinary action. They can range from costs and fines on lawyers or their clients, or both, to publicly rebuking lawyers. Courts sanction lawyers to discourage wasting judicial resources on litigation that lacks merit and to punish lawyers who assert meritless claims. Courts also sanction to make whole the victims of harassing or malicious litigation.[12]

Lawyer's Role as Advocate

The first question lawyers must ask themselves is whether they should handle a particular case or client. New York lawyers have a gatekeeping role to prevent frivolous litigation. Lawyers must decline employment when it is "obvious" that the client seeks to bring an action or argue a position to harass or injure or when the client seeks to argue a position without legal support.[13]

When is it "obvious" that a claim lacks merit? One factor is whether the lawyer claims to specialize in a practice area and therefore should have known that an action was meritless. One New York court sanctioned for making frivolous arguments two defense lawyers who had held themselves out as specialists.[14] The court stated that sanctions were appropriate because the lawyers knew that their arguments were frivolous but still wasted the court's time and their client's and the plaintiff's time and money.[15] The Appellate Division, Third Department, eventually disbarred one of the defense attorneys for making the same frivolous arguments in eight cases.[16]

Lawyers whose potential client litigates for a legitimate purpose must

> The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

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then decide whether they can represent the client effectively. Lawyers have an ethical responsibility to be prepared and competent to represent a client.[17] A lawyer incompetent to represent a client may decline employment, associate with a lawyer competent to represent the client, refer the matter to a competent lawyer, or tell the client that the lawyer needs to spend time studying a legal issue or practice area. This rule has teeth. For not verifying another's writing and research, local counsel,[18] co-counsel,[19] and supervising attorneys[20] risk court sanction and discipline.

A lawyer who accepts employment must represent the client zealously.[21] Lawyers also owe a duty to the court to be candid about the law and the facts of a case.[22] The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

Research

Lawyers must avoid the pitfalls of under-preparation. Poor research wastes the court's time and the taxpayer's money. It also wastes the client's time and resources.[23] Lawyers must know the facts of the case and the applicable law. Knowing fact and law adverse to their clients' interests helps lawyers advise their clients and argue their cases. Lawyers must know adverse facts and law for ethical reasons, too. A lawyer must cite controlling authority directly adverse to the client's position if the lawyer's adversary has failed to cite that controlling authority.[24] Lawyers who move ex parte or seek an order or judgment on a default must further inform the court fully about contrary fact and law to insure that the court commits no injustice.[25]

Failing to find controlling cases reflects poorly on the lawyer's skill as an advocate and jeopardizes the client's claims.[26] Courts are unsympathetic to lawyers who bring claims that, in light of controlling authority, should not be brought. The case law on this point is legion.[27]

Lawyers must cite cases that continue to be good law. They may not conceal from the court that a case they cite has been reversed or overruled, even if it was on other grounds. Citing reversed cases or overruled principles is a sure way to lose the court's respect. In one example, a federal district court in Illinois chastised the lawyers for failing to make sure that the cases they cited still controlled.[28] In response to the lawyers' statement that the court's public disapproval would damage their reputation, the court stated that the reprimand's effect on their reputations "is perhaps unfortunate, but not, I think, undeserved."[29]

Argument

Ethical writing is more persuasive than deceptive writing.[30] Disclosing adverse authority, even when the lawyers' opponents haven't raised it, can diffuse its effects and increase confidence in the lawyers' other arguments. Lawyers who don't address adverse authority risk the court's attaching more significance to that authority than it might otherwise deserve. The more unhappy a lawyer is after finding adverse authority, the wiser it is to address it.[31]

It's not enough to find controlling authority. To argue competently, a lawyer must also know what the case or statute stands for. One defense lawyer who misinterpreted an important case in her brief faced possible sanctions from a New York federal district court.[32] The court scheduled a hearing to determine whether the lawyer's misstatement occurred intentionally or due to her "extremely sloppy . . . reading" of the case.[33] To make a point, and possibly to humiliate, the court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendants' brief."[34]

Lawyers must cite cases honestly.[35] They must cite what they use and use what they cite.[36] They mustn't pass off a dissent for a holding.[37] The cases must also conform to what the lawyers argue they stand for. Thus, a federal district court in New York ordered a plaintiff's lawyer to show cause why it shouldn't sanction him for, among other briefing mistakes, citing four cases that didn't support his argument.[38] The lawyer's mistake was to cite four cases not resolved on the merits.[39]

To make a point, and possibly to humiliate, one court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendant's brief."

A lawyer may argue a position unsupported by the law to advocate that the law be extended, limited, reversed, or changed. It chills advocacy to sanction for what, in hindsight, is frivolous litigation. But as one New York court explained, frivolous litigation is "precisely the type of advocacy that should be chilled."[40]

Lawyers must also argue clearly. Unclear arguments increase the possibility that courts might err. One Missouri appellate court explained that briefs that don't competently explain a lawyer's arguments force the court either to decide the case and establish precedent with inadequate briefs or to fill in through research the gaps left by deficient lawyering.[41] Rejecting the idea that it should do the lawyers' research for them, the court dismissed the appeal.[42]

To embody the profession's ethical ideals, lawyers' writing must be accurate and honest. Citing authority is common sense; authority bolsters argument. But citing can be a must: some lawyers have incurred sanctions and reprimands for arguing positions without citing legal authority at all.[43]

Civility

Lawyers should be courteous to opposing counsel and the court.[44] Appellate lawyers may attack the lower court's reasoning but not the trial judge personally.[45] Never may a lawyer make false accusations about a judge's honesty or integrity.[46] Many courts have sanctioned lawyers for insulting their adversaries or a lower court. In one case, the Appellate Division, First Department, sanctioned a lawyer for attacking the judiciary and opposing counsel.[47] The court found that the lawyer's behavior "pose[d] an immediate threat to the public interest."[48]

Ghostwriting

The American Bar Association, while condemning "extensive" ghostwriting for pro se litigants, has found that disclosing ghostwriting is not required if the lawyer only "prepare[s] or assist[s] in the preparation of a pleading for a litigant who is otherwise acting pro se."[49] But the Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics has concluded that lawyers may not prepare papers for a pro se client's use in litigation "unless the client commits . . . beforehand to disclose such assistance to both adverse counsel and the court."[50] At least two federal district judges in New York have disapproved of ghostwriting.[51]

So many judicial opinions trash lawyers for their writing that until *The Legal Writer* resumes next month with Part II of this column, it's apt for lawyers and judges to consider this:

> Reading these cases, we might experience a bit of schadenfreude — being happy at the misfortune of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we could, very easily, have made that very same mistake. And then we wonder: did the judge have to be so very clever in pointing out the lawyer's incompetence? Was the shaming necessary?[52] ■

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1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, The Ethics of Legal Writing, an unpublished two-part manuscript for CLEs the authors gave at the New York Court of Appeals in April 2002 and June 2003. Several citations in this two-part column are taken from that manuscript. For a text on ethics and legal writing, see Drake University Law School Professor Melissa H. Weresh's *Legal Writing: Ethical and Professional Considerations*, which Lexis/Nexis will publish in late 2005.

2. *See* Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 Rutgers L. Rev. 889, 895 (1999) (recommending that law schools teach professionalism in legal writing); Beth D. Cohen, *Instilling an Appreciation of Legal Ethics and Professional Responsibility in First Year Legal Writing Courses*, 4 Perspectives 5 (1995) (same); Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. Legal Educ. 501 (1990) (same); Melissa H. Weresh, *Legal Writing Symposium, Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 27 Touro L. Rev. 427 (2005) (same).

3. ABA Standards of Approval of Law Schools 302(b) (2001).

4. The New York Code differs from the ABA's Model Rules in substance and style. The Model Rules, for example, allows lawyers to reveal a client's confidential information to prevent "death or substantial bodily harm"; New York's Code doesn't. Another difference is that the New York Code includes the Canons and the Ethical Considerations but the Model Rules don't.

5. *See, e.g.*, Code of Professional Responsibility Canon 1 (Jan. 1, 2002) ("A lawyer should assist in maintaining the integrity and competence of the legal profession."), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/LawyersCodeOfProfessionalResponsibility.pdf (last visited June, 1 2005).

6. *See, e.g., id.* EC 2-2 ("[L]awyers should encourage and participate in educational and public relations programs . . . .").

7. *See* 22 NYCRR 1200.1 *et seq.*

8. *E.g., The Cadle Co. v. Demadeo*, 256 F. Supp. 2d 155, 156 (E.D.N.Y. 2003).

9. E.D.N.Y. L.R. 1.5(b)(5); N.D.N.Y. L.R. 83.4(j); S.D.N.Y. L.R. 1.5(b)(6); W.D.N.Y. L.R. 83.1(b)(6).

10. New York: 22 NYCRR 130-1.1(a). Federal: Fed. R. Civ. Pro. 11(c); Fed R. App P. 38.

11. *See* Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories*, 9 Scribes J. of Legal Writ. 77, 78-79 (providing many examples of courts sanctioning lawyers for failing to abide by court and disciplinary rules).

12. *Kernisan v. Taylor*, 171 A.D.2d 869, 870, 567 N.Y.S.2d 794, 795 (2d Dep't 1991) (mem).

13. DR 2-109(a)(1), (2) (22 NYCRR 1200.14(a)(1), (2)).

14. *See Providian Nat'l Bank v. McGowan*, 179 Misc. 2d 988, 1000, 687 N.Y.S.2d 858, 866 (Civ. Ct. Kings County 1999), *modified mem.*, 186 Misc. 2d 553, 554, 720 N.Y.S.2d 709, 709–10 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000).

15. *See id.*, 687 N.Y.S.2d at 866.

16. *In re Capoccia*, 275 A.D.2d 804, 809, 712 N.Y.S.2d 699, 703 (3d Dep't 2000) (per curiam). Advancing false claims is improper. *Kushner v. DBG Prop. Inv., Inc.*, 793 F. Supp. 1161, 1181 (S.D.N.Y. 1992); *In re Babigian*, 247 A.D.2d 817, 817–18, 669 N.Y.S.2d 686, 686–87 (1998) (per curiam).

17. DR 6-101(a)(2) (22 NYCRR 1200.30(a)(2)).

18. *Long v. Quentex Resources, Inc.*, 108 F.R.D. 416 (S.D.N.Y. 1985).

19. *Pravic v. U.S. Indust.-Clearing*, 109 F.R.D. 620 (E.D. Mich. 1986).

20. DR 1-102(a)(2) (22 NYCRR 1200.3(a)(2)).

21. DR 7-101 (22 NYCRR 1200.32).

22. For a history of lawyers' conflicting roles as advocates and court officers, see Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 Suffolk U.L. Rev. 59, 66–74 (1997).

23. *See Roeder v. Islamic Rep. of Iran*, 195 F. Supp. 2d 140, 184–85 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2836 (2004).

24. DR 7-106(b)(1) (22 NYCRR 1200.37(b)(1)).

25. *Id.*; DR 1-102(a)(5) (22 NYCRR 1200.3(a)(5)).

26. *See, e.g.*, Wayne Schiess, *Ethical Legal Writing*, 21 Rev. Litig. 527, 534 (2002) (giving examples of consequences for poor research).

27. *See, e.g., Schutts v. Bentley Nev. Corp.*, 966 F. Supp. 1549, 1563 (D. Nev. 1997); *Peterson v. Foote*, 1995 WL 118173, at *8 n. 25, 1995 U.S. Dist. LEXIS 3391, at *30 n. 25 (N.D.N.Y. 1995); *Pierotti v. Torian*, 81 Cal. App. 4th 17, 20, 96 Cal. Rptr. 2d 553, 566 (2000); *McCoy v. Tepper*, 261 A.D.2d 592, 593, 690 N.Y.S.2d 678, 679 (2d Dep't 1999) (mem); *Saveca v. Reilly*, 111 A.D.2d 493, 494, 488 N.Y.S.2d 876, 877 (3d Dep't 1985); *Estate of A.B.*, 1 Tuck 247 (N.Y. Sur. Ct. 1866); Marguerite L. Butler, *Rule 11 Sanctions and a*

Lawyer's Failure to Conduct Competent Legal Research, 29 Cap. U.L. Rev. 681 (2002).

28. *See Gould v. Kemper Nat'l Ins. Co.*, 1995 WL 573426, at *1, 1995 U.S. Dist. LEXIS 14102, at *2 (N.D. Ill. 1995).

29. *Id.* at *4, 1995 U.S. Dist. LEXIS 14102, at *13.

30. Nancy Lawler Dickhute, *Playing By the Rules: Dealing Effectively With Adverse Authority in Writing a Brief*, Neb. Lawyer 34 (Sept. 2003).

31. Geoffrey Hazard & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.3:206 (3d. ed. 2001).

32. *See Hernandez v. N.Y.C. Law Dep't Corp. Counsel*, 1997 WL 27047, at *14, 1997 U.S. Dist. LEXIS 620, at *43 (S.D.N.Y. 1997).

33. *Id.*

34. *Id.* at *14 n.11, 1997 U.S. Dist. LEXIS 620, at *43 n.11.

35. *United States v. Jolly*, 102 F.3d 46, 50 (2d Cir. 1996); *People v. Whelan*, 165 A.D.2d 313, 324 n.3, 567 N.Y.S.2d 817, 824 n.3 (2d Dep't); *In re Cicio v. City of N.Y.*, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467, 468–69 (2d Dep't 1983) (per curiam); Ronald V. Sinesio, *Imposition of Sanctions Upon Attorneys or Parties for Miscitation or Misrepresentation of Authorities*, 63 A.L.R.4th 1199 (1998); H. Richard Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 Hofstra L. Rev. 729 (1978).

36. Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 Law Lib. J. 148, 149 (1982).

37. *Sobol v. Capital Mgmt. Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (Nev. 1986) (per curiam).

38. *See USA Clio Biz, Inc. v. N.Y.S. Dep't of Labor*, 1998 WL 57176, at *2, 1998 U.S. Dist. LEXIS 783, at *6–7 (E.D.N.Y. 1998).

39. *Id.*, 1998 U.S. Dist. LEXIS 783, at *7.

40. *Gordon v. Marrone*, 155 Misc. 2d 726, 732, 590 N.Y.S.2d 649, 653 (Sup. Ct. Westchester County 1992), *aff'd*, 202 A.D.2d 104, 111, 616 N.Y.S.2d 98, 102 (2d Dep't 1994), *appeal denied*, 84 N.Y.2d 813, 647 N.E.2d 453, 623 N.Y.S.2d 181 (1995).

41. *See Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. 2004).

42. *In re Knight*, 264 App. Div. 106, 34 N.Y.S.2d 810 (1st Dep't 1942) (per curiam); *In re Schwartz*, 202 App. Div. 88, 195 N.Y.S. 513 (1st Dep't 1922); *Goldreyer v. Shalita*, 152 N.Y.S. 1002 (App. Term 1st Dep't 1915) (per curiam).

43. *E.g.*, *DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding lawyer who made unsupported arguments in reply brief); *Chapman v. Hootman*, 999 S.W.2d 118, 124 (Tex. App. 1999) (same).

44. Donald H. Green, *Ethics in Legal Writing*, 35 Fed. Bar News & J. 402, 405 (1988) (discussing incivility in legal profession).

45. Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 Rev. Litig. 301, 327 (2004).

46. DR 8-102(b) (22 NYCRR 1200.43(b)).

47. *See In re Truong*, 2 A.D.3d 27, 30, 768 N.Y.S.2d 450, 453 (1st Dep't 2003) (per curiam).

48. *Id.*; *cf. In re Justices of the App. Div., First Dep't v. Erdmann*, 33 N.Y.2d 559, 559–60, 301 N.E.2d 426, 427, 347 N.Y.S.2d 441, 441 (1973) (per curiam) (finding that isolated instances of lawyer's disrespect outside court not subject to discipline).

49. Am. Bar Ass'n. Comm. on Eth. & Prof. Resp., Informal Op. 1414, *Conduct of Lawyer Who Assists Litigant Appearing Pro Se* (1978).

50. Ass'n Bar City N.Y., Comm. on Prof. & Jud. Eth., Op. 1987-2 (1987), *available at* http://www.abcny.org/Ethics/eth1987-2.htm (last visited July 6, 2005); *see also* N.Y. St. Bar Ass'n Op 613 (1990).

51. *See Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (noting that court ought not countenance pro se litigant's undisclosed legal assistance); *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970) (noting that undisclosed representation of pro se litigant "smacks of the gross unfairness that characterizes hit-and-run tactics").

52. Mary Whisner, *When Judges Scold Lawyers*, 96 Law Lib. J. 557, 558 (2004) (endnote omitted).

BY GERALD LEBOVITS

Legal-Writing Ethics — Part II

The Legal Writer continues from last month, discussing ethical legal writing.

The Facts

Lawyers must set out their facts accurately. They may never knowingly give a court a false fact,[1] especially a false material fact. Giving a court a false material fact can subject the lawyer to court-ordered and disciplinary sanctions.[2] In an illustrative case, the Appellate Division, Second Department, suspended a lawyer for five years for repeatedly providing courts with false facts.[3]

To write ethically and competently, lawyers must communicate the factual basis of their clients' claims and defenses. One federal district court in New York noted that two types of substandard fact pleadings can lead to dismissal or denial: (1) a pleading written so poorly it is "functionally illegible" and (2) a pleading so "baldly conclusory" it fails to articulate the facts underlying the claim.[4] As the Ninth Circuit explained, "[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs."[5]

Lawyers must choose which facts to include in their pleadings. Omitting important adverse facts is not necessarily dishonest.[6] Lawyers may omit facts adverse to the client's position and focus on the facts that support their arguments. It might be poor lawyering or even malpractice to inform the court of all the cases' pertinent facts. A criminal-defense lawyer, for example, can be disbarred for telling the court the client is guilty without the client's consent.

But lawyers who omit facts lose an opportunity to mitigate adverse facts. Being candid with the court about facts adverse to the client's position, moreover, gives credibility to the lawyer's arguments. And the court is more likely to consider the lawyer's other arguments credible.

To prove they are using facts honestly, lawyers must cite the record.[7] They may not add to their record on appeal new facts not part of the record before the trial court. Thus, the Appellate Division, Second Department, sanctioned two lawyers for including new information in their record on appeal and then certifying that their record was "a true and complete copy of the record before the motion court."[8]

Writing Style

A lawyer's writing must project ethos, or credibility and good moral character: candor, honesty, professionalism, respect, truthfulness, and zeal.[9] To evince good character, lawyers should write clearly and concisely.[10] They should avoid using excessively formal, foreign, and legalistic language. They should also avoid bureaucratic writing. Bureaucratic writers confound their readers with the passive voice and nominalizations.

The active voice: "The plaintiff signed the contract." The passive voice: "The contract was signed by the plaintiff." The double-passive voice: "The contract was signed." Think: "Mistakes were made." A lawyer who uses that phrase is hiding the name of the person who made the mistake. The passive voice is wordy. The double-passive voice omits an important part of a sentence — the "who" in "who did what to whom" — a necessary feature unless the object of a sentence is more important than the subject.

Nominalizations are verbs turned into nouns. Nominalization: "The police conducted an investigation of the crime." No nominalization: "The police investigated the crime." Nominalizations are wordy and make sentences difficult to understand. They can also make writing abstract and conclusory.

Lawyers who combine the passive voice with nominalizations are poor communicators. Worse, they might be trying to disguise, confuse, or warp.[11] The following illustrates how vague writing damages a lawyer's effectiveness and credibility: "The court clerk has a preference for the submission of documents." To correct the sentence, the lawyer writer must do three things. First, remove the two nominalizations. The sentence becomes: "The court clerk *prefers* that documents be *submitted*." Second, remove the double-passive. Who submits? The judge? The police? Without the double passive, the sentence becomes: "The court clerk prefers that litigants submit documents." Third, explain. What documents? Submit them where? With the explanation, the sentence might read: "The court clerk prefers that litigants file motions in the clerk's office."

Subject complements also deceive readers. They appear after the verb "to be" and after linking verbs like "to appear" and "to become." "Angry" is the subject complement of "The judge became angry." This construction hides because it does not explain how the judge became angry. Compare "Petitioner's claim is procedurally barred" with "Petitioner is procedurally defaulted because he did not preserve his claim."

Lawyers shouldn't use role reversal to disguise what happened. A lawyer who reverses roles moves the object of the sentence to the first agent or subject in the sentence. Compare: "Police Shoot and Kill New Yorkers During Riot" with "Rioting New Yorkers Shot Dead."[12]

Skeptical courts can easily spot obfuscation. In one such case, the Tenth

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Circuit noted that the appellees' "creative phraseology border[ed] on misrepresentation."[13] The court also noted that incoherent writing is "not only improper but ultimately ineffective."[14]

Lawyers shouldn't use adverbial excessives like "obviously" or "certainly." Overstatement is unethical while understatement persuades. In that regard, shouting at readers with bold, italics, underlining, capitals, and quotation marks for emphasis raises ethical concerns of overstatement.[15] Nor should lawyers use cowardly qualifiers like "generally" or "usually" to avoid precision.

Courts must dispose of motions and cases quickly. Courts might sanction lawyers for wasting the court's time with poor writing. As one court sarcastically put it when faced with incoherent pleadings, "the court's responsibilities do not include cryptography."[16]

Plagiarism

Lawyers must not present another's words or ideas as their own. Doing so deceives the reader and steals credit from the original writer. Plagiarism, prohibited in academia, can affect a lawyer's ability to practice. In one case, the Appellate Division, Second Department, censured a lawyer dismissed from law school for plagiarizing half his LL.M. paper who failed to disclose his dismissal in his bar application.[17] In another, the Appellate Division, First Department, censured a lawyer who plagiarized the writing sample he submitted as part of his application for the Supreme Court (18-B) criminal panel for indigent defendants.[18]

Lawyers reuse form motions and letters, law clerks write opinions for their judges, and some judges incorporate parts of a litigant's brief into their opinions.[19] But plenty remains of the obligation to attribute to others their contributions, thoughts, and words.

To avoid plagiarizing, lawyers should cite the sources:

- On which they relied to support an argument;
- From which they paraphrased language, facts, or ideas;
- That might be unfamiliar to the reader;
- To add relevant information to the lawyer's argument;
- For specialized or unique materials.[20]

Courts don't forgive lawyers who plagiarize.[21] A federal district court in Puerto Rico, for example, reprimanded a lawyer who copied verbatim a majority of his brief from another court's opinion without citing that opinion.[22]

Lawyers must quote accurately.[23] A reader who checks a quotation and finds a misquotation will distrust everything the lawyer writes.[24] To quote accurately, lawyers must use quotation marks, even if the lawyer omits or changes some words. Lawyers must use ellipses to note omissions and put changes in brackets.[25] The key to honest writing is to use quotation marks when quoting even a few key words and then to cite. That's the difference between scholarship and plagiarism.

Lawyers must not substitute practice forms for their professional judgment. While not plagiarism, it's bad lawyering to rely on forms or boilerplate. One federal district court in New Jersey sanctioned a lawyer for reproducing without analysis a complaint from a Matthew Bender practice form.[26] As part of the sanction, the court ordered the lawyer to attend either a reputable continuing-legal-education class or a law-school class on federal practice and procedure and civil-rights law.[27] The court concluded that despite the availability of practice forms and treatises, lawyers are "expected to exercise independent judgment."[28]

Court Rules

Most courts have rules that govern the length and format of papers. Under the Second Circuit's Local Rule 32, a brief must have one-inch margins on all sides and not exceed 30 pages.[29] New York State courts have their own rules.[30] State and federal courts in New York and elsewhere may reject papers that violate the courts' rules regarding font, paper size, and margins.

Lawyers shouldn't cheat on font sizes or margins. And they must put their substantive arguments in the text, not in the footnotes. In one illustrative case, the Second Circuit declined to award costs to a successful appellant whose attorney "blatantly evaded" the court's page limit for briefs by including 75 percent of the substantive arguments in footnotes.[31] Lawyers must edit and re-edit their work to set forth their strongest arguments in the space allowed. A court may, in its discretion, grant a lawyer leave to exceed page limits. Conversely, lawyers shouldn't try to meet the page limit with irrelevancies or unnecessary words for bulk.[32]

Lawyers who ignore court rules risk the court's disdain.[33] Worse, the court can dismiss the case.[34] The Ninth Circuit did just that when an appellant disregarded its briefing rules.[35] The appellant's lawyers submitted a brief that didn't cite the record or provide the standard of appellate review. Instead, the brief exceeded the court's word-count limit and cited cases without precedential value.[36] The lawyers also submitted a reply brief that had no table of contents or table of authorities.[37] The court stated that despite the appellant's poorly written briefs, it examined the papers and decided that appellants were not entitled to relief on the merits.[38] Other than to comment on the lawyers' ethics and briefing errors, the court didn't explain its reasoning for dismissing the appeal.[39]

Even if a court doesn't have rules about a brief's format and length, lawyers shouldn't burden the court with prolix writing. In a 1975 New York Court of Appeals case decided before the court instituted rules to regulate brief length, the court sanctioned a lawyer who submitted a 284-page brief about issues "neither novel nor complex."[40] To illustrate the brief's absurdity, the court broke down the number of pages it devoted to each issue, including 50 pages for the facts,

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126 for one argument, and 4 to justify the brief's length.[41]

Lawyer's Role as Advisor

Lawyers must mind the Disciplinary Rules when advising a supervising attorney or a client. Lawyers are often asked to prepare memorandums for a supervising attorney or a client directly. A memorandum is intended to predict objectively how the law will be applied to the facts of the client's case, not to persuade the reader what the law should be. A memorandum must take a position, but it must also provide the strongest arguments for and against the client's position. A skewed memorandum is no strategic or planning tool.

Lawyers mustn't give unsolicited advice to non-clients. Publicly discussing the law, however, is essential to understanding how the law works and applies. The Disciplinary Rules allow lawyers to write about legal topics, but they forbid lawyers to give unsolicited advice to non-clients.[42] A lawyer who participates in an on-line chat, for example, should notify the other participants that the discussion doesn't create a lawyer-client relationship, that none of the communications are confidential, and that the advice is general in nature and not intended to provide specific guidance. The notice should contain unequivocal language that non-lawyers will understand.

Clients pay the bills. They can use their economic influence to pressure lawyers to break the law or violate a Disciplinary Rule. A lawyer is prohibited from assisting a client to engage in unlawful or fraudulent conduct.[43] A lawyer can choose to refuse to aid or participate in conduct the lawyer believes is unlawful, even if there's some support for the argument that the conduct is legal.[44] The Disciplinary Rules recognize that when clients place their lawyers in an ethical quandary, and when it is unclear whether the lawyer will be advising a client to commit legal or illegal conduct, the lawyer should err on the side of not advising rather than face possible disciplinary action.

Conclusion

Ethics permeates all aspects of the legal profession. The way a lawyer writes can establish the lawyer's reputation as ethical and competent. Reputation is a lawyer's most precious asset. By embodying the profession's ethical ideals in their writing, lawyers will insure that their reputation remains positive and increase the possibility that their clients will prevail in litigation. ■

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1. DR 7-102(a)(5) (22 NYCRR 1200.33(a)(5)).
2. 22 NYCRR 130-1.1(c)(3).
3. *See In re Abrahams*, 5 A.D.3d 21, 22–27, 770 N.Y.S.2d 369, 371–75 (2d Dep't 2003) (per curiam), *appeal dismissed*, 1 N.Y.3d 619, 808 N.E.2d 1273, 777 N.Y.S.2d 13 (2004).
4. *See Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 234 (S.D.N.Y. 1987).
5. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (citation omitted).
6. Except when the other side is absent. See Part I of this column.
7. Margaret R. Milsky, *Ethics and Legal Writing*, 85 Ill. B.J. 33, 34 (1997) (noting that citing record enhances lawyer's credibility).
8. *DeRosa v. Chase Manhattan Mtge. Corp.*, 15 A.D.3d 249, 249, 793 N.Y.S.2d 1, 2 (1st Dep't 2005) (mem.).
9. Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 122 (2002).
10. Wendy B. Davis, Writing Clinic, *An Attorney's Ethical Obligations Include Clear Writing*, 72 N.Y. St. B.J. 50, 50 (Jan. 2000) (calling clear legal writing an ethical obligation).
11. George Orwell, *The Politics of Language*, *in* 4 The Collected Essays: Journalism and Letters of George Orwell 165–69 (1968).
12. Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions*, 46 UCLA L. Rev. 75, 101 (1998).
13. *Wilson v. Meeks*, 52 F.3d 1547, 1558 (10th Cir. 1995).
14. *Id.*
15. *See United States v. Snider*, 976 F.2d 1249, 1251 n.1 (9th Cir. 1992) (Kozinski, J.) (referring to brief's bold-faced font, capital letters, and quotation marks for emphasis, the court wrote that "[w]hile we realize counsel had only our welfare in mind in engaging in these creative practices, we assure them that we would have paid no less attention to their briefs had they been more conventionally written").
16. *Duncan*, 668 F. Supp. at 234.
17. *See In re Harper*, 223 A.D.2d 200, 201–02, 645 N.Y.S.2d 846, 847 (2d Dep't 1996) (per curiam).
18. *In re Steinberg*, 206 A.D.2d 232, 233, 620 N.Y.S.2d 345, 346 (1st Dep't 1994) (per curiam) (citing DR 1-102(a)(4) (22 NYCRR 1200.3 (a)(4)); *see also Kingvision Pay Per View, Ltd. v. Wilson*, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (noting that lawyer failed to give credit to source).
19. Linda H. Edwards, Legal Writing Process, Analysis, and Organization 10 (2002).
20. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236, 245 (1999).
21. *See, e.g.*, Wayne Scheiss, *Ethical Legal Writing*, 21 Rev. Litig. 527, 538-39 (2002) (documenting courts reprimanding lawyers for plagiarism).
22. *See Pagan Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001).
23. *See generally* Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part I*, 76 N.Y. St. B.J. 64 (May 2004); Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part II*, 76 N.Y. St. B.J. 64 (June 2004).
24. *See* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1, 30-31 (1997) (providing example of courts sanctioning lawyers for misquoting).
25. Louis J. Sirico, Jr., *A Primer on Plagiarism*, Second Draft 11 (May 1988).
26. *See Clement v. Pub. Serv. Elec. & Gas Co.*, 198 F.R.D. 634, 635–36 (D.N.J. 2001); *see also DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding attorney for copying opposing counsel's memorandum of law).
27. *See Clement*, 198 F.R.D. at 636.
28. *Id.*
29. Local Rule 32(a), *available at* http://www.ca2.uscourts.gov/Docs/Rules/LR32.pdf (last visited June 20, 2005).
30. *See, e.g.*, 22 NYCRR 500.1(k) (Ct. App.); 600.10(a)(1) (1st Dep't); 670.10.1(f) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(h) (4th Dep't).
31. *See Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir.1995).
32. Thomas R. Haggard, *Good Writing as Professional Responsibility*, 11 S.C. Law. 11, 11 (May/June 2000).
33. *See, e.g., La Reunion Francaise, S.A. v. Halbart*, No. 96-CV-1445, 1998 WL 1750128, at *1 n.1 (E.D.N.Y. Sept. 28, 1998) (expressing court's disfavor with plaintiff's using "microscopic font and half-inch margins" to circumvent page limit); *LaGrange Mem'l Hosp. v. St. Paul Ins. Co.*, 317 Ill. App. 3d 863, 876, 740 N.E.2d 21, 32 (2000) (reprimanding lawyers for exceeding page limits).
34. *See, e.g., Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. S.D. 2004) (dismissing case because lawyer's briefs did not conform to court's rules); *Frazier v. Columbus Bd. of Educ.*, 70 Ohio St. 3d 1431, 1431, 638 N.E.2d 581, 582 (Ohio 1994) (same).
35. *See N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146–47 (9th Cir. 1997).
36. *Id.* at 1146.
37. *Id.*
38. *See id.* at 1147.
39. *Id.*
40. *Slater v. Gallman*, 38 N.Y.2d 1, 4–5, 339 N.E.2d 863, 864–65, 377 N.Y.S.2d 448, 450–51 (1975).
41. *See id.* at 5 n.1, 339 N.E.2d at 865 n.1, 377 N.Y.S.2d at 450 n.1; *accord Stevens v. O'Neill*, 169 N.Y. 375, 376, 62 N.E. 424, 424 (1902) (per curiam) (commenting on how typewriters rather than pens allow verbosity).
42. DR 2-104(e) (22 NYCRR 1200.9(e)).
43. DR 7-102(a)(7) (22 NYCRR 1200.33(a)(7)).
44. DR 7-101(b)(2) (22 NYCRR 1200.32(b)(2)).

BRIEF WRITING & ORAL ARGUMENT

INCLUDING ETHICAL CONSIDERATIONS

FOR APPELLATE COUNSEL

by

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BRIEF WRITING & ORAL ARGUMENT
including ethical considerations for appellate counsel

Robin Mary Heaney
Rockville Centre, N.Y.

1. Record on Appeal

a. Your appeal is only as good as your Record. Remember, if it's not in the Record, the Court won't know about it and you can't argue it. So … make certain the Record is complete.

b. If you're doing the underlying motion, you can make the Record better. Think about the potential appeal when you are preparing your motion. Make sure you have a good and complete set of papers because this is all the appellate court is going to see if the matter winds up on appeal. So think appeal even before you make your motion. Don't use deposition excerpts, reproduce the entire transcript. What may not seem important at the time may provide a critical point on appeal. And you won't leave the justices wondering what was on those missing pages.

c. If you're using photographs, use color laser copies. The Court wants them. The Second Department demands them. And, they are usually clearer and sharper than xeroxed copies, so they will tell your story much better.

d. If you're doing a trial record, make sure you have all the Exhibits. You can stipulate to include or exclude certain exhibits but make certain you have them and can review them to determine if they are relevant.

e. You have an ethical obligation to prepare a complete Record. Don't leave something out just to make your case stronger or because you think it helps your adversary. There's no excuse for conveniently overlooking some page or submission. Not only is it unethical, but your adversary will point it out to the Court and you'll be open to criticism. Even worse, a weak point will be highlighted to the Court.

f. If there are cross-appeals, make certain you consult with the cross-appellant to prepare the Joint Record. You must file a Joint Record with cross-appeals.

g. Make proper use of your appellate printer. The printers are up to date on the rules for each court and can help smooth the way. They know the rules for electronic filing and they have the technical expertise to do it. They know how many briefs to serve and file, filing dates, printing specifications. If you're using a printer ask for help. Printers also will serve a transcript for settlement. This can be a timesaver. You'll get phone calls from many printers once you file…you can shop around…fees are not always the same.

h. If the appeal is from a trial, get the transcript early. Remember, you have to settle that transcript before you prepare the Record.

2. Writing the Brief

A. Basic Considerations

a. When you start the brief, even if you've done the motion or tried the case, start fresh, because now you have the benefit of knowing what your adversary is going to say and how one judge perceived the dispute and what that judge thought of the evidence. Reread the depositions and all of the exhibits…Read your adversary's papers from the Court below…Read the Court's decision to see why you won (for the Respondent) or lost (if you're the Appellant). Look at the weaknesses of your case and try to provide an answer to the adversary's argument or the Court's concerns. If the appeal is from a trial judgment, read the transcript and outline each witness' testimony.

b. The brief is not the place to rehash your personal problems with an adversary. Personal attacks do not belong in the brief – the Court doesn't want to hear them. And, however angry you may be about the lower court's decision, be diplomatic. Don't attack the trial court. Let the facts speak for themselves without attacking the trial court. Civility is essential plus appellate judges were trial judges, too. You may believe the lower court was wrong, but be respectful. You need to be diplomatic – you can say the court erred or your adversary's arguments were incorrect. In fact, you have to as an appellant, but don't include vitriolic rhetoric or *ad hominem* attacks. Appellate practice is about the law… not personal conflicts.

c. You need to know where you're going before you start writing. What do you need to establish to persuade the Court? Some appellate practitioners will do the STATEMENT OF FACTS before they do the research. Personally, I prefer to do the research first. That way, you can review the case law and take your direction from that. Doing the research first will help you identify issues and pick out the facts in your case which should be emphasized to support your position. Make sure you take a look at the cases that were cited by the Court in its opinion. Whether appellant or respondent, you want to be able to argue those cases and their relevance to your facts. Identify your issues, but don't be locked in. Develop your thesis before you start writing. What is it you want to prove?

B. Preliminary Statement

a. Preliminary Statement should be brief and should be a summary of your theme. Here, unlike the Statement of Facts, you can argue your thesis. Use the facts to persuade and point out the strong points in your case – "despite the fact that plaintiff's doctor failed to explain a five-year gap in treatment, …."By the same token, if you don't have a strong argument, then simply identify the appeal by citing the order appealed from and the relief sought.

b. A concrete overview is essential in a Preliminary Statement. An example of a good first sentence – "Wheaton appeals a $1.3 million judgment holding Wheaton liable for an assault committed by Michael Mullinax, a third party over whom Wheaton had no control." You've told the Court what you are appealing and why, in a single sentence. You can then elucidate the facts in a brief overview of the case.

c. Be Brief. A Preliminary Statement should be just that, preliminary and concise, no more than one page. This is your chance to let your audience – the Court – know why you're appealing, but remember, your case is not the only case on the docket, there are nearly 20 other cases before the Appellate Division each day, and the Court has to read all of those briefs. So while you want to say enough, you don't want to say too much! Don't clutter your Preliminary Statement with unnecessary details. You don't need to give parties' addresses or tell where an accident occurred. You don't need to give a procedural history unless it's a procedural appeal. Your Preliminary Statement shouldn't be complicated or legalistic.

d. Remember, the Court knows nothing about your case and this is your chance to orient the judges hearing your case and tell them about your case. A good Preliminary Statement will create interest in your case and make the reader want to learn more about your case. To see if you're clear and informative, give the Preliminary Statement to a spouse or co-worker who doesn't know anything about the case and ask them to tell you what your case is about. Remember, you know your case – your audience doesn't – so you need to be clear about the issues raised.

e. Let the Court know right up front what the case is about. Is it a negligence claim? Breach of contract? A breach of warranty?

f. Although you can argue here, be honest. It's your ethical obligation and essential to your credibility as an appellate argument. Moreover, if you have to withdraw a portion of your claim or have determined that a basis for relief is untenable, tell the Court right here that you are withdrawing a specific argument. It establishes that you are not going to waste the Court's time arguing a meritless claim, and it also gives credibility to your stronger arguments and gets problems out of the way early so they don't clutter the brief and obscure your valid arguments.

g. Don't be afraid to go back to the Preliminary Statement after you've finished your brief to strengthen it, edit it, tighten it up and make it better reflect your arguments.

C. Questions Presented

a. When you outline the questions raised you should incorporate the facts into your questions. You don't want to say "was the Order of the Supreme Court properly made?" Why bother? Instead you want to incorporate favorable facts into your question – "Was the plaintiff, who fell from a scaffold entitled to summary judgment?" (plaintiff) or Was plaintiff entitled to summary judgment under Labor Law Section 240(1) where the scaffold was not defective and did not collapse? (defendant) – and use the question to highlight your arguments.

D. Statement of Facts and Legal Argument

a. First and foremost – Be HONEST!!!!!!!!!! The facts are important. Don't fabricate. Don't fudge. Don't ignore the facts that are against you. It's your ethical obligation to include all the facts, good and bad, and besides, your adversary will point them out, and highlight them, hurting your case and damaging your credibility.

b. Have a page citation to the Record for each fact, no matter how small. You need to be able to show that the Record supports your claim on the facts.

c. Don't include matters not in the Record, even if you know the facts are true. The Court can't consider what's not in the Record, and can't base its decision on facts which were not before the Court below.

d. Don't editorialize in the Facts. Don't say an adversary's papers "inadequately" opposed the motion. Instead, say that, in opposition, the respondent "only" submitted certain documents. You can persuade in the Facts but you should do it discreetly.

e. But … while a Statement of Facts should appear scrupulously neutral, you can write so that each fact advances your argument and is part of a package that conditions the Court to believe that justice is on your side.

f. Use the active voice. It's much clearer when you say "the parties agreed to meet" rather than "it was agreed by the parties that they would meet".

g. Don't overwrite. Compound sentences are confusing. Overstatement of facts not relevant to the issues (no matter how sympathetic they may be) is boring and a waste of the judge's time. It's called a "brief" for a reason. Therefore, there are some facts that just aren't relevant and don't need to be included. Not everything asked at a deposition is relevant so pare down the facts. It will make your brief more interesting and the judges reading it won't get bored and restless.

h. Don't refer to parties as "plaintiff-respondent-cross-appellant". "Plaintiff" will suffice. Use the clearest term. "Insurance carrier" is clearer than "insurer"; "policyholder" is clearer than "insured". Here, a single typo could change the meaning of your words and could be easily read over (eg. insured vs. insurer). So be careful using the automated correction systems on your computer—just because it's a word doesn't mean it's the right word so read your brief – don't simply rely on technology.

i. Skip jargon. There's no need for "said" defendant. Use "Court's Order" instead of "Order of the Court"; "can" instead of "has the capability to"; "because" instead of "due to the fact that". Skip sarcasm and rhetoric – make every word count. Avoid words like "incredible" or "absurd".

j. If there are cases contrary to your position, cite them and deal with them. It's not only the ethical thing to do, but it gives you a chance to demonstrate why your case is different, and why the negative case doesn't apply. Look at a negative case as an opportunity to argue your position not as a negative. Be assured that if you don't do this, your adversary or the Court will find that case.

Not only will you have acted unethically, but you'll be embarrassed and your credibility will be destroyed.

k. Remember you are telling a story – your client's story – to people who know nothing about your case.

l. After you've finished, set the Brief aside, then pick it up and EDIT. Proofread – cut – edit – take out any unnecessary verbiage – make sure your story is clear – don't be afraid to edit – citecheck – you want to be sure the Court can find the cases you cite – use official citations – make certain there are no misspellings and no errors in grammar or usage which are distracting to your audience.

m. Write your point headings after you've written the argument. By then, you'll know what you want to highlight and what proposition your argument and the case law supports. Point headings should be direct, succinct and supported by your argument. Think of them as topic sentences.

n. Make sure the typing complies with Court rules on length, margins, and typeface. Make sure the brief looks good and is easy to read. Use enough space between points. Don't put point headings at the bottom of a page. Limit string citations. Don't use footnotes for argument. If it's important enough to be said, say it in the text. Footnotes are distracting.

o. Prepare a Table of Cases whether Court rules require it or not. It is helpful to the Court and therefore to your case.

p. Respondents' Briefs should set forth the points relied on below, and, if possible, should demonstrate why any case law cited by appellant is inapplicable. Otherwise, they involve the same techniques of identifying issues, analyzing the law, and writing clear, uncomplicated prose designed to support the result reached below.

q. Refer to books like *Effective Brief Writing* by Garner.

E. Reply Briefs

a. Reply Briefs shouldn't rehash your main brief. You don't need to restate the facts – simply address the issues raised by Respondent, which you believe are incorrect, misleading or distinguishable, whether on the facts or law.

b. Reply Briefs should be brief counter-arguments. Don't use them to restate your main arguments or they lose their effectiveness. Use them to refute the respondent's arguments.

F. Oral Argument

a. The first issue is – do you want to argue? If you're the appellant, you do. It shows an interest in the case and may give you the opportunity to clarify that one point or one issue which could

convince the Court that you're right. Even if your adversary doesn't appear, as an appellant, you want that opportunity to answer the Court's questions. As a respondent, however, you may not want to argue against yourself, unless there's something in the Reply Brief which needs a response or some new case which you want to point out to the Court. You may not want to give the Court the opportunity to highlight the weaknesses in your argument.

b. If you've never argued in a particular court before, get familiar with the Court – learn the rules. Try to visit to hear an argument – see how the calendar call works – does the Court permit rebuttal? The First Department & the Court of Appeals allow it, but you must indicate you want it when you ask for time during the calendar call.

c. When the calendar is called, identify the party you represent and tell the Court how much time you need. Although you have the right to 15 minutes in most Appellate Division cases and 30 minutes in the Court of Appeals, you probably don't need that much. All of our appellate courts are "hot" – the judges know the facts; they've read the briefs; they have bench memos; and they know the Record, sometimes better than you do. So only ask for the time it will take for you to highlight your arguments, probably no more than 10 minutes. And, if the Court permits rebuttal, that time is part of your total allotment and must be requested at the calendar call. Remember, in some courts, you will need to share the 15 minutes among all of the parties on one side of the case, so you may get only five minutes for your individual argument.

d. If your train is delayed or you are in a traffic jam, always call the Clerk's office to let the Court know you may be late. If you miss the calendar call, you've waived argument.

e. Know your facts and be familiar with the Record, but don't recite the facts. The Court already knows them. But know your Record. Don't let the Court know it better than you do.

f. Don't read your argument – you need to make eye contact with the judges; you don't want to be looking down at the podium; it should be a conversation, not a recitation. Your argument won't be as interesting, if you're reading, and you won't be able to respond properly to the Court's questions. Instead, jot down some notes – ideas or cases you want to highlight. Make an outline, but don't be bound to a script. You'll sound more sincere and more passionate and you won't be thrown off by the Court's questions. You'll be able to recover from those interruptions and make your points. By the way, you want questions – they give you the opportunity to clarify and to persuade the Court.

g. Listen to the Court's initial questions and, if you're the Respondent, the questions the Court asks the appellant. Those will give you an idea about which issues may interest or trouble the Court. Even before the argument, play devil's advocate or ask someone else to do that and try to think what questions the Court may pose and how you can explain any weaknesses in your case.

h. Don't assume you know where the Court is going. A judge may ask a question not because he doesn't know the answer, but because he wants to highlight an issue for the rest of the bench or point out an issue the judge believes is important.

i. Don't fight with the Court – don't yell – don't talk over the Court. Be respectful!!!

j. Answer the question when it's asked. Don't defer the question to a later time. And, answer the question.

k. Do your homework. It's several months after you wrote the brief, and there may have been a new case on the issues raised. What was good law then may not be good law any longer. If you find a case, whether favorable or unfavorable, it is your duty to make the Court aware of the new decision. Make copies for the Court and your adversary – in the First Dept., ask the court officer for the necessary form. You are ethically bound to give the Court a case on point which goes against your client's position!!!!

l. You may want to check the computer to see if any of the judges hearing your case has sat on any similar cases or was involved in any cited opinions. Be careful here, however, because that judge will know that case better than you.

m. Know when to shut up!!!!!! You don't need to use all your time. Take your cue from the Court. If the bench seems satisfied, it's time to sit down.

n. Be respectful to your adversary. Don't get hot during the argument or react to your adversary's statements. Don't make faces etc., and don't make gratuitous comments. It's an ineffective, and sometimes an offensive tactic. Civility rules.

o. Finally, and above all, protect your own reputation and credibility. Tell the truth. Answer the Court's questions honestly and directly. If you can't distinguish a case which is negative or has negative facts, admit it!! Never misstate the law or the facts. Be an advocate, but don't duck the weaknesses of your case. Address those aspects of your case which do not support your position, and discuss those cases which are contrary to your position. Professional ethics demand this. And, no one case is worth the loss of your professional reputation or personal credibility.

EFFECTIVE APPELLATE ADVOCACY

by

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Judge Kaye focuses her practice on appellate litigation and arbitration. Before joining Skadden, she served for 25 years on the New York State Court of Appeals, including 15 years as Chief Judge of the State of New York. She was the first woman to serve on New York's highest court and the first woman to occupy the State Judiciary's highest office. Prior to being appointed to the Court of Appeals, Judge Kaye was a litigator in private practice.

Effective Appellate Advocacy

Prepared, engaged and mutually respectful advocates and jurists, excellent written submissions, and a hearty, informed give and take at oral argument pave the way to an effective appeal.

The spirit that most litigators share, taking pleasure in preparing to encounter and overcome unforeseeable challenges, peaks at the appellate level. Appellate litigators generally face higher stakes, have greater impact on the law and attract more public visibility. For judges, an appeal offers the opportunity to endlessly search all the crevices of an issue and imagine the unimaginable of where the law can go. For unprepared attorneys, however, it can present the nightmarish risk of being unable confidently and authoritatively to answer the court's questions, most hauntingly the night after a less-than-satisfying oral argument.

Two recurring principles best encapsulate the formula for attorneys to reduce the risk inherent in appellate practice and enhance their prospects for success in litigation:

- Know your case.
- Know your audience.

While in one respect a trial court or other official body may have altered the landscape, as by finding facts or defining issues, even for appellate litigators these two fundamental principles remain the inseparable top priorities to promote the chance for a successful outcome.

This article provides guidance on how to be an effective appellate advocate, whether an attorney is new to appellate practice or a seasoned appellate litigator. It offers insights and practical tips on navigating the appellate process, from the moment the process begins through triumphant victory. An effective advocate understands and follows all applicable rules, embraces the narrative of the case, impresses the appellate panel with briefs and oral argument and, ultimately, establishes a great legal precedent. The successful appellate process represents the American justice system at its best.

FIRST STEPS

The path to an effective appeal begins with understanding the technical requirements of the appellate court and formulating the overarching narrative of the appeal. Both can be done before submitting anything to the court.

Search Initiating an Appeal for Practice Notes explaining the procedure for starting an appeal to the Federal Circuit, Ninth Circuit and Second Circuit.

UNDERSTAND THE RULES COMPLETELY

Counsel should start by learning everything possible about the court to which the appeal is headed, from its jurisdiction to its time-honored traditions. This means checking out all rules applicable to the destination appellate forum, all constitutional provisions, statutes, court regulations, websites and materials (like treatises and articles) written on the subject. In this case, familiarity breeds content. An effective appellate litigator understands the rules for getting to the court and the rules for being there.

For example, the lack of a final order is the kiss of death at the New York Court of Appeals, yet counsel often overlook this simple procedural prerequisite in favor of their broader legal position. Even the most persuasive legal argument, however, will fall on the sword of dismissal if the order of the court below leaves an open issue, such as counsel fees. Understanding the court's jurisdiction and scope of review is a crucial first step.

FOLLOW THE RULES METICULOUSLY

The more technical requirements, like type fonts and footnoting, may seem downright silly. Counsel should not waste time trying to circumvent court rules, but should instead just assiduously follow them. Otherwise, the appeal might not even get to the starting line. Counsel must be sure to include every required section in the brief based on the court's rules and understand all technical requirements for filing. Since attorneys have to piece together the various parts of their briefs into a cohesive package, they are well advised to spend the minimal extra time required to do it right.

Search Court and Judge Rules Update for weekly updated reports on significant changes to the local rules and procedures for all US federal district and appellate courts, as well as changes to the individual practice rules for judges in select district courts.

Following the rules includes superbly formatting, clearly articulating and quadruple checking everything that goes into court submissions. Counsel should not risk annoying the court staff or losing a judge's confidence by ignoring mechanical matters that are wholly knowable and doable. With careful organization and attention to detail, counsel can prevent what would be gifts to the opposition, such as:

- A sloppy looking, or sounding, submission.
- Gendered writing (for example, unnecessarily always using "he") that might irritate a reader.
- Reliance on an overruled, limited or disparaged case.

A call to the clerk's office is among the simple, risk-reducing options to assure that all technical prerequisites are meticulously met. If the rules, practice guides and other written sources do not sufficiently explain a requirement or answer a question, the professionals at the court can often fill in the gaps. Counsel should make the clerk's office an asset, not an impediment.

LEARN THE RECORD INSIDE OUT

Counsel should diligently read all filings in the lower court, not just the court's ruling and the papers that immediately led to it. The appellate court will be familiar with the record filed on appeal and may be interested in portions of the record not necessarily emphasized by the lower court. Even papers that are not part of the appendix or record on appeal may help develop a fuller picture of the narrative counsel will convey to the court.

CREATE THE NARRATIVE

A prime objective for appellate litigators is to understand the case thoroughly and best formulate a narrative that, within the framework of the law, will capture a sense of justice in the client's favor. Research and precedents are important, but so are the theme and story counsel will put before the court. Although *stare decisis* matters a lot to appellate courts, precedents are not mere rubber stamps. Society evolves and hopefully progresses. Judges, even on courts of law with no "interest of justice" jurisdiction, do not like simply affixing old citations to a result that seems blatantly wrong today.

Hopefully the most feared precedents or devastating evidence can be cornered off. Attorneys seeking an extension or modification of existing precedent must be sure they understand and can identify the outer boundaries of where their position would next take the law. They should craft their narrative in a way that provides comfort that the change they seek will not produce unpalatable results in the inevitable next cases on the horizon. Appellate litigators need to know their record, find their story and build on it.

In short, counsel should know the rules, the story, the objectives, the hurdles and the major legal points surrounding them. An effective brief is fully thought through before a word is set to paper.

SUBSTANCE OF THE BRIEF

Briefs matter. Since appellate tribunals, however high, are composed of human beings, it is hard to quantify precisely how much briefs matter to any particular judge or court. Do they matter more than oral argument? An unanswerable question. Because briefs indisputably do matter, they should be the best they can be. The chances for success can surely be influenced, perhaps ultimately even turned around, by oral argument, but a persuasive, credible, readable and authoritative brief should be the goal of every appellate litigator. Attorneys want to author the brief the judge turns to, and returns to, in crafting the court's writing.

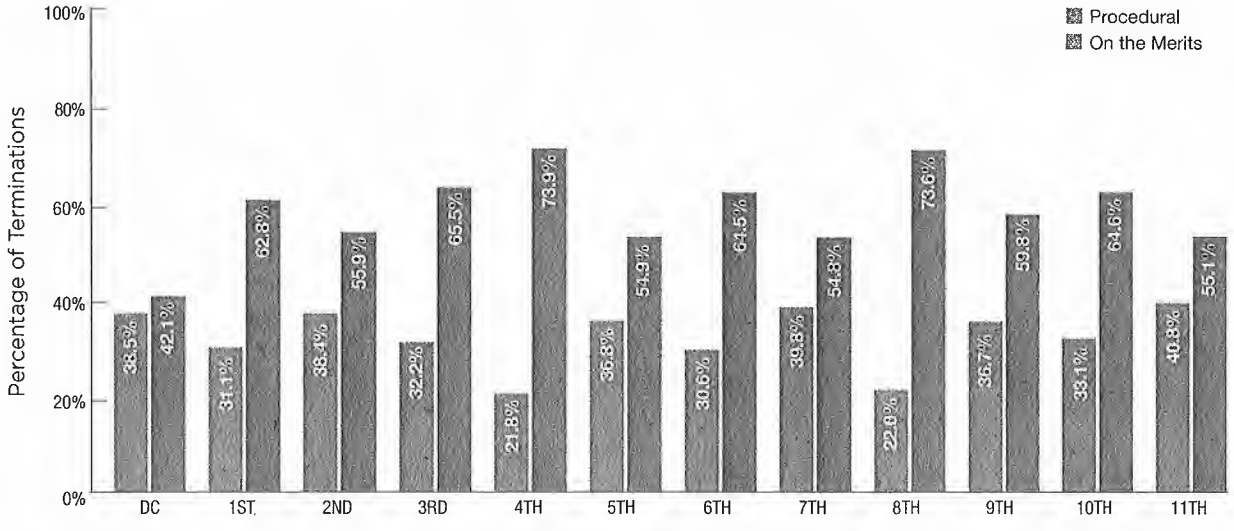
Search Appellant's Brief and Appellee's Brief for sample briefs, with explanatory notes and drafting tips, to be used in the Federal Circuit, Ninth Circuit and Second Circuit.

KNOW YOUR AUDIENCE: THE LEGAL ARGUMENT

As counsel begin to frame their writing, they should take into account both the rules of the tribunal that will be receiving the briefs and the judges they will face. It is important to understand not just the judges' views on the substantive and procedural issues (hopefully discernible from precedent, speeches, articles, continuing legal education presentations and the like), but also the context in which they consider cases.

APPEALS TERMINATED ON PROCEDURAL GROUNDS VS. ON THE MERITS

(for the 12-month period ending March 31, 2013)



Totals for procedural terminations include terminations due to jurisdictional defects, voluntary dismissal under FRAP 42, default, denial of grant of certificate of probable cause or certificate of appealability or other procedural grounds.

Cases disposed of by consolidation and cross appeals are counted as a subset of procedural and merit terminations to reflect the manner in which the appeal was disposed.

This graph does not include data for the US Court of Appeals for the Federal Circuit

All figures were taken from Federal Court Management Statistics, *published by the Administrative Office of the United States Courts (available at* uscourts.gov).

Appellate courts are necessarily mindful of both the immediate impact of their decisions on the parties and the more general impact on the law. In the argument portion of the brief, counsel must therefore thoroughly satisfy the tribunal that the just result being urged fits comfortably within what the law is and should be.

For example, a tribunal such as the New York Court of Appeals is essentially limited to the review of questions of law, with little fact-finding jurisdiction, which for the most part stops at the intermediate appellate level. While the narrative counsel has evolved should evoke a sense of justice, the presentation to the Court of Appeals must be formulated as an issue of law, not merely based on "fairness."

Even more generally, for appellate tribunals the fairness or justice aspect of the narrative always should be crafted to posit law questions, with special attention paid to the precedents of the court in which counsel are appearing. The essence of the brief is why, based on the facts, existing precedential law should be upheld, overturned or modified, and the consequences that will flow from that decision.

Appellate courts are necessarily mindful of both the immediate impact of their decisions on the parties and the more general impact on the law. They know that even small tweaks in existing precedent can ripple into troubled waters in future cases. In the argument portion of the brief, counsel must therefore thoroughly satisfy the tribunal that the just result being urged fits comfortably within what the law is and should be.

KNOW YOUR CASE: THE FACTS AND PRELIMINARIES

Facing a stack of appellate briefs, some judges tend to reach first for the appellant's reply, for the most succinct introduction to the battle. Others prefer to start at the beginning, even with the table of contents. No matter the order in which briefs are read, the statement of facts is the meat of the brief. Each fact recited in a brief should advance the legal argument counsel plan to make, avoiding reference to extraneous facts that have no impact on that argument. In its totality, the statement of facts should condition the reader to feel that both law and justice are on the author's side.

While the fact section is never neutral, it must appear scrupulously so. Facts must be accurate, correctly portraying the record. Obviously, facts and law must be fully documented by citations to the record. Overkill, such as misstating or overselling the facts, will likely be detected in the adversarial system, and can be suicidal for the brief as well as for counsel's credibility with the court.

Perhaps most important is the brief's first taste, often a preliminary statement or statement of issues. Counsel should consider leaving that drafting task for last, to formulate the opening paragraphs only after writing up the facts and the law. Once the narrative and argument are in place, counsel should use the opening section of the brief to establish the frame through which the judges will hopefully view the rest of the appeal, explaining succinctly the result counsel wants and the reasons the court should reach that result.

CLEAR AND CONCISE WRITING

Appellate judges tend to bring briefs with them wherever they go, which heightens the importance of clear, cogent and readable writing. Attorneys do not know where judges will be reading their briefs, whether at a desk in chambers, on a sundeck at the beach, or on a train or an airplane. A good advocate understands that, whether or not there are prescribed page limitations, short and crisp is better than long and flat. Plain English is the preferred language. Flaming rhetoric, arcane jargon and endless sentences are better saved for another day, and another audience. A giant stack of paper is better saved for doorstops.

Know your case and know your audience (particularly the precedents and materials actually authored by the intended

readers) are the constant background themes that should be echoing in the attorneys' minds as they compose their briefs. They should take full advantage of this opportunity that is within their control. Counsel should use their briefs to:

- Tell the reader simply and clearly what they want.
- Embroider the story with the facts and law.
- Succinctly drive it all home.

There are no demerits for artful repetition.

ORAL ARGUMENT

The concept of oral argument in appellate advocacy has changed over the years. Unimaginable that in a bygone era, an appellate advocate might have a full day before the court. Today, precious minutes are doled out, with lighting systems to warn of approaching deadlines (if not yet to administer a small electrical shock to violators).

The purpose of oral argument is largely to answer the court's questions, perhaps outing issues not sufficiently explored in briefs, perhaps enabling the judges to test and exchange their own theories about the case through questions to counsel. Indeed, for judges who have spent solitary days reading briefs and conferencing with clerks, facing counsel at oral argument is "showtime." Oral argument has therefore become less "give" by the advocate than "give and take" among all the participants.

Although oral argument may take place during a relatively short period of time, it is nonetheless the summit of the appeal, and can seem to span an eternity for counsel standing at the podium. It is imperative to be prepared for this presentation to the judges, having uppermost in mind both the message and the limited time (not an eternity) that has been allowed.

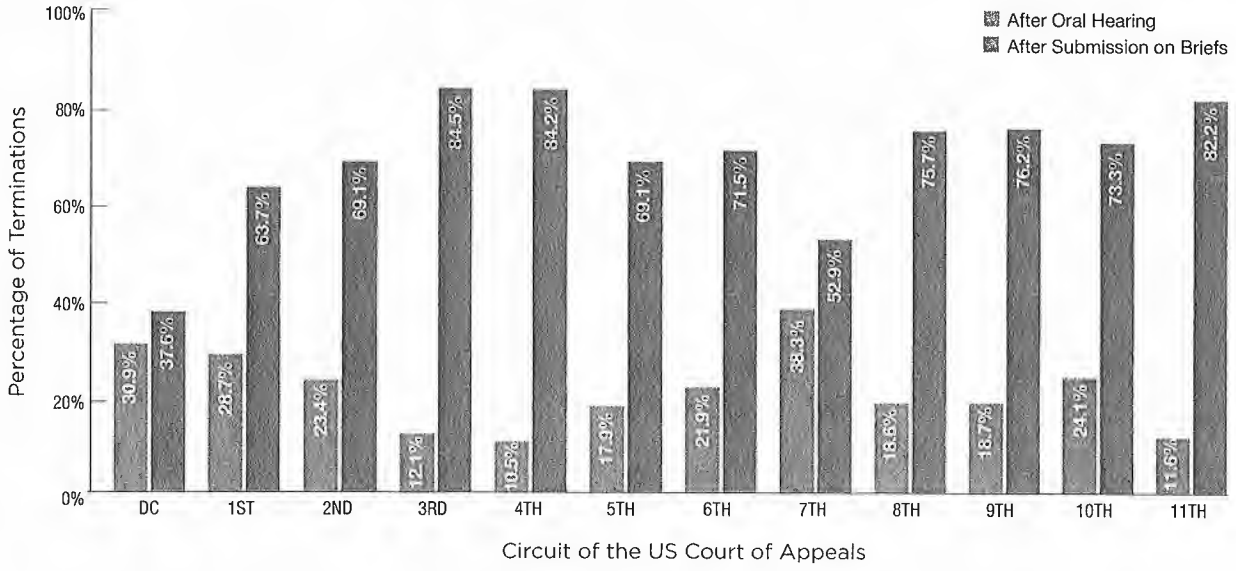
Search Oral Argument, Disposition and Rehearing for Practice Notes explaining the availability, scheduling and conduct of oral argument in the Federal Circuit, Ninth Circuit and Second Circuit.

IN ADVANCE OF THE ARGUMENT

It is especially important for counsel to focus on the mainstay principle, know your audience, in preparing for oral argument. This includes knowing the courtroom layout and traditions, and how to pronounce the judges' names (when in doubt, simply use "Your Honor"). A visit before argument day is highly recommended, to get a sense of courtroom atmospherics, physical and human, and to help each attorney find his or her own comfort zone.

APPEALS TERMINATED ON THE MERITS AFTER ORAL HEARINGS VS. AFTER SUBMISSION ON BRIEFS

(for the 12-month period ending September 30, 2012)



Cases disposed of through consolidation and cross appeals are not included in this graph. This graph does not include data for the US Court of Appeals for the Federal Circuit.

All figures were taken from Judicial Business of the United States Courts, *published by the Administrative Office of the United States Courts (available at* uscourts.gov).

TOOLKITS

The following related Toolkits can be found on practicallaw.com

>> Simply search the resource title

Federal Circuit Appeals Toolkit
Ninth Circuit Civil Appeals Toolkit
Second Circuit Civil Appeals Toolkit

If a visit is not feasible, counsel should check the court's website for video or audio recordings. While these recordings cannot fully replicate the experience of seeing the actual courtroom set-up and witnessing oral argument, they can give attorneys at least some sense of what to expect and be useful learning tools.

The other fundamental principle, know your case, is also particularly important at this point. Appellate litigators must practice, practice, practice, hopefully with challenging colleagues. Attorneys can never have too many moots with both new and experienced colleagues who also know the case and the audience.

Having colleagues assume the role of judges and ask questions provides an invaluable opportunity to learn the strengths and weaknesses of a case and prepare to discuss both effectively. By trying multiple variations of an answer to a likely question, practice moots enable counsel to formulate the answer that works best. This exercise can also help attorneys identify and eliminate seemingly minor verbal or physical mannerisms that become distracting during the argument.

AT THE ARGUMENT

In contrast to learning the rules and writing briefs, which are both within counsel's control, the ebb and flow of oral argument is largely unpredictable. But this is what makes oral argument so exciting. Counsel should do their best to anticipate the general mood of the day and, in particular:

- How best to use the time allowed.
- Whether a request for additional time to complete an argument would be favorably received.
- Whether or not it will be a hot bench.
- What other cases are being argued that day (they can check the court's docket for other cases and determine whether there are any with similar issues).

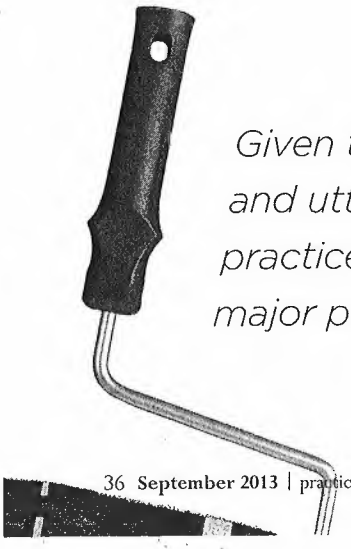
Even then, however, it is truly impossible to know with certainty how any particular oral argument will proceed. Even the tribunal cannot know.

Map Out Key Points

Given the uncertainty of the ebb and flow of oral argument, and utter certainty of time limitations, next to practice, practice, practice, it is best for counsel to sketch out their major points on a sheet or two of paper — a roadmap. Counsel can place this on the lectern as they rise to speak and return to it, however far the court's questions may take them, to insure that they have indeed fully conveyed all of their important points. Keeping close at hand a tabbed copy of the record, a notebook or index cards summarizing key authorities, can be reassuring too. Counsel should always appear calm and credible, speak slowly and clearly and project precisely the right amount of nervousness, never over-confidence.

Best points should always come first. Even if counsel encounter an aggressive bench, indeed, especially because counsel may encounter an aggressive bench, they must be sure to immediately get their message out and be mindful of their allotted time.

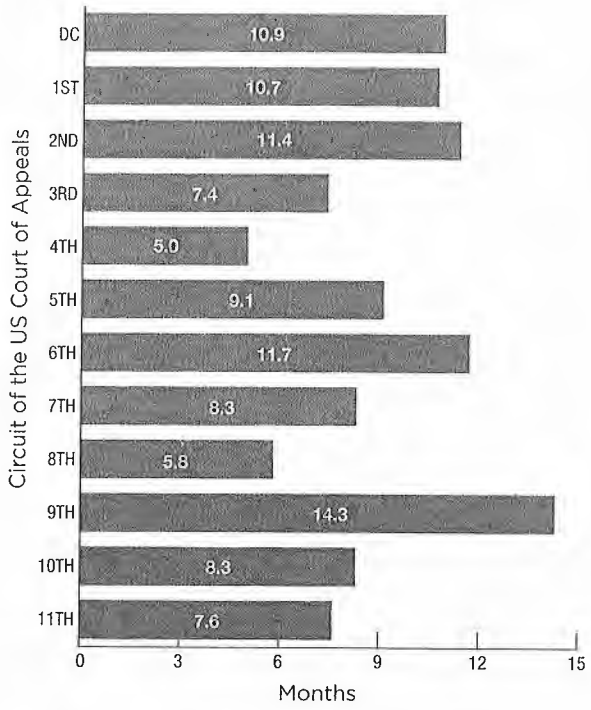
Search Appellate Oral Argument Outline for a sample outline that can be used by counsel during an appellate oral argument, with explanatory notes and drafting tips.



Given the uncertainty of the ebb and flow of oral argument, and utter certainty of time limitations, next to practice, practice, practice, it is best for counsel to sketch out their major points on a sheet or two of paper — a roadmap.

MEDIAN TIME FROM FILING NOTICE OF APPEAL TO DISPOSITION

(for the 12-month period ending March 31, 2013)



This graph does not include data for the US Court of Appeals for the Federal Circuit.

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Answer Swiftly and Decisively

Major objectives for counsel, of course, are decisively answering the court's questions (however irrelevant or annoying they might seem) and conveying that theirs is the better, and correct, outcome. This means fully directing attention to the questioner, without hesitation and with an air of commitment and sincerity. It also includes responding with legal authority or an answer to a posed hypothetical. If counsel do not believe in the position they are advocating, the judges ask themselves, why should we?

When two or more judges fire away simultaneously, counsel should take a moment to compose themselves and then be sure to answer everything. It is not a good idea to defer an answer to a question from the bench ("With your permission, Your Honor, I'll turn to that later in my argument"). This may insult the judge or be even worse if the attorney forgets to return to it.

And then there is the greatest gift of all: when the adversary has flubbed an answer and in response counsel get to hit the ball out of the park. In such a situation, an attorney offering response or rebuttal may wish to lead off the argument with the right answer to an important question that the other side botched.

Counsel should also avoid major wastes of time during oral argument, such as:

- Searching for record citations in response to a question (attorneys can leave the reference with the clerk after argument or request an opportunity to send the material to the court).
- Beginning argument by correcting minor errors in the brief.
- Asking, "Did that answer your question, Your Honor?" (if it did not, counsel would know soon enough).

When in doubt about an answer, it is better to squeeze the best advantage from the question while still appearing to answer it, and move briskly ahead.

Fully conveying the narrative and the law supporting it, satisfactorily answering all of the court's questions and uttering the words, "Thank you, Your Honors," just as the red light goes on, must rank among the world's greatest pleasures.

A Note to Fellow Travelers

Colleagues who join on the trip to the destination forum and sit alongside the arguing attorney at counsel table should maintain professionalism and composure. The bench notices their behavior too. No grimacing, frantic searches through the record or worried whisperings. They should just sit quietly and take notes (perhaps even slipping a note to counsel at the lectern where appropriate). Hopefully, the fellow travelers will make their greatest contribution offering compliments on the way back to the office.

EFFECTIVE BRIEF WRITING

by

HON. JUDITH S. KAYE

Former Chief Judge
Court of Appeals of the State of New York
Albany

Effective Brief Writing

Judith S. Kaye
Judge, Court of Appeals of the State of New York

A brief is private oral argument, your time alone with the judge. Your goal is to hold the attention of that judge, establish credibility, win confidence, and ultimately persuade that judge that yours is the correct position. Obviously, a first principle of such an exercise--indeed a first principle of advocacy generally--is Know Your Audience.

In terms of effective brief writing, this means familiarizing yourself early with the rules of the court. Requirements that may strike you as downright silly--for example, cover colors, page limitations, margin and other formatting specifications--often exist for a reason, and in any event must be satisfied, or even the cleverest argument may not survive the Clerk's Office. Be sure you learn and comply with all rules of the court in which you are appearing, including style preferences. You have to "package" your brief anyway, you might as well spend the minimal extra time required to do it right. Even if judges don't notice a beautifully presented submission, they surely do notice one that is sloppy, or painful (because closures protrude or disintegrate, or cited cases have been reversed). "Gendered" writing belongs in this category too--it's so unnecessary. Why risk losing a judge's confidence, or patience, on account of mechanical matters that are wholly within your control?

That same first principle--Know Your Audience--applies also to the substance of your brief, over which you have somewhat

less control. Our court, for example, is a court of law; we have no "interest of justice" jurisdiction. An argument resting solely on "fairness" thus might discomfit the judges during the night, but it cannot carry the day unless buttressed by the law. Knowing your audience at least gives you an opportunity to get beyond the initial hurdles so that you can make your points on the merits.

As for the merits, judges have widely varying tastes and predilections in writing, and in reading. You rarely can know how a judge approaches the task of brief reading--which judges, for example, look to tables of contents and issue statements for their introduction to the case, or whether a particular judge habitually reads reply briefs first, or even where judges might be when reading your brief. (I carry briefs everywhere.) But you can safely assume that all judges have a lot of briefs to read. I would therefore put at the top of the list of effective brief writing clear, concise, cogent presentation of the pertinent facts and contentions: no humor, no sarcasm, no wild rhetoric.

The goal of a clear, concise, cogent presentation calls into play another first principle of advocacy--Know Your Case. Long, irrelevant fact recitations (however spicy) and "kitchen sink" legal argument are definitely not appreciated. If your submission is the size of a doorstop, ask yourself several times over whether that is really necessary. You get no extra points for mentioning every possible issue, and your best arguments may disappear.

An effective brief is fully thought through before a word is set to paper. If you don't know your objectives, and the major points leading to them, it's not likely the reader will either.

After 21 years as a litigator and seven as an appellate judge, I continue to believe that composing the fact statement requires the greatest skill. It is the brief writer's first opportunity to relate the case to the judge, and is never neutral though it must appear scrupulously so. Each fact recited in a brief should advance the legal argument you plan to make; in its totality the fact statement should condition the reader to feel that justice is on your side. Even in a court of law like ours, no judge votes easily against the just result. Above all, your facts must be accurate, correctly portraying and citing the record. It is suicidal to misstate or even oversell the facts; your adversary lives for such opportunities.

The legal argument section of a brief is controlled by the same first principles--Know Your Audience and Know Your Case. Each law point, starting with your strongest, should build toward your objectives, and be forthrightly presented and well documented. As a judge, I never resent being told what the brief writer plans to say, then having the argument developed with case law and other authorities, and finally being gently reminded of what the writer has established.

The brief a judge can follow easily and have confidence in is the one the judge returns to when deciding how to vote the case or compose the opinion. That's the brief you want to write.

BRIEF WRITING AND ORAL ARGUMENT IN APPELLATE PRACTICE

by

Hon. Albert M. Rosenblatt

McCabe & Mack LLP
Poughkeepsie

On August 3, 1995, Mycroft Megachip Corp. and Franco-Midland Hardware Co. entered into a ten-year lease by which respondent leased office space at 221-B Fulton Avenue, in the City of White Plains, County of Westchester, State of New York. Respondent is an entity duly incorporated under the laws of the State of Delaware, with its principal offices in the City of Yonkers, in the County of Westchester, State of New York. Because of the fact that the transaction took place in the County of Westchester, the location of the demised premises, venue was lodged and this action was heretofore commenced in Supreme Court, Westchester County, State of New York.

In the spring of 1999, difficulties arose, giving rise to the claims that form the basis for the commencement of the instant action. It is alleged that the lease was wrongfully breached, culminating in the subject petition, brought on by order to show cause, signed by Hon. James Armitage, a Justice of the Supreme Court, dated November 3, 1999.

In an affidavit of B. Adelbert Gruner, dated December 15, 1999, counsel argued that the provisions of the lease were ambiguous and should therefore be construed against the draftsman of the lease. On January 25, 1999, Supreme Court granted partial summary judgment. The Appellate Division reversed, concluding that there were questions of fact, based on the doctrine set forth in 67 Wall St. Co. v Franklin Natl. Bank (37 NY2d 245, 249).

☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆

This narrative leaves the reader confused and frustrated.

1. Who is the landlord and who is the tenant? The phrase "leased office space" is ambiguous. Landlords lease or rent space; so do tenants.

2. "Respondent leased" adds to the confusion. In certain proceedings the parties are referred to as petitioner and respondent. If the petitioner wins at the first level, petitioner becomes the respondent on appeal to the Appellate Division. If the Appellate Division reverses, the parties switch designations and respondent at the Appellate Division is the appellant at the Court of Appeals. Here, the reader can't tell who is the respondent. On an appeal, if someone is merely called "respondent," we are uncertain as to who won below, and who is appealing. Here, because we are still uncertain of who is the landlord and who is the tenant, the references to respondent are all the more bewildering. In some jurisdictions, there are appellants and appellees. We are not that fortunate; we have appellants and respondents. Because of the potential for confusion, "respondent" belongs on Susan McCloskey's list of bad words.

3. Who is claiming a breach of the lease? "The lease was breached" is in the passive voice, and we cannot tell.

4. "Counsel argued" or "it is alleged" are unhelpful phrases that frustrate the reader. Counsel for whom? Who is alleging? Subject to appropriate exceptions, it is clearest to refer to the party's name or to "the bank" or "the Town Board," or "the wife." In criminal cases, "the defendant" and "the People" are the best designations.

5. "Supreme Court granted partial summary judgment." Who sought it? Summary judgment for what? And to whom?

- It is better to say drafter than draftsman.
- All the talk about place of incorporation and venue is irrelevant and distracting.
- Check the dates. January 25, 1999, is obviously wrong. The decision cannot precede the motion.

☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆☆

ls *rewritten:*

On August 3, 1995, Mycroft Megachip, as landlord, entered into a ten-year lease vith Franco-Midland Hardware Co., as tenant, for the rental of office space at 221-B Fulton Avenue in White Plains. Claiming that Franco-Midland breached the lease by subletting the premises to a third party, Mycroft brought this proceeding to evict Franco-Midland and obtain damages for the breach. Citing 67 Wall St. Co. v Franklin Natl. Bank (37 NY2d 245, 249 [1975]). As landlord, Mycroft argued in the courts below that the lease provision should be construed strictly against the drafter of the lease—here, the tenant.

Supreme Court awarded Mycroft partial summary judgment on the issue of liability, leaving open only the question of damages. The Appellate Division reversed (*citation*), concluding that there were questions of fact as to certain alleged subsequent modifications of the lease. Mycroft has appealed to this Court.

2005

BRIEF WRITING AND ORAL ARGUMENT IN APPELLATE PRACTICE

By ALBERT M. ROSENBLATT
Judge, New York Court of Appeals

It is well known that time and advice are a lawyer's stock in trade. To this I would add, certainly in an appellate context, the lawyer's use of words.

Oral argument and brief writing are forms of communication. If the communication is clear and orderly, the reader will grasp the advocate's position. A good product is lucid, lean, and crisp. We get many briefs and arguments of that kind. Unfortunately, other presentations, bent perhaps only on content, are ponderous and disorganized, burdening the reader with the job of ferreting out what is important.

These concerns go beyond grammar and style. Poor style or improper punctuation are a hindrance to the reader, but may be overcome. On the other hand, a brief that is written with good grammar and style will be an insurmountable frustration if it fails to orient the reader as to what the appeal is about.

The suggestions concerning orientation relate not only to the brief's introduction, but to its content. Throughout this article I have tried to identify other considerations that go into brief writing, notably, what to include, and how to include it, in a way that best informs the reader.

I. ORIENTATION

A clear orientation marks the difference between a brief that is either joyful and informative, or dark and incomprehensible. From this, all else follows. Principles of law

ıd detailed factual accounts are of little value to a judge who is not told at the outset hat the parties are seeking, and why.

A good appellate advocate will note a critical difference between oral argument nd brief writing. In contrast with some past practices, appellate judges in New York ›day will have read the briefs before the oral argument. The brief, therefore, is the ıdges' introduction to the case, and a talented brief writer begins with that in mind. It ıkes planning and knowledge of one's audience. As New York's Chief Judge Judith S. ‹aye suggests (Callaghan's Appellate Advocacy Manual, John W. Cooley, ed.), "An ffective brief is fully thought through before a word is set to paper."

A clear orientation is a preview, a concise road map for a "naive" reader who at hat moment is being treated for the first time to an account that the writer may have ived with for days or weeks.

An introduction or orientation of this type may, more often than not, be done in ıbout a page. If the orientation is not supplied, or if it fails to inform the reader neaningfully, the reader is soon thrust into a sea of facts and dates without an anchor. The reader, the judge, is unable to differentiate between critical facts and subordinate facts. A concise, meaningful orientation helps the judge process the torrents of information that follow.

CIVIL CASE APPEALS

Here is a sample of a clouded, unhelpful, introduction in a civil case:

FACTUAL AND PROCEDURAL BACKGROUND

This action was brought by plaintiff-appellant Holmbjorn Sigerson against defendant-respondent, a facility duly incorporated under the laws of the State of Delaware and acting under the name and style of Hilton-Cubitt, as well as the defendant-respondent United States East Coast Athletic Association. Because of the fact that Hilton-Cubitt is owned by a New York State parent corporation (Garrideb, Inc.) and because Hilton-Cubitt does business in New York, venue was lodged and the aforesaid action commenced in Supreme Court, Westchester County, the residence, at all times relevant herein, of the plaintiff-appellant herein.

Prior to trial, both defendants-respondents had moved to dismiss the action by notice of motion dated October 8,2004. The motion was opposed by the plaintiff-appellant who submitted his affidavit dated December 28, 2004, a former employee of defendant-respondent Hilton-Cubitt. The court, in its order dated January 20, 2005, determined that the case should not be decided as a matter of law, owing to the existence of factual questions, but did authorize defendants-respondents to renew the motion at the conclusion of the proof, at trial. On March 9, 2005, the motion was renewed, at which point the court granted it, holding that, as a matter of law, no claim was established. The ruling was duly objected to, thus preserving the issue for appeal.

* * * * *

There then follows a statement of issues in the form of "Questions Presented."

1. Did the trial court fail to deny defendants-respondents' motion?

   Plaintiff-appellant contends that the answer to this question is in the affirmative.

2. Did the proof at trial reveal the existence of a question or question of fact? Plaintiff-appellant contends that the answer to this question is also in the affirmative.

Although the stilted, legalistic style of the introduction is far from a model of good writing, it does set forth facts. But as an orientation to an appellate judge, the account has no value. What is this case about? The questions presented are indistinct. Is it contract? Negligence? A minority stockholder's suit? A warranty? Anti-trust? It could be anything.

* * * * *

There then follows a factual narrative. We cannot assess it because we haven't context. We are unoriented if not disoriented.

THE FACTS

The first witness called was Francis Carfax who testified that on March 13, 2002, he was an employee of Hilton-Cubitt, which operated a ski area approximately five miles from the center of the Village of Paddington. He left work at approximately 6:45 p.m. after seeing to it that the lift apparatus was shut down (R 118) for the night. As part of her routine, she examined each chair on the lift, and the race gates, to be sure that the equipment was in tact. She then reported to her supervisor, Maud Bellamy, that the main power switch was functioning properly, and that the area was in shape for the skiing and racing activities scheduled for March14, 2002 (R 120).... (It continues).

At this point, we are beginning to get the idea that the case has something to do with skiing; maybe there was an accident. We are given dates. Are the dates

important? If the case involves the statute of limitations, the dates are critical, otherwise less so. We are told that Carfax left work at 6:45 p.m. Should we mark that fact? Does nightfall have anything to do with this? As we read, we still do not know what is going on. We are getting cluttered.

Eventually we will find out what is at stake, but we must do so *in spite of the brief* Consider the following orientation instead:

As Rewritten

INTRODUCTION

In this personal injury action, the plaintiff-appellant, Holmbjorn Sigerson,a professional ski racer, was injured when he crashed into a slalom pole during a ski race. In his first cause of action, he claimed that the Hilton-Cubitt's ski area personnel were negligent in the way they set up the slalom poles. He also asserted negligence against the United States East Coast Athletic Association, which authorized the race, and devised the rules and the racing course layout.

At the close of the case, the court dismissed these causes of action, holding that the plaintiff, as a professional racer, assumed the risk. At issue is the extent to which a pro racer's collision with a slalom pole is a risk that inheres in the sport, as against plaintiff's claim that the slalom poles used during this race were blatantly defective, and that the defendants knew of the condition of the poles but did not inform plaintiff of their hidden hazards.

The other causes of action relate to the defendants' failure to secure prompt ıedical help for the plaintiff, after the accident. We submit that the court erred when it ismissed the plaintiff's complaint. We seek a reversal of the judgment and a new trial.

* * * * *

In light of what we know, go back to the first *Factual and Procedural Background* aragraph, on p. 23 and see what it contains and what it lacks. Facts there are, but if ıe examine them one by one we see that these "facts" serve only to clog the reader's ıind with a plethora of dates and corporate entities upon which nothing turns.

The questions presented might also be sharpened, as follows:

1. Did the plaintiff, as a matter of law, assume the risk of being injured when colliding with a defective slalom pole during a ski race? We say no.
2. Did the defendants fail to secure reasonable, prompt, medical assistance for the plaintiff after the accident? We submit that this claim presented a question of fact for the jury, and that the court should not have dismissed the complaint.

CRIMINAL CASE APPEALS

The same considerations are true for criminal case appeals. Examine the following sample introductory paragraph, and ask yourself whether you can tell what the appellate *issues* are.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant-appellant was tried jointly with co-defendant Reginald Musgrave, charged with two knife point robberies committed on January 2, 2003 and January 5, 2003, in violation of Penal Law Section 160.10(1) at the residences of Roger Prescott and Mary Morstan, respectively, both of whom reside in the Whitehall section of Queens County. Upon his arrest, on February 8, 2003, defendant was allegedly in possession of a knife and was charged with Criminal Possession of a Weapon in the Second Degree, in violation of Penal Law Section 265.01(2). Before trial, Supreme Court conducted a combined Huntley/Suppression/Dunaway hearing and by order dated June 12, 2003, found defendant's statement admissible at trial. The defendant is not challenging so much of the Court's decision as deals with the suppression of the knife. Following the verdict, the defendant was sentenced as a second felony offender, to 7 ½ to 15 years.

There then follows a statement of issues:

QUESTIONS PRESENTED:

1. Was defendant's guilt proved beyond a reasonable doubt? Defendant-appellant contends that this should be answered in the negative.
2. Did the hearing court improperly find that defendant's statement was admissible into evidence? Defendant-appellant contends that this should be answered in the affirmative.
3. Did the court improperly refuse to grant defendant's motion for a mistrial? Defendant-appellant contends that this should be answered in the affirmative.

The questions and the *"Factual and Procedural Background"* do almost nothing to aid the appellate judge. In the first sentence the writer refers to a co-defendant, but gives no disposition of the co-defendant's case. This is a grave and perilous omission. Next, dates are given, along with names and addresses. This is "factual," and may be exquisitely accurate, but still does not direct the court to the points on appeal. Then there is mention of a mistrial. We do not know why the defendant sought one. The writer then refers to a non-challenge, and, lastly, that sentence was imposed.

We are then presented with an overly detailed factual account that we are unable to analyze:

THE FACTS

At the Huntley/Suppression/Dunaway hearing Patrolman C.F. Ricoletti testified that on February 8, 2003 he was on radio patrol while on duty at the 13th Precinct in the County of Queens (H 19). At 10:50 a.m., in the forenoon of that day, he received a dispatch telling him that a red 1981 Mustang automobile, bearing license plate number 443-CR, was seen leaving Simpson's Restaurant at a high rate of speed (H 20). He approached the intersection of Crooksbury Hill and Deep Dene Streets when he spotted a 1981 Mustang (H 21). With him, in the said vehicle, was his partner, John Darme, who had joined him at 10:00 a.m., to continue *through* the shift until 6:00 p.m. Ricoletti described the Mustang as having a "brownish-rust colored tint " Ricoletti ascertained from headquarters that the car was reportedly stolen. He saw the driver (the defendant), who was dressed in a blue sweat shirt, bearing lettering of a college, which he could not make out. The driver had a beard (H 22), shaped like a "goatee,"

and long sideburns. In the passenger seat he saw another male, wearing sunglasses (H 23), etc., etc., etc.

* * * * *

What have we here? We are awash in facts up to our eyeballs, but we cannot see. Are the times relevant? (As it turns out, no.) Is the college sweat shirt important? (As it turns out, no.) Is the car model and license plate material? (No, as we shall see.) We are being swamped, and we are uneasy.

Consider, instead, the following:

INTRODUCTORY STATEMENT

The defendant was indicted, tried, and convicted of two knife point robberies jointly with co-defendant Reginald Musgrave, whose conviction was reversed by this court on July 25, 2000 *(citation*).

When defendant was arrested and questioned by the police, he had an open "adjournment in contemplation of dismissal" (ACD) in Criminal Court. Defendant claims that when he was brought to the station house he told the police of the ACD and asked about the availability of his lawyer. We contend that the police proceeded to interrogate the defendant in violation of his expressed right to counsel, and that his purported confession should have been suppressed.

The defendant also contends that the prosecutor, while cross-examining the defendant, violated the court's *Sandoval* (34 NY2d 371 [1974]) ruling, so as to warrant a mistrial, by inquiring into defendant's 1990 youthful offender adjudication. Moreover, the defendant's guilt was not proved beyond a reasonable doubt. The only testimony

elating to the robbery charges came from the alleged complainants, notably, drug addicts who were intoxicated at the time of the alleged crime and while testifying.

II. CHRONOLOGY

At times, a labored recitation of dates is not only unnecessary, but distracting. An irrelevant date is nothing more than a burden on the court. There are times, though, when dates are critical. There are also cases with tangled procedural histories that may bear on the appeal. The following is adapted from a brief. It is long and belabored. The facts are there, but the jumble of dates frustrates the reader:

A judgment of foreclosure and sale was entered on March 20, 1999, upon the motion of plaintiff-respondent's attorney, Joyce Cummings.

Defendant Vincent Spaulding has appealed from the judgment. On May 9,1999, this court denied defendant Spaulding's motion for a stay in the sale of the premises.

On October 23, 1991, the defendant Spaulding, a real estate management corporation, purchased the premises known as 221-B Baker Street in Hewlett from Mawson Holding Corp. (hereinafter Mawson) which later assigned the mortgage to the plaintiff 840 Appledore Corporation (hereinafter 840) on July 31, 1996.

On January 13, 1997, 840 brought the within foreclosure action, which also sought appointment of a receiver, when Spaulding's failure to make payments triggered the mortgage's acceleration clause. On March 18, 1997, Justice DeNide appointed Sebastian Moran receiver. Spaulding then brought an application to vacate the receivership via an order to show cause which was denied by April 6, 1997 order of Justice DeNide.

On June 27, 1998, this court dismissed Spaulding's appeal from the order of Justice DeNide, entered August 4, 1997, which, upon Spaulding's default, granted 840's motion to appoint a referee to compute the amount due on the mortgage, and denied Spaulding's motion to deem its answer and counterclaim served nunc pro tunc.

In a companion appeal, the Appellate Division, on May 13, 1998, reversed an order of Justice DeNide dated May 13, 1997 which had imposed sanctions of $3,000 on Spaulding for frivolous motion practice, finding that the court lacked the inherent power to impose such sanctions (*citation*). The action, *supra,* brought by Spaulding against Mawson had sought damages alleging false and fraudulent representations made at the time of contract, and an injunction enjoining assignment of the mortgage.

On October 20, 1996, the court (Rowbottom, J.) had dismissed with prejudice the TRO which had been granted by Mycroft, J., enjoining the assignment of the mortgage and any action to foreclose the mortgage.

On January 14, 2000, this court denied Spaulding's motion to reargue the dismissal of the appeal.

On April 24, 1999, this court had found that the appointment of a receiver for the property in question was proper.

While the above appeal was pending in this court, Spaulding brought a suit in Federal Court challenging the constitutionality of the provision of Real Property Law Section 254(10) which allows ex-parte appointment of a receiver. The Eastern District Court dismissed the action, and the Court of Appeals for the Second Circuit affirmed on May 15, 1988.

Consider employing a chronology, as an appendix. Be sure to tell the reader, arly on, that there is a chronology, and where it is located.

CHRONOLOGY

10/23/91	Defendant Spaulding purchases property from Mawson.
7/31/96	Mawson assigns mortgage to plaintiff 840.
10/20/96	Rowbottom, J., dismisses TRO of Mycroft, J., by which Mycroft, J. had enjoined foreclosure.
1/13/97	Plaintiff 840 brings foreclosure action.
3/18/97	DeNide, J. appoints Dodd as receiver.
4/6/97	DeNide, J. denies defendant's motion to vacate receivership.
5/5/97	Defendant's answer.
5/13/97	DeNide, J. imposes sanctions on defendant.
8/4/97	DeNide, J. order appointing referee to compute.
5/13/98	Appellate Division reverses DeNide's order of 5/13/85 (_AD2d_).
6/27/98	Appellate Division dismisses defendant's appeal from 8/4/85order in that it's an appeal from a default judgment (AD2d_).
[1]10/25/98	Order of Denide, J. denying defendant's motion to vacate DeNide's 8/4/85 order.
10/28/98	October 25, 1998 order entered.
2/14/99	Defendant's instant appeal perfected.
[2]3/20/99	Judgment of foreclosure entered.

[1]Order *appealed from.*

[2]Judgment, which includes the order (10/25/98) *appealed from.*

4/24/99 Appellate Division finds appointment of receiver proper (AD2d_)

5/9/99 Appellate Division denies defendant's motion for stay of foreclosure sale.

1/14/00 Appellate Division denies defendant's motion to dismiss the appeal (_AD2d_).

5/15/00 Second Circuit affirms dismissal of defendant Spaulding's federal action (_F2d_).

* * * * *

We are able to see that the order appealed from is subsumed in the judgment, so that the appeal is from the judgment. There is no appeal from the order. This emerges from a morass of dates and proceedings. The chronology helps identify relevant dates.

III. INCLUSION OF MATERIALS

If there is a relevant statute or regulation, reproduce it in the brief. This calls for judgment. Obviously, the brief would be swollen if every remotely relevant statute were reproduced. Bear in mind, though, that judges sometimes read briefs at locations other than offices or libraries and do not have ready access to law books or to the record.

If there is any criticism as to overly lengthy briefs it is, generally, not because statutes are included.

IV. THE DESIGNATION OF PEOPLE AND PARTIES

The following sample is an overblown legalistic description of people and parties:

While in front of her home at Grosvenor Square in the Town of Brewster, on March 15, 2002, the seven-year-old infant plaintiff herein, Isadora Klein, was struck by a vehicle having been driven by defendant third-party plaintiff, Grice Patterson (R 113). The use and operation of the vehicle was admitted. Negligence, however, was denied by the defendant third-party plaintiff, on the ground that the said vehicle was defective (R 115). It was asserted that his automobile, a 2001 Renault was equipped with brakes that were improperly manufactured and/or installed by Renault International, Inc. , and Renault, and not he, was liable therefor, as third-party defendant. By service of summons and complaint dated May 12, 2003, a fourth-party action was commenced, wherein Cardboard Box Co., Inc., the actual brake supplier, was named by the third-party defendant, as being at fault (R116).

The defendant, the third-party defendant, and the fourth-party defendant each cross-claimed against the other, leaving questions of fact for the jury as to whether and to what extent liability should be imposed on any or all of them.

* * * * *

Try this:

On March 15, 2002, defendant Grice Patterson, while operating his 1998 Renault, struck the seven-year-old plaintiff, Isadora Klein (R 113). Patterson, in a third-party action, impleaded the auto manufacturer, Renault, blaming it for defective brakes. Renault, in turn, in a fourth party action, blamed its supplier, the Cardboard Box Co., Inc. (R 115). The driver, the manufacturer, and the brake supplier cross-claimed against one another, creating questions of fact as to who was at fault and to what extent.

It is best to designate the parties by first identifying the legal status (e.g., plaintiff-appellant Cox & Co., [buyer]). It then follows that "Cox, the buyer, sought specific performance." It is also usually preferable to refer to the Town, the Board, the Village, the City, the Department of Health, etc., rather than respondent-intervenor-appellant, etc. (e.g., "The trial court directed a verdict against the Village.").

Similarly, refer to "the bank," "the wife," "the husband," "the doctor," "the hospital." Although there is nothing legally or stylistically wrong with the words "insurer" or "insured," they create problems because that are too easily (and too often) switched, owing to typographical errors or oversights. An "insurer" is more clearly referred to as "the carrier" or "the insurance carrier." An "insured" may be a "policy holder."

At times, proper names will help clarify. There are obvious exceptions: Often it is clearest to simply say "the plaintiff." In a single-defendant criminal case, it is obviously better to say "the defendant," than "Jones" or "Roylott." Use whatever is clearest. Almost always, terms like "respondent-appellant" are least clear.

There are other expressions or usages that should generally be avoided, such as words like "counsel" and "witness." "The witness said..." sometimes presents a case of identity. So, too, with counsel, as in "counsel argued...and opposing counsel retorted... " [which counsel?] Better to say "the hospital argued," the "City asserted," and so forth.

THE USE OF DESCRIPTIVE RECOGNIZABLE TERMINOLOGY

'LLUSTRATIONS FROM BRIEFS THAT ARE OVERWRITTEN	*IN MOST (BUT NOT ALL) INSTANCES, THIS IS ALL WE NEED:*
)n April 26, 2001, the lease was sent to he office of plaintiff-respondent's ittorney (T 18), after having been ;igned on that day by lefendant-appellant (T 24). Thereafter,)n April 30, 2001, the lease was signed)y plaintiff-respondent, by a duly authorized officer of plaintiff-respondent, lamely, Vice President Archie Stamford T 30).	The landlord signed the lease on April 26, 2001 (T-24). The tenant signed it on April 30, 2001 (T 30).
Following the entry of an order of support, plaintiff-appellant brought on a motion to correct an Income Execution pursuant to CPLR 5241 (R18), asserting in her affidavit that the court, in setting the amount of support, had made a "mistake of fact" in calculating arrears. The defendant-respondent's attorney made across-motion to correct, and submitted an affidavit in support thereof, averring that the calculations were inaccurate only to the extent that they were tabulated in a way that unduly favored plaintiff-appellant (R 51).	The wife moved (R18) to correct the Income Execution (CPLR 5241) , claiming that the court made a "mistake of fact" in calculating arrears due her. The husband cross-moved claiming that he overpaid (R51).

Appellate courts usually have page limitations in briefs. The reformulation results not only in greater clarity but a sizable gain in economy.

V. THE PASSIVE VOICE

The improper use of the passive voice is a serious drawback. It is not only stylistically poor, but often leaves the reader groping. Tom Goldstein and Jethro K. Lieberman in *The Lawyer's Guide to Writing Well* (McGraw Hill, 1989) emphasize this point. The passive voice is a construction that permits the writer (to the discomfort of the reader) to avoid referring to the person or thing that takes the action. "The lease was broken." But we are not told who broke it. The passive voice expressions on the left, adapted from briefs, convey uncertainty and incompleteness. Compare them with the active voice.

PASSIVE VOICE	*ACTIVE VOICE*
The contract was signed on March 12, 2005. [Who signed it?]	The buyer signed the contract on March 12, 2005.
It was argued that the adjournment had been sought twice. [Argued *by* whom?]	The plaintiff's attorney argued that she had sought the adjournment twice.
A motion for joinder was opposed. [By whom?]	The defendant Moriarty opposed the prosecutor's motion for joinder.
At 10 p.m. the car was returned to the defendant's girlfriend, after reading the agony column. [Who returned the car?]	After reading the agony column, Donald Melas returned the car to defendant's girlfriend at 10:00 p.m.

VI. PRONOUNS THAT CONFUSE

ILLUSTRATIONS OF UNCLEAR EXPRESSIONS	*PREFERRED*
The defendant then spoke with Hattie Doran whom Moulton identified as his girlfriend (R 77). [Who's girlfriend is he?]	The defendant then spoke with Hattie Doran, Moulton's girlfriend (R 77). OR The defendant spoke with Hattie Doran, who, according to Moulton, was *defendant's* girlfriend (R 77).
The plaintiff stated that he returned to Jefferson Hope's (R 301), had a "few drinks" with his friend, Wiggins, and drove off in his car (R 302). [Whose car?]	Plaintiff stated that he returned to Jefferson Hope's (R 301), had a "few drinks" with his friend, Wiggins, and drove off in Louis's car (R 302). OR ...in his own car.

When editing the brief check it for confusing pronouns. "She sent her another letter on April 7, 2005" can be confusing. "X sent Y another letter on April 7, 2005" leaves no doubts.

Occasionally, a lack of clarity as to the order of words, or as to who is doing what, may result in some entertaining offerings:

Presbury could not identify the person who hit him at trial.

Mortimer Tregennis testified that the injury occurred when a pole banged against the plaintiff's head, as he was placing it on the ground.

The car was driven by the defendant without steering capacity.

This case involves the liability of a landlord arising out of a defective boiler.

Jack Woodley was struck by the defendant who was riding on a horse with defective bifocals.

VII. JARGON and "BAD WORDS "

Most judges are not impressed with legal jargon. In an article entitled *Working With Words* (New York State Bar Journal, vol. 54, no. 3, p. 24'7), Herald Price Fahringer urged attorneys to cleanse their writings of those "awful idioms" that amount to no more than a gaudy show of erudition. Only the impressionable novice is impressed. At best, these idioms are stilted and archaic; at worst, they are redundant.

Susan McCloskey, a writing consultant who often works with attorneys, has compiled a list of what she calls "bad words" and "inflated phrases," along with the cure. The list epitomizes the field:

INFLATED PHRASES (and the words they are inflating)

at this point in time	now
by means of	by
by reason of	because of
by virtue of	by, under
despite the fact that	although
due to the fact that	because
during the time that	during, while
for the period of	for
for the purpose of	to
for the reason that	because
from the point of view of	to
have the capability to	can
in accordance with	by, under
inasmuch as	since, considering

in connection with	with, about, concerning
in favor of	for
in many cases	often
in relation to	about, concerning
in some instances	sometimes
in terms of	about
in the event that	if
in the nature of	like
on or before	by
on the basis of	because
on the grounds that	because
prior to	before
pursuant to	under
question as to whether	whether, the question whether
subsequent to	after
until such a time as	until
with a view to	to
with reference to	about, concerning
with regard to	about
with respect to	about

McCloskey also offers a number of instant editing devices that convert jargon into good writing:

Prune (or uproot) legalese.

Instead of: Pursuant to the Order of the Court, said defendant commenced his time in prison due to the fact that he had been held in contempt.

Try: Under the court's order, this defendant began serving time for contempt.

Don't bury the real verb in a noun phrase.

Instead of: give an extension to

Try: extend

If you're unnecessarily repeating words, phrases, or ideas, revise to eliminate the repetition.

Instead of: Decedent was only child and a widower, and had no offspring during his lifetime. Decedent died without siblings, spouse, or children, and therefore the decedent died without relatives to survive him.

Try: The decedent left no relatives.

VIII. DATES and CITATIONS

Perhaps it seems too obvious to urge that citations and dates be checked and double checked before signing off on the brief. If a citation is wrong we can, with some effort, usually locate the case. If a date is wrong it can throw the reader off course. It happens often enough as to merit our emphasizing it.

NEW YORK STATE BAR ASSOCIATION

EFFECTIVE BRIEF WRITING AND ORAL ADVOCACY

by

Hon. Thomas E. Mercure
Acting Presiding Justice
Appellate Division Third Department
Fort Edward

and

Hon. Edward O. Spain
Associate Justice
Appellate Division Third Department
Troy

October 2011

EFFECTIVE BRIEF WRITING

The brief is the essential component of the appeal. It is submitted for only one reason, to help persuade the court to reach the desired result. Anything about the brief that detracts from that end is counterproductive, and that includes distractions like excess verbiage, poor grammar, incorrect citations, spelling errors and inadequate margins.

If a judge finds that a brief is repetitive, contains irrelevant matter or is burdensome to read, he or she will reject it. Conversely, if the brief engages and holds the interest of the reader by telling an absorbing story and addressing the legal issues in a clear and logical manner, it will be read, however long it is.

Appellate judges are inundated with reading material and often read briefs at home, nights and on weekends. Judges should not be expected to read and re-read cumbersome sentences. They want to grasp the essence of the argument and get on to the next case. The experienced brief writer will present his or her argument as simply, concisely and clearly as possible.

The goal then is to hold the attention of the judge, establish credibility and ultimately persuade the judge that your position is correct.

OUR INSIGHTS AND SUGGESTIONS:

(1) The brief must be fully thought through before the writing begins. If you do not know your objectives and the points that you intend to make to achieve them, it is unlikely that the reader will either.

(2) At the top of the list of effective brief writing is a clear and concise presentation of the contentions. The brief should be no longer than is absolutely necessary to

make your points.

(3) The statement of facts is the most important part of the brief. It is the writer's first opportunity to relate the case to the court. No matter how much substantive law a judge may know, he or she knows nothing about the facts of the case until the appellant's brief is read.

(a) The presentation of the facts must be scrupulously accurate. Counsel should state the facts truthfully, without exaggeration, but in such a way as to permit or suggest the inferences that favor his or her side of the case.

(b) Counsel should avoid overstated or unwarranted conclusions which actually detract from the credibility of the brief.

(c) Unfavorable facts should not be ignored; if they are, rest assured that they will be brought to the court's attention – perhaps more tellingly – by the other side. The unfavorable fact should be put forward in the best possible light.

(d) In most cases, a chronological development of the facts is best; it is usually the easiest to follow and creates a realistic relationship between persons and events. However, the writer should always choose the organizational structure that leads to the most logical, clear presentation of the case.

(e) Subheadings should be used when the facts are lengthy in order to focus the reader's attention more closely. If beneficial to achieve clarity, an exhibit, diagram, chart or table may be reproduced and attached.

(f) Throughout the brief, use the same designation for the same party. This will make it much easier for the reader to follow your story. It is very confusing if one party – at various times within the same brief – is referred to as the plaintiff, the infant plaintiff, the appellant, the injured party, and by name.

(i) It is much clearer to say "the buyer" and "the seller" than "defendant-respondent" or "plaintiff-appellant."

(ii) In matrimonial and family law litigation, reference to the parties as "husband" and "wife" or as "mother" and "father" is often more helpful to a quick understanding of the issues and the parties than "appellant" and "respondent" or "plaintiff" and "defendant."

(iii) It is also usually preferable to refer to the "Town," the "Board," the "Village," the "City," the "Department" and the "Bank," rather than, for example, "respondent-intervenor-appellant."

(iv) Use the term "respondent" rather than the term "appellee."

(g) All factual assertions recited in the statement of facts should be followed by parenthetical record page cites. Where there is an original record and you have provided an appendix, you should always cite to the original record in addition to a page cite to your appendix.

(h) One of the more serious breaches of appellate decorum is to refer to facts or papers that are outside or "dehors" the record. It is a fundamental rule of appellate practice that the rights of the litigants are to be determined

based on what is in the record. Counsel do not help their case by attaching to their briefs items that are outside the record.

(4) The questions presented should be directly related to the point headings that follow in the argument portion of the brief. The point headings should be affirmative statements in answer to each question presented. Every part of the brief should be viewed as part of an integrated argument, making and re-emphasizing your points.

(5) The legal argument portion of the brief should be divided into separate points, each with its own heading.

(a) There is no need to repeat the statement of facts in the body of the legal argument.

(b) Ordinarily, the strongest point should be argued first and the remaining points made in diminishing order of strength. However, ease of comprehension is of equal importance and dictates that arguments be advanced in logical progression of thought.

(c) Do not overburden the court with a multitude of insubstantial points. If you have two strong arguments followed by a number of frivolous points, the judge may forget your best arguments by the time he or she arrives at the last point.

(d) Your objective should be to move the reader, smoothly and without distraction, to the inevitable conclusion that relief is necessary to correct the error or injustice of the result below, or that the result below was correct.

(e) A dignified and professional tone should be maintained. No matter how intense your feelings may be about what happened below, avoid sarcasm and other forms of intemperate and unwarranted attacks on opposing counsel or the court which not only are improper, but often counterproductive.

(i) Never accuse your opponent of lying or deliberately misstating the holding of a case. The most outrageous misstatements can be turned to your advantage in a professionally dignified manner.

(ii) Similarly, if your opponent indulges in absolutes ("There is no evidence..." or "it was undisputed that..."), the simplest and most effective way to torpedo his or her credibility is to quote the record evidence belying that assertion.

(f) Counsel must bear in mind that the function of an appellate brief is to assist, not mislead, the court and that they have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration (see Rules of Professional Conduct [22 NYCRRR 1200.0] rule 3.3 [a] [2]).

"(a) a lawyer shall not knowingly;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

(g) Always bear in mind the particular court you are addressing. When the appeal is to the highest court of the jurisdiction, it is a mistake to rely on

precedent alone. Be prepared to advance policy reasons why those precedents are (or are not) still valid.

(i) If the appeal is to an intermediate appellate court, such as the Appellate Division, you are less likely to prevail on an argument designed to show that public policy requires a change in the law.

(ii) An argument urging a change in the law should, however, be mentioned in your brief to an intermediate appellate court so as to preserve it.

(h) Case citations should always be to the official reports; a style manual should be obtained and followed; "string citations" – numerous citations strung together without discussion in support of the same position – should rarely be used. Citing and discussing two or three cases closely on point is more effective. Contrary cases should be distinguished, if possible.

(i) Footnotes are distracting and quotations are often overdone. Counsel should be cautious in the use of both devices.

(j) Care should be taken to make sure that all writing is gender neutral.

(k) If the brief refers to an esoteric text, administrative decision or court decision not readily available, the item cited should be reproduced and included at the end of the brief.

(l) The conclusion should state succinctly and clearly what you want the reviewing court to do and, where applicable, an alternative.

(m) Don't forget to <u>always</u> include a "<u>Table of Authorities and Cases</u>." All

citations must be accurate and, again, to official reports.

(6) A respondent's brief takes an approach substantially different from that of the appellant.

(a) The respondent's brief should not only answer the appellant's points – or state why it does not – but also present its own affirmative side of the case, on both the facts and the law.

(b) It is generally a mistake to accept appellant's statement of the facts or questions presented. In most cases, counter-questions or a counter-statement of the case should be prepared.

(c) The opinion below, if there was one, will usually provide important support for the respondent's position. Respondent, however, should not overlook the possibility that the trial judge reached the right result for the wrong reason.

(7) A reply brief by appellant should be limited to responding to new points or misstatements in respondent's brief.

(a) Sur-reply briefs are not permitted in any of the New York Appellate Courts.

(b) Likewise post-argument or post-submission communications to the court are not permitted unless they have been specifically requested or authorized by the panel.

SUMMARY - BRIEF WRITING

FIRST - You must know the record on appeal from cover to cover. As Thomas R. Newman states in his treatise on New York Appellate Practice – which we highly recommend – quoting Bacon, "Some books are to be tasted, others are to be swallowed, and some few to be chewed and digested." Newman goes on to say, "The proper handling of an appeal does not permit mere tasting or swallowing of the record; it requires that it be thoroughly chewed and digested." Know your record and do not misstate or overstate the contents of the record. Document crucial facts by page cites to the record and stay within the record.

SECOND - Keep the brief as simple and as short as you possibly can in the circumstances of the case. There is no reason – in 90% of the appeals that we hear – to test the rules on page limitations. Quite frankly, in most cases, a 15 or 20 page brief will do the job nicely.

THIRD - Selectivity in the number of points you raise is extremely important. Choose, at most, 3 or 4 of the strongest points and have sufficient confidence in them to withstand the temptation and, at times, the forceful recommendation of clients, to raise less compelling grounds.

FINALLY - No matter how intense your feelings may be about what happened below, a dignified and professional tone should be maintained. Attacks upon opposing counsel or the trial judge are improper and counterproductive.

You should therefore -

(1) Know the record

(2) Keep the brief short and simple

(3) Focus on the critical points

(4) Maintain a dignified approach

Note: See CPLR 5528 and 5529: "Content (and Form) of Briefs and Appendices" and the Rules of Practice of the court to which you are taking the appeal:

Court of Appeals 22 NYCRR part 500,

First Department 22 NYCRR part 600,

Second Department 22 NYCRR part 670,

Third Department 22 NYCRR part 800 and

Fourth Department 22 NYCRR part 1000.

EFFECTIVE ORAL ADVOCACY

The value of oral argument today is primarily in the opportunity it gives counsel to emphasize the essentials of his or her case and, through dialogue with the court, to answer whatever doubts have been left in the minds of the judges after reading the briefs.

The presentation must depend upon the judgment and style of each individual advocate and should be governed by the comfort level of the lawyer presenting. This makes advice about oral argument difficult, but there are several items that can be highlighted and stressed -

(1) First, should you argue or submit?

(a) In some cases, the choice is made for you by the rules of the court.

(b) In most cases, if appellant's counsel has the opportunity to argue, he or she should do so. Oral argument enables the judges and counsel to crystallize their focus by cutting through the mass of papers to reach the heart of the controversy.

(c) If you are a respondent, and the appellant intends to argue, you should be prepared to argue. What if you are a respondent and the appellant submits? In most cases, the respondent should not argue if the appellant submits.

(2) If permitted, the appellant should always reserve a minute or two for rebuttal – just in case your opponent misstates some fact or raises a new issue. The request for rebuttal time must be made at the opening of your argument.

(3) Counsel should always state his or her name and the party represented. Even if

we know you, state your name.

(4) Please don't simply rehash the brief. Don't read a prepared argument. Obtain and hold the court's attention and communicate with the members of the panel.

(a) Counsel should look not just at the Justice Presiding or the judge who authored a previous decision in your case, address each of the judges on the panel. Speak up. Wake up the court with an opening statement of what the appeal is about in a manner that will stimulate some questions.

(b) Stay behind the lectern. You are not trying a case before a jury and should not be pacing back and forth.

(c) Remember, in this era of the "hot" or well prepared bench, you should assume that the judges are familiar with the facts, and have generally read the briefs and – at least – some of the record and the key cases cited. Make your argument with this in mind.

(i) You need not devote much time to a statement of the facts, but be prepared with one so you can answer questions and comment upon any liberty taken by the other side with the record.

(ii) Should questions from the bench suggest that a judge is not well prepared or confused about a factual issue, respectfully explain the relevant facts.

(iii) Lead with your best points. Don't begin oral argument by listing

your points or correcting errors in your brief.

(iv) Don't try to argue every issue in your brief. Focus on one or two and rely on your brief for the rest.

(v) Don't waste time with full citation of case names or quotes from decisional law.

(d) If you are asked a question, do your best to answer it immediately; don't say "I will get to that later." The question was obviously important enough to the judge to cause him or her to interrupt your argument. It should be answered at once.

(i) If the question from the bench seems to indicate disagreement with your position, take the opportunity to emphasize your position and engage the court in further dialogue.

(ii) You must be absolutely candid in answering questions, even if the answer covers something you would rather not have discussed.

(iii) If you do not know the answer to a question, or have not previously thought about your case in the context of the question, do not be afraid to say so.

(iv) Before you make any concession, be sure you fully understand the question and all of its implications. If you do not understand a question, politely ask the judge to explain it.

(v) If you deem a question from the bench irrelevant, you should answer it anyway and then respectfully explain why you believe it is

not relevant.

(vi) When you have answered a question – move back to your argument. Do not say, "Does that answer your question, your honor?" If you haven't answered to the court's satisfaction, you'll soon know.

(5) Be flexible – If some of your allotted time is used up in a debate with a member of the court, be sure you have an alternative argument to touch upon the important issues you may not have had the opportunity to fully discuss.

(6) Don't lecture the court. For example, you need not tell the court that "summary judgment is a drastic remedy."

(7) Be civil. Avoid personal attacks on the trial judge or your adversary. While your adversary is arguing, refrain from facial expressions demonstrating disbelief or other emotions. If you refer to any of the judges on the court by name, be sure you know how to pronounce his or her name correctly. "Your honor" is fine, and safe.

(8) One difficulty that counsel may face is that at times members of the bench may converse among themselves. If this happens, simply continue with your argument, addressing it to those members of the bench still following you.

(9) Be mindful of the time allotted. Just because you requested a certain amount of time does not mean that you are under any obligation to speak that long. The court will not be disappointed if you finish your argument before your

time has been used up and prolonging the argument after your points are made may dilute its impact.

(10) Even though argument time has been reserved, if the respondent's points have been favorably covered during the appellant's argument by questions from the bench, the respondent should not hesitate to advise the court that he or she will rely on the brief unless there are any questions.

(11) Remember – the best arguments are conversations between lawyers and judges. Members of the court were at one time practicing lawyers just like you who enjoy dialogue with well-prepared lawyers. In the final analysis, if you advance a good part of your prepared argument and converse intelligently with the court without conceding your case away, you have likely made an effective legal argument and added something to your brief.

SUMMARY - ORAL ARGUMENT

FIRST - Time and genuine effort must be spent in preparing for the argument. If you are unprepared, it will be apparent to the court. You must be able to find relevant material in the record and you should review and be familiar with each of the cases relied upon in the briefs.

SECOND - Hold the court's attention by focusing on the critical issues. Lead with your best points and don't feel that you must argue every issue in your brief. Assume that the court is well prepared but be flexible and prepared to relate the facts.

THIRD - Answer questions directly and at once, even if it means you have to deviate from

your carefully prepared outline of the argument. Be absolutely candid in answering questions, but do not let questions intimidate you into surrendering a position you believe to be correct.

FINALLY - Be very careful not to exceed the allotted time. End your argument on a high note. Prepare a brief conclusion that summarizes the essence of your argument, which you can give in about 30 seconds in the event you run out of time.

You should therefore -

(1) Thoroughly prepare

(2) Focus on the critical issues

(3) Answer questions immediately, but carefully

(4) End your argument on a high note within the allotted time

Note: Consult the Rules of Practice of the Court to which you are taking the appeal regarding oral argument.

Court of Appeals 22 NYCRR § 500.18

First Department 22 NYCRR § 600.11 (f)

Second Department 22 NYCRR § 670.20

Third Department 22 NYCRR § 800.10

Fourth Department 22 NYCRR § 1000.11

Final Note

We also strongly recommend that, in your preparation, you consult the following New York State Bar Association Publications:

1) "Practitioner's Handbook for Appeals to the Appellate Divisions of the State of

New York" (Alan D. Scheinkman, Esq. and Professor David D. Siegel [2d ed 2005]) and

2) "Practitioner's Handbook for Appeals to the Court of Appeals" (Hon. Alan D. Scheinkman and Professor David D. Siegel [3d ed 2007]).

BRIEF WRITING AND ORAL ARGUMENT

by

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NYSBA Appellate Practice Program
Albany, NY · December 8, 2009

Brief Writing and Oral Argument

Cynthia Feathers, Esq., Saratoga Springs, NY
Denise Hartman, Esq., New York State Attorney General

Brief Writing: 15 minutes of lecture, 10 minutes for questions
Oral Argument: 15 minutes of lecture, 10 minutes for questions

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I. The Appellate Brief

A. The most important element of the appeal.
B. The goal: persuading judges to reach the desired result.

II. Before Writing the Brief

A. Consider using appellate counsel for objectivity and an appellate perspective.
B. Carefully review the record on appeal to identify viable issues.
C. In general, errors must be preserved, have a prejudicial impact.
D. Do not advance every conceivable argument, only strong ones.
E. Do thorough legal research – statutes and cases cited in trial court; Practice Commentaries and treatises for context; seminal and controlling authority that explicates the law; similar cases to analogize; dissimilar cases to distinguish.
F. Do an outline.

III. Statement of Facts

A. Often the most important section of the brief.
B. Strive for the ABC's: accuracy, brevity, and clarity.
C. Generally, it works best to provide a chronological narrative of facts needed for background and for support of your argument.
D. This section should be easy to understand and compelling.

E. While the Statement of Facts should not be argumentative, it is a piece of advocacy: carefully choose the facts to present and to emphasize.
F. Be honest: reveal bad facts, but find a way to mitigate them.
G. Decide on a simple way to characterize the parties, and use the labels consistently throughout, such as "husband" and "wife" or "landlord" and "tenant" or "the People" and "the defendant."
H. Appellate courts seek a dignified, professional tone; eschew a shrill or emotional tone, and do not make ad hominem attacks or refer to opposing counsel by name.
I. Cite to the record for every sentence.
J. If you are using the appendix method, create the appendix and insert the new page references.

IV. Argument

A. Usually the strongest point should come first.
B. Set forth controlling authority.
C. Choose key, favorable cases; analogize them to your case.
D. Distinguish important adverse cases.
E. Limit the use of string cites, block quotes, and repetitive facts.
F. Generally, do not add any new facts.
G. Especially in a high court, make policy arguments.
H. In the conclusion section, set forth the relief sought.

V. Editing

A. If practicable, set aside your draft for several days to have a fresh view for editing.
B. Turn the raw draft into a polished, refined product that will persuade and delight busy and skeptical, busy judges.
C. Break up paragraphs into manageable blocks.
D. Make the opening of each paragraph the topic sentence and the last sentence a transitional one.
E. Break up long sentences into shorter statements.
F. Use the active voice and plain, but precise language.
G. No matter how complex the material, achieve clarity.
H. Add subheads to serve as sign posts.

VI. Respondent's and Reply Briefs

A. A respondent's brief should stand alone as an affirmative statement of why the challenged decision should be affirmed.
B. If the lower court result is right, but the reasoning is arguably wrong, consider advancing an alternate ground for affirmance.
C. A respondent should feel free to reframe issues, not merely defensively counter appellant's points.
D. Disclose adverse controlling authority missed by appellant.
E. Study cases cited by appellant; distinguish ones that matter.
F. Reply briefs should not repeat points made in appellant's main brief, but should pointedly and pithily respond to objectionable, material points in respondent's brief and help sharpen the debate for oral argument.

VII. Controversial Issues

A. Preliminary Statement – Should you include one? Should it provide only jurisdictional facts? Should it encapsulate the case and your arguments?
B. Questions Presented – They should be sufficiently neutral to be credible, but framed to capture your argument and standard of appellate review.
C. Summary of Argument – Required in federal appeals, but may be helpful as a roadmap in complex appeals in state courts.
D. Table of Contents – Topic headings or complete sentences? How much detail? If you use complete sentences as topic headings in your Statement of the Case and well-considered point headings in your Argument, the Table of Contents can also provide a roadmap of your case.
E. Font Size – Downstate courts require 14 point. But it lengthens your briefs in the upstate courts that have strict page limits. How low can you go?
F. Bluebook vs. NY Reports Style Manual.
G. Parallel Cites – Generally, cite to official reports only. When a case is unreported, should you cite to Westlaw or LEXIS or both?
H. Websites – Beware.

DO'S AND DON'TS OF BRIEF WRITING:

PERSPECTIVE OF AN

APPELLATE PRACTITIONER

by

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Albany

I. PREPARATION

A. Read the Record

B. Issue Spotting

1. Determine issues to be briefed.

2. Preserved?

II. OPENING/ANSWERING BRIEF

A. Goal

1. Persuade the Court that your argument is the correct way to resolve the appeal.

2. Persuasion should be done quickly.

B. Use of Preliminary Statement

1. Summary of argument based on concise statement of facts.

2. Set forth unifying theme for your argument.

C. Questions Presented

1. Fact specific.

2. Not too long.

D. Statement of Facts

1. Avoid common failings.
    a. omission of favorable facts;
    b. inclusion of unnecessary facts; and
    c. omission of bad facts.

2. Tell a "story" that is readable.

E. Argument

1. A doctrinal argument tells the Court that the law, whether embodied in the constitution (state or federal), statute or binding precedent, requires a certain result; and a fact centered argument analyzes the facts in light of governing law and attempts to persuade the Court the result below was proper/improper.

2. Develop through point headings.

3. Begin argument with your legal conclusion and then use precedent to support that conclusion, applying the facts to that law.

4. Anticipate counter-argument.

F. Conclusion

1. Summarize your argument in compelling fashion.

2. State the relief you want.

III. REPLY BRIEF

A. File

1. Unless there are good reasons not to.

B. Substance

1. Focus on replying to respondent's arguments.

2. Make it a stand-alone document.

IV. PRINCIPLES OF GOOD BRIEF WRITING

A. Clarity

B. Brevity

C. Candor

D. Citations

1. Avoid string-cites.

2. Use jump-cites.

3. Cite to your Department's case law.

E. Proof Read!!

ARGUMENT OF THE APPEAL

by

A. VINCENT BUZARD, ESQ.

Harris Beach PLLC
Rochester

CHAPTER 8

Argument of the Appeal

SYNOPSIS

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[8] Be Conversational
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§ 8.08 Rebuttal Argument
§ 8.09 Post-Argument Submissions

§ 8.01 The Importance of Oral Argument

[1] Never Submit an Appeal without Oral Argument

Oral argument is the only chance the lawyer has to speak directly to the judges deciding their case and to answer their questions, to focus their thinking and talk to them directly about the important issues. Without oral argument the lawyer does not know what part of the case the judges don't understand or is not clear from the briefs. The judges may have misunderstood something in the record or been concerned about an issue that the lawyer did not adequately brief; the judges may be troubled by the implications of the decision for future cases or for the industry in which the case arose. The memorandum prepared by the law clerks may be mistaken in some material respect or focused on the wrong issue. Simply to rely on the briefs is to attempt to talk to someone about an important issue by e-mail or letter rather than seeing them in person. In appeals, appellate advocates have the opportunity to do both and to submit without oral argument is to waive one of the most important rights a client has.

At any continuing legal education conference on appellate advocacy, at least one person inevitably asks judges whether oral argument still matters or whether cases are decided only on the briefs. The unanimous response from appellate judges at every level is always the same: yes, oral argument can make a critical difference in a case.

Nevertheless, many lawyers, particularly those who only occasionally handle appeals, approach oral argument with skepticism. If that view results in the lawyer either submitting the case without oral argument or not taking the argument seriously, he or she is doing the client a grave disservice. The mistaken view that oral argument does not matter may rest in part upon the fact that many times judges seem to have made up their minds before the argument starts, and that is often the case at first. However, the typical estimate is that oral argument can make a difference in 10 to 20 percent of cases.[1]

The perception among some lawyers that oral argument is irrelevant is directly contradicted by Justice Scalia and Bryan Garner who state that "this skepticism has

[1] Conversations with judges at continuing legal education conferences.

proven false in every study of judicial behavior we know."[2]

At the Supreme Court level, the typical view among many lawyers is that the Justices have already made up their minds because of the tone and content of their questions. However, Chief Justice Roberts describes his approach to many cases after having read the briefs as follows:

> I'm leaning this way, but I need a better answer to this problem. Or I'm leaning this way, but I'm worried about this case. Does it really seem to cut the other way? I'm leaning this way, but is it really going to cause this issue? So even when you're tentatively leaning, you have issues that you want to raise that give the other side a chance to sway you. Some cases, you go in and you don't have a clue. And you're really looking forward to the argument because you want a little greater degree of certainty than, you know . . . hard to tell. Other cases, you go in and there are competing certainties. The language sure seems pretty clear this way. It really leads to some bad results. What are you going to do? Or, yes, this precedent does seem to control, but I think this consequence is too troubling, or the Congress seemed to have a different idea in mind here, and then you've got the work that out. That's a much more typical situation going into argument.

There could not be a more compelling summary of why oral argument is of critical importance than this statement by the Chief Justice of the United States Supreme Court. The Chief Justice, after reading all the briefs and having all of his law clerks analyze the issues, still comes to cases where he is not sure which way he is leaning or is still having issues, or simply does not have a clue. Appellate advocates would have no way of knowing in advance what the Chief Justice of United States is puzzled by, unless they appear in front of the Court to argue. Of course, no one gives up a chance to argue in the Supreme Court, but the Chief Justice's description of his uncertainty about cases is surely true of the overworked appellate judges of New York who are trying to decide anywhere from 1,700 to 2,500 cases per year. The point is that there is no way to know what the questions are and what is bothering the court without going there.

Similarly even Justice Scalia, whom most people presume has his mind pretty well made up prior to oral argument, has stated the following:

> To begin with, you should know that oral advocacy is important, that judges don't often have their minds changed by oral advocacy, but very often have their minds made up. I often go into a case right on the knife's edge, and persuasive counsel can persuade me that I ought to flip to this side rather than the other side.[3]

An anecdote from the Fourth Department also illustrates the importance of arguing and not submitting. In early 2000, Justice Eugene Pigott, Jr. (now an Associate Judge of the Court of Appeals) described an appeal where he and another justice had disagreed in their pre-argument discussions on how the appeal should be decided. The

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[2] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, 139, (Thompson/West 2008).

[3] Bryan A. Gardner, *Interviews with United States Supreme Court Justices: Antonin Scalia*, 13 The Scribes J. Of Legal Writing 5, 51 (2010).

other justice indicated that if Justice Pigott could get the attorney to make certain concessions or limitations on his or her position during oral argument he would join Justice Pigott's position.

Apparently the day before, or the day of, oral argument, the attorney, who had requested oral argument, decided to submit. When the case was called and the attorney was not present, the other justice simply looked at Justice Pigott and shrugged his shoulders. Without those concessions the other justice did not join Justice Pigott. Although there was no guarantee that the attorney would have made the concessions, he or she may have done so easily and the impression given was that a different result would have occurred. The lesson is that the opportunity was lost.

Some lawyers appear for argument only to say, "All my points are in the brief and unless you have any questions, I will sit down." That approach is essentially the same as submitting, and is a waste of the money the lawyer spent for gas to get to court. The lawyer is really saying to the court, "I am not especially prepared and I have not taken this very seriously." There is no justification for asking the court for questions when an attorney is representing the appellant and must obtain a reversal in order to win. The chance of obtaining a reversal is generally low, so why lower the chances even more?

In representing a respondent, even if the court appears to be likely to affirm, the lawyer should still give a short argument. This will give the court time to think of questions or key points, or to show they may not be with you after all.

An additional function of oral argument is to dispel the negative implication that arises from a submission. Counsel should not let the court think the matter is insubstantial, that the attorney or the client does not care enough about the appeal to argue, or that the attorney is not "up to" oral argument. Any one of these perceptions will, to a greater or lesser extent, adversely affect the chance of success.

Presiding Justice Scudder of the Appellate Division Fourth Department in discussing the importance of oral argument tells of a discussion among judges about an argument which was about to occur. One of the judges said that he had a number of questions for one of the attorneys and was eager to ask them. When they went on the bench, though, the lawyer was not there. The judge's basic attitude after that was, "If he doesn't care, then why should I?" That implication alone is sufficient reason never to submit.

The point is that oral argument provides the opportunity to speak directly to the judges to clarify the record, to answer questions, and to focus the case on the issues which are important. To waive that opportunity, whether by an outright waiver or by resting on your papers, is to waive a critical opportunity to win the case. At a trial, we certainly would not waive final argument even if we thought that the proof had gone in well. Maybe somewhere out there is a case which is such a sure winner that it does not require oral argument, but few appellate lawyers have the good fortune of having such a case. If the case is such a loser, then why was it appealed?

Furthermore to submit is to miss one of the most exhilarating aspects of appellate practice and perhaps of all practice. As Chief Judge Judith Kaye explains:

> Oral presentations demand all of a lawyer's personal and professional skills. They are

> a form of hand-to-hand combat—an opportunity to match wits, to be challenged and tested in public, and in the best of all worlds to triumph, with the client present and gavel-to-gavel TV coverage. Even now as a judge, I look forward to oral argument—perhaps even more so, since I no longer have to fear being embarrassed by the unexpected question.[4]

Any lawyer who cares about advocacy would not want to miss an opportunity to argue as described by Chief Judge Kaye. Therefore, never submit.

[2] What If Your Opponent Submits?

As the foregoing discussion demonstrates—NEVER SUBMIT! What happens, however, when opposing counsel advises, either during briefing or the day before argument is scheduled, that he or she intends to submit? How does that affect the attorney's decision? The easy, and correct, answer is that it should not affect the decision. *Do not let your opponent control your appellate strategy*. Not allowing your opponent to determine the strategy is particularly true for the appellant. Counsel for the appellant must persuade the court to reverse or modify the order or judgment of the court below. Obtaining a reversal is an uphill battle and counsel should not waive the last chance to answer the court's questions and persuade them even if the respondent waives oral argument.

If the appellant foolishly submits, the best practice is for the respondent to still appear to argue and launch into the main points of the case. The purpose is to make sure that the Court does not have questions and understands the case. If, after a brief argument, the court is not asking questions or makes clear that they do understand, then the respondent can stop arguing. The better practice for respondent is not to scare the court by saying what an interesting or novel case it is but rather simply treat it as a routine case, which is exactly what the appellant did by not showing up to argue.

§ 8.02 Preserving the Right to Argue

Each court requires that certain steps be taken to preserve the right to argue. The rules for the particular court in which the case is pending should be consulted. In the New York State Court of Appeals, the process of preserving the right to argue begins with the briefs, which must show on the cover either the time requested for argument or that the appeal is to be submitted. The name, address and telephone number of counsel who will argue also must appear on the cover of the brief. If a time request does not appear on the brief, the Court will generally allow no more than 10 minutes.[1]

In each of New York State's intermediate appellate courts, including the four judicial departments of the Appellate Division of the Supreme Court, the Appellate Terms and the County Courts, the name of counsel who is to argue must appear on the cover of the initial brief, most often in the upper right-hand corner, filed by each party.[2]

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[4] Hon. Judith S. Kaye, *Effective Oral Argument*, New York Appellate Practice (NYSBA) 218, 219 (1995).

[1] 22 NYCRR § 500.13(b).

[2] *See* 22 NYCRR § 600.10(d)(1)(ii) (First Department); 22 NYCRR § 670.10.3(g)(1) (Second

Generally, as in the Court of Appeals, only one counsel per party will be permitted to argue.[3] Application always can be made for an exception, and the rules of the Appellate Division, Second Department, expressly so provide.[4] Importantly, in this instance, the exception has not become the rule, and counsel should make such application only in the most compelling situations.

In the Appellate Division, First Department, counsel are required to consult and determine whether they wish to argue or submit. If they wish to argue, the clerk must be notified in *one* writing of the time desired for argument by each party. The court will not accept separate requests from each party desiring to argue. The writing must be in the possession of the clerk on or before the court's scheduled date therefore in that particular term. Failure to comply with this rule will result in the appeal being marked "submitted with respect to all parties."[5]

In the Appellate Division, Second Department, each party's main brief must set forth, on the upper right-hand section of its cover, whether the appeal is to be argued or submitted, the name of counsel who will argue, and "the time actually required for the argument."[6] If the party's main brief fails to set forth the appropriate notations with respect to time requested for argument, the appeal will be deemed to have been submitted without oral argument by the defaulting party.[7] If a party's main brief is not filed in time and late filing of the brief is permitted by the court, that party will be deemed to have submitted the case without argument, despite any contrary notation on the cover of his or her late brief, unless otherwise authorized by the court or a justice.[8]

In the Appellate Divisions for the Third[9] and Fourth[10] Departments, the practice is for counsel to indicate on the cover of the brief whether the appeal is to be argued or submitted and, if argued, how much time is requested. After an appeal is perfected in the Fourth Department, a scheduling order will be mailed out by the clerk. Within 15

Department); 22 NYCRR § 800.8(a) (Third Department); 22 NYCRR § 1000.4(f)(4) (App. Div., 4th Dep't); 22 NYCRR § 640.5(a) (First Department, Appellate Term); 22 NYCRR § 731.2(a)(2) (Second Department, Appellate Term, 2d and 11th Judicial Dists.); 22 NYCRR § 732.2(a)(2) (Second Department, Appellate Term, 9th and 10th Judicial Dists.).

[3] *See, e.g.*, 22 NYCRR § 500.18(b); 22 NYCRR § 1000.11(a) (Fourth Department). If a party wishes to have more than one attorney argue the case, an advance request must be made to the clerk by letter with proof of service on each other party. 22 NYCRR § 500.18(b).

[4] 22 NYCRR § 670.20(e). If argument by more than one attorney is sought, an application must be made before the beginning of argument. Note that in the Second Department, a party who has not filed a brief may not argue the appeal.

[5] 22 NYCRR § 600.11(f)(1). The First Department rules do not specify the date by which this request must be received by the clerk. At the present time, the custom and practice is to require notification to the clerk no later than the day after respondent's brief is due, *i.e.*, 26 days before the start of the term.

[6] 22 NYCRR § 670.10.3(g)(1). This phrase may be taken to mean the time requested for argument.

[7] 22 NYCRR § 670.20(f).

[8] 22 NYCRR § 670.20(g).

[9] 22 NYCRR § 800.10(c).

[10] 22 NYCRR § 1000.4(f)(4).

days after the date the scheduling order is mailed, a party or his or her attorney must notify the clerk in writing of any dates on which counsel will be unavailable for argument during the term.[11] As it is frequently not an easy matter to adjourn oral argument, notifying the court of unavailability is a key consideration.

In the Appellate Term, First Department, in the absence of a notation on the upper right hand corner of the cover page of the brief that the appeal is to be argued, it will be marked "submitted," and oral argument will not be permitted.[12]

In the Second Department, the practice in the Appellate Term is the same as in the Appellate Division; in both civil and criminal appeals, the time request and the identity of counsel who will argue must appear on the cover of the brief.[13] Absent such information, the appeal will be deemed submitted without oral argument.[14]

There are certain instances where oral argument will not be permitted, regardless of any notation on the brief cover. Generally, no argument is permitted by filing an *amicus curiae* brief. This rule has been codified in the Second Department.[15] Oral argument is not permitted on applications for leave to appeal, either in the Court of Appeals or the Appellate Division. 22 NYCRR § 500.21(a) (Court of Appeals); 22 NYCRR §§ 600.2(d), 600.14(b) (Appellate Division, First Department); 22 NYCRR § 670.5(b) (Second Department); 22 NYCRR § 800.3 (Third Department); 22 NYCRR § 1000.13(a)(6) (Fourth Department); 22 NYCRR § 640.8(c) (Appellate Term, First Department). Nor is oral argument permitted on motions to reargue.[16] In the First and Second Departments, oral argument is permitted in transferred Article 78 proceedings.[17] In the Third and Fourth Departments, oral argument is not permitted in a transferred proceeding if the sole issue raised is whether there was substantial evidence to support the challenged determination.[18]

In the First Department, there is no argument of "non-enumerated" appeals except by order of the court.[19]

The Second Department has its own version of "non-enumerated" appeals, although not termed as such, in which argument is not permitted without application to the court on the day the appeal is on the calendar, notice of intention of which must be given at least seven days earlier.[20]

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[11] 22 NYCRR § 1000.10(c).

[12] 22 NYCRR § 640.5(a) and (b).

[13] 22 NYCRR §§ 731.2(a) and 732.2(a).

[14] 22 NYCRR §§ 731.6(b) and 732.6(b).

[15] 22 NYCRR § 670.11.

[16] See the Chapter 10 in this treatise entitled "Reargument."

[17] 22 NYCRR §§ 600.11(f) and 600; 22 NYCRR § 670.20(a)(3).

[18] 22 NYCRR § 800.10(a); 22 NYCRR § 1000.11(c).

[19] 22 NYCRR § 600.11(f)(3). In the First Department, whether an appeal is noticed as enumerated or nonenumerated is determined by application of 22 NYCRR § 600.4(a), (b).

[20] 22 NYCRR § 670.20(c).

The categories of appeals in the Third Department in which no oral argument is permitted reflect that court's unique location in the state capital. Thus, absent leave of court, there will be no oral argument in appeals from the Workers' Compensation Board, the Unemployment Insurance Appeal Board appeals in criminal cases in which only the sentence is challenged and certain CPLR Article 78 proceedings.[21] Any party seeking permission for oral argument in any of these cases must submit a letter application, on notice to all parties, within 10 days after the filing of appellant's or petitioner's brief together with proof of service upon respondent, specifying the reasons why oral argument is appropriate and the amount of time requested.[22]

With respect to civil appeals, the Fourth Department only prohibits oral argument in appeals in criminal cases challenging the legality or length of the sentence imposed, Article 78 proceedings transferred to the court where the sole issue is whether there is substantial evidence to support the determination, and any other case in which the court determines oral argument is not warranted.[23]

Even if oral argument has been sought and permitted, if counsel is not present at the call of the calendar which occurs at the beginning of each session in the First and Second Departments, the appeal automatically will be marked "submitted."

Appellate courts have also adopted other methods to avoid or minimize oral arguments. Certain courts, for example, have procedures by which counsel can revoke their requests for oral argument.[24] The courts, too, have been known to put direct pressure on counsel to avoid oral argument. In one instance, it is said, after having heard appellant's argument, no sooner had the first respondent's counsel identified himself when the presiding justice remarked that it seemed to him that the decision below was well reasoned, well written and most convincing. As he spoke, he looked at his colleagues on the bench, and there were nods of agreement. He then asked counsel for the first respondent whether there was anything not in his brief that he wished to bring to the court's attention to indicate the correctness of the result below. Taking this rather broad hint, counsel stated that he would rest on his brief and sat down. Counsel for the second respondent then stood, identified himself and either undaunted by, or oblivious to, the immediately preceding colloquy, began his argument. Before he had completed his first sentence, the justice presiding interrupted and pointedly asked counsel whether he was prepared to snatch defeat from the jaws of victory. The desirability of oral argument notwithstanding, counsel took the hint and rested on his brief. Unanimous affirmance followed shortly.

§ 8.03 Time Allowed for Argument

In the Court of Appeals, maximum argument time is 30 minutes, and only one counsel is permitted to argue for a party. If no time request appears on a brief that

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[21] 22 NYCRR § 800.10.

[22] 22 NYCRR § 800.10(b).

[23] 22 NYCRR § 1000.11(c).

[24] *See, e.g.*, 22 NYCRR §§ 670.20(h), 731.6(c), 732.6(c).

requests oral argument, 10 minutes will be assigned.[1] As a practical matter, the court, through the clerk's office, determines how much time will be permitted. If some difficulty is encountered, the clerk will confer with the Chief Judge, and in the most unusual case, the Chief Judge will consult the entire court.

In a normal case, less than the requested time is allotted. Counsel can request additional time from the Court of Appeals for good cause, such as: the unusual importance of the case; a lengthy record; the need to address differing positions of a large number of adverse parties; or the complexity of the issues. Any such request should be made in a writing to the clerk on notice to all parties well in advance of argument.

In requesting time for argument, the practitioner should be cognizant of the admonition in the Court of Appeals rules: in requesting argument time, counsel shall presume the Court's familiarity with the facts, procedural history and legal issues the appeal presents.[2] To the extent there is any difference in time allotment, it is more likely that the appellant will be given more time than the respondent so that any necessary facts can be presented. In the case of multiple parties on one side or the other, it is not uncommon for the side with fewer briefs, especially if it is the appellant, to receive argument time equal to the total of all the adversaries' times. Notwithstanding the stated time limitations, if the judges wish to continue a line of questioning, they will do so until they are satisfied that their questions have been answered. This sometimes can lead to a return to the practice of years ago. For example, in *In re Rothko*,[3] oral argument continued until 9:00 p.m.

In the Appellate Division, First Department, on the argument of an enumerated appeal, unless the court orders otherwise, not more than 15 minutes is allowed to either side and only one counsel on each side will be heard.[4] Oral argument will not be heard in nonenumerated appeals except by permission of the court.[5] The definitions of enumerated and non-enumerated appeals appear in Section 600.4 of the Rules of the Appellate Division, First Department.[6]

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[1] 22 NYCRR § 500.13(b).

[2] 22 NYCRR § 500.18(a).

[3] *In re* Rothko, 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977). This was consistent with prior proceedings in that case. The trial, for example, took 89 days.

[4] 22 NYCRR § 600.11(f)(2).

[5] 22 NYCRR § 600.11(f)(3).

[6] This rule states:

(a) The following appeals are to be noticed as enumerated:

(1) Appeals from final orders and judgments of the Supreme Court, other than those dismissing a cause for failure to prosecute, for failure to serve a complaint or for failure to obey an order of disclosure or to stay or compel arbitration;

(2) Appeals from decrees or orders of the Surrogate's Court finally determining a special proceeding;

(3) Appeals from orders granting or denying motions for a new trial;

In the First Department, if more time is required for the presentation of the argument, any party may, for good cause, make a written request for additional time. Such a request must be delivered to the clerk before the day of argument.[7] Such requests are not welcomed. Indeed, before the call of the day calendar, the presiding justice often will tell counsel that seven or eight hours of argument have been requested, that the justices are familiar with the facts and that counsel should bear that in mind when advising the court how much time they will require.

In the Appellate Division, Second Department, not more than 30 minutes will be allowed for argument to each attorney who has filed a brief in appeals from: judgments, orders or decrees made after a trial or hearing; appeals from orders of the Appellate Term; or special proceedings to review administrative determinations made after a hearing.[8] No more than 15 minutes for argument will be allowed to each attorney who has filed a brief in other causes, except those in which no argument is permitted absent permission of the court.[9] As to those appeals in which oral argument is the exception, rather than the rule,[10] permission to argue may be sought. However, the advocate seeking argument should evaluate this option carefully, particularly from a cost perspective. The application, which must be made on seven days' notice, is made in court on the day the appeal appears on the calendar, and there is no certainty that it will be granted. Only one attorney may argue for each side, unless an application

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(4) Appeals from orders granting or denying motions for summary judgment;

(5) Appeals from orders granting or denying motions to dismiss a complaint, a cause of action, a counterclaim or an answer in point of law;

(6) Appeals from orders of the Appellate Term;

(7) Appeals from judgments or orders in criminal proceedings;

(8) Special proceedings transferred to this court for disposition;

(9) Controversies on agreed statement of facts;

(10) Appeals from orders of the Family Court finally determining a special proceeding;

(11) Appeals from orders granting or denying custody of minors after a hearing;

(12) Special proceedings challenging determination of the New York City Tax appeals tribunal; and

(13) Such other appeals as the court or a justice thereof may designate as enumerated.

(b) All other types of appeals not set forth in subdivision (a) of this section shall be noticed as nonenumerated.

[7] 22 NYCRR § 600.11(f)(2).

[8] 22 NYCRR § 670.20(a).

[9] 22 NYCRR § 670.20(b).

[10] *See* 22 NYCRR § 670.20(c). These include issues involving: maintenance; spousal support; child support; counsel fees; the legality, propriety, or excessiveness of criminal sentences; determinations made pursuant to sex offender registration act; grand jury reports; and calendar and practice matters including, but not limited to, preferences, bills of particulars, correction of pleadings, examinations before trial, physical examinations, discovery of records, interrogatories, change of venue and transfer of actions to and from the Supreme Court (*see* CPLR 325).

to the court is made and granted before the beginning of argument.[11]

That which the rules of the Second Department give in Section 670.20(a) and (b), they take away in Section 670.20(e).[12] Again, a party desiring to waive oral argument may do so easily by notifying the clerk without appearing in court.[13]

In the Appellate Division, Third Department, unless otherwise ordered, each side will be allowed not more than 30 minutes for oral argument on appeals from judgments, in actions on submitted facts and in special proceedings transferred to or initiated in the Appellate Division. Not more than 15 minutes will be allowed on appeals from non-final orders.[14] Moreover, those maximum time limits are rarely granted.

In the Appellate Division, Fourth Department, only one counsel will be heard on each side,[15] and the amount of time allowed for oral argument is within the court's discretion.[16] The party or counsel must sign in with the clerk's office prior to the time designated for the commencement of argument.[17]

In the Appellate Terms in the First and Second Departments, no more than 15 minutes is allotted for argument for each side.[18]

As a final ministerial concern, in addition to requesting time on the face of the brief, counsel should notify the court as to unavailability at the time the brief is filed. In the Court of Appeals, for example, counsel has a continuing obligation to notify the clerk's office of days of known or possible unavailability for oral argument during the Court's scheduled sessions.[19]

§ 8.04 Who Should Argue?

Ideally, the person who argues the appeal should be the person who either prepared or supervised the preparation of the brief, whether he or she tried the case below or not.

In other states, there is a long-standing recognition of the benefits of having separate appellate counsel handle the appeal. In fact, the argument has been made that appellate practice should be recognized as a separate area of the law. In the *Journal of Appellate Practice and Process*, Volume A1, Spring 2006, the author states: "On the civil side the tradition of the trial lawyer who handles a case from first interview to last order of

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[11] 22 NYCRR § 670.20(c).

[12] 22 NYCRR § 670.20(e) provides that when the total time requested by all the attorneys on each side exceeds 30 or 15 minutes, as applicable, the court may, in its discretion, reduce the time requested.

[13] 22 NYCRR § 670.20(h).

[14] 22 NYCRR § 800.10(c).

[15] 22 NYCRR § 1000.11(a).

[16] 22 NYCRR § 1000.11(b). A notice to appear for oral argument will be mailed by the clerk to all parties or their attorneys not less than 20 days prior to the term. Counsel must appear as directed or submit on the brief. 22 NYCRR § 1000.10 (e).

[17] 22 NYCRR § 1000.11(a).

[18] 22 NYCRR §§ 640.7(d), 731.6(a), 732.6(a).

[19] 22 NYCRR § 500.17(c).

the highest available court dies slowly despite the growing understanding that few lawyers can optimize both trial and appellate skills."[1] Furthermore, some very able trial lawyers do not have the time to handle their own appeals or do not like doing them. If either is the case, then appellate counsel should be brought in.

Additionally, the person handling the case below often is so involved in a particular approach or particular issue that they may miss an issue or approach that could win the case. Too often, the trial lawyer will want to make the same losing argument made at the trial level. There is also a tendency on the part of lawyers who tried the case below to be so in love with each of their earlier arguments that they do not want to focus the appellate argument on the issues which matter. The job of the appellate lawyer is to give the case a fresh look and focus the case on core issues and to find new approaches that can win.

If the trial lawyer decides not to bring in appellate counsel to handle the case, he or she should at least consider bringing in appellate counsel, or a respected colleague, to review the case and look for a new or winning approach.

The need for a fresh look is not restricted to appellants. Often a case is won below but should not have been; bringing in appellate or other counsel to look at the case also is useful under those circumstances.

If appellate counsel is brought in to handle the entire appeal they should still work carefully and closely with trial counsel. The knowledge of trial counsel should not be lost.

Sometimes difficult issues arise when appellate counsel believes that an issue or approach of trial counsel should not be repeated and trial counsel insists that the argument be made. If the argument does not hurt the credibility of the case and the trial counsel insists, the argument can be included. However, if appellate counsel believes that an argument or approach taken by trial counsel is detrimental to the case then deference should be given to appellate counsel.

When appellate counsel is brought in to handle the case, they should meet with the client directly to understand that it is a real case with real people and not simply an intellectual exercise. By meeting with the client, empathizing with them and hearing their concerns, appellate counsel is able to realize they are not working simply on a file but that, through caring and committed work, they may have an impact the life of an individual, business, or government.

§ 8.05 Preparation for the Argument

[1] The Key to Success is Preparation

The key to effective oral argument, as in every other aspect of the law, is preparation. The method for preparation will vary with the lawyer but there are nevertheless certain basic principles. The fundamental point is that preparation must be

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[1] The American Academy of Appellate Lawyers, On *the Functions and Future of Appellate Lawyers*, 8 The Journal of Appellate Practice and Process 1, Spring 2008.

taken seriously and is better performed if the lawyer has a routine to follow. The following suggestions are based upon the experience of the author and the methods used by well known appellate practitioners around the country.

Preparation for oral argument can take hours and often days depending upon the complexity of the case and the court in which the appeal is to be heard. That time may seem excessive to some considering that an argument may last only 15 to 20 minutes. However, the lawyer must be prepared not only to make the argument, but for all the questions the court will ask.

The fact that some lawyers do not take these admonitions seriously is demonstrated by watching them in the attorney's room scribbling notes on a blank legal pad immediately before the argument. The lawyer who treats an oral argument on appeal like a routine motion at special term is doomed not to serve the client well and not to enjoy the experience.

At a meeting of the Council of Appellate Lawyers of the Judicial Division of the American Bar Association, federal circuit judges from outside New York said that, in their experience, only 20 percent of the lawyers before them made effective arguments and only 10 percent were really "hot."[1] Only by extensive preparation can a lawyer give a "hot" or excellent oral argument.

The most effective preparation begins several days or even weeks in advanced of argument. Setting aside a couple of days immediately before the argument may sound like enough time, but if the preparation requires more, the result of such meager preparation will be panic. Furthermore, preparation spread over a more extended period of time allows the lawyer to think about the case and let the ideas for presentation percolate in their thoughts. In driving home from work, getting ready to come to work or just sitting and thinking about the case, this time permits a lawyer to think about the presentation more calmly and with greater care.

Usually, time has elapsed between the preparation of the brief and the oral argument so that other cases and issues have intervened, and the case may seem somewhat cold to the attorney. Therefore, at least two weeks before the argument, begin preparation. For cases in the Court of Appeals, begin earlier.

[2] Suggested Steps for Preparing for Oral Argument

[a] Read the Opinion Below and the Briefs

Some lawyers recommend reading the record first, but better practice is to first reread the briefs, the opinion of the court below and the cases to be reminded of what the case is about. When rereading, try to think of what would be the most persuasive way to present this case, what few issues should be emphasized (because not all issues should be emphasized), and in what order the arguments should be presented.

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[1] References to the comments of judges are from interviews conducted with the author, A. Vincent Buzard, at the meeting of the Council of Appellate Lawyers of the Judicial Division of the American Bar Association, held in Miami, Florida in February of 2007.

[b] Review the Law

Reread all the cases and prepare a synopsis of each, so you know what the case is about, whether it must be distinguished and how it hurts or helps your case. Counsel must know the contents of the appellate briefs—of all parties—the legal issues and authorities. While every point will not be argued, those arguments that are made should be understood in context, and the good advocate should be prepared to answer questions about the cases on all the arguments, not just those that have been culled from the brief for presentation at oral argument.

Often two kinds of authorities are recited in the brief: (1) those supporting general, well-settled and usually subsidiary principles of law; and (2) those that hone in on the particular facts and circumstances of a particular case. While the appellate advocate must be prepared to discuss the first category, they must also be well versed in the latter, for it is the ability to compare or contrast the case at issue with such precedent that may, in large part, determine success on the appeal.

Because there invariably is a substantial period of time between the completion of the briefs and the argument of the appeal, the importance of checking the accuracy of the legal research in the briefs cannot be overemphasized. There is no worse predicament for the appellate advocate than to learn during the course of argument that the law underpinning the argument has changed for the worse or the adversary's for the better. Similarly, inform the court at oral argument, or by letter shortly before, that the adversary's legal position is no longer tenable in view of recent case law developments or statutory changes.

[c] Review the Record on Appeal

After counsel's recollection is refreshed as to the applicable law and the lower court's holding, reviewing the record can be then fitted into the framework of the law and arguments. Reviewing the record is a matter of personal style. Some prefer to read the record and tab the important pages while others will take notes. The problem with taking notes is that it will likely be necessary to repeatedly move references around as your argument develops. Whatever approach is taken, the point is to review the record and determine what facts support your argument. Ultimately, the important record references should be inserted into your outline, as discussed below.

Knowledge of the record is critical. Using citations during the argument to the record gives a lawyer credibility and conversely not being able to answer questions from the record raises doubt as to the lawyer's preparedness. Any factual statement to be made to the court should have a record reference in the outline so that if the court says, "Well, where is that in the record?" the reference can be readily made.

Also, in reviewing the record, consider having the key documents copied. That way instead of using tabs to find them, they are more readily available. Knowing every page of the record can seems daunting, but the major goal is to make sure that you have record references readily available for all contested points referred in the briefs.

[d] Prepare an Outline

In addition, the lawyer should prepare a detailed outline on each of the issues

presented. Revise this outline frequently. With adequate preparation, the outline is often not even necessary because the lawyer will eventually memorize these points and know what to say.

The main purpose of the outline is to engage in the analysis required for its preparation. In particular, an outline will focus the advocate's thinking to make sure the key points are prepared and available. By preparing an outline counsel will determine what is important, what to focus the argument on, and will include all other arguments which may come up as a result of a question.

Importantly, the purpose of an outline is not to deliver a prepared speech. Counsel will not be able to read the outline, but the preparation will facilitate the memorization of the lawyer's main points. As part of the process described above, the outline should become more and more detailed.

The issues to be covered in the argument will be laid out and will include the key sub-points to be made. The outline will also include case names with references to the page in the brief in which they are included.

Tabbing the outline in the notebook taken to the podium[2] will enable counsel to flip to that page if they do need help fully explaining a particular point. Even though an outline is essential, flexibility of the presentation is crucial. Eventually, the advocate will know from memory the basic points to be made, but the outline will provide a sense of security and will be a valuable reference during the argument.

An additional benefit of preparing an outline is that counsel may discover areas of vulnerability in his or her brief and may decide to buttress that point in oral argument. At the very least, preparing the outline will suggest those areas in which the advocate might expect hard questioning. One can attempt to preempt such questioning by direct argument and/or one can frame effective responses to likely questions.

A good starting point for the outline is the table of contents in the brief, which should be sufficiently descriptive of the fact and argument sections to lend itself easily to the outline process. In constructing the outline, the advocate should be able to respond affirmatively to the following two questions for each item that is included, whether factual or legal: (1) Does its inclusion logically advance the argument? (2) Is its inclusion necessary for the argument?

These two considerations are quite different. While a particular point may be logical, given the limited amount of time for oral argument, if the argument can stand without it, the advocate may decide to omit it. By discussing something interesting, but not necessary, one risks diffusing the point of one's argument and focusing the court's attention on a peripheral issue. It is difficult enough for an advocate to keep the oral argument focused in the face of the usual questioning from the bench; the advocate should not provide any additional opportunity for the argument to become sidetracked.

Another necessity in preparation is the creation of a single page of the key points which must be made so that when the questions come and as the argument progresses,

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[2] *See* § 8.05[2][e] *below*.

the lawyer can look at this page and see what points have or have not been covered. Many times during an oral argument, there will be no time to go back to the detailed argument outline because the questions come too fast and when the questions do come, the planned order of the argument are lost. If the outline is on a single page, the lawyer can look down to see what has or has not been covered.

[e] Prepare a Notebook

One way to avoid needless anxiety is for the lawyer to make sure he or she has all the necessary documents readily available. A notebook is an excellent way to provide that sense of security. The notebook should consist of a four-page summary of key points and a full outline tabbed to the key points. The notebook should also include a brief synopsis of each key case. Obviously, counsel should be able to recall the cases from memory, but in case of emergency, a synopsis will help. The synopsis should also include references to the pages in the brief where the cases are cited if more effective than case citations.

The notebook should also include key documents from the record, such as the operative paragraph from the contract or a key admission and transcript. Some practitioners tab the record at key points. The problem with this approach is that on many lecterns there is not enough room for the record. A more organized way is to have the key parts of the record in the notebook. Having the key documents organized not only reduces anxiety and prevents fumbling through papers.

[f] Preparing the Opening

To start the argument, the lawyer for the appellant should have prepared an opening in order to take advantage of the few moments before questioning begins. Such a quick summary is often used in a good summation or opening statement at trial and is often referred to as a "grabber," which allows the appellant to grab the attention of the court.[3] Judge Hugh R. Jones, Associate Judge of the New York Court of Appeals, once said that at the beginning the advocate has the maximum attention of the court which should not be squandered.[4] An advocate should not waste that moment of maximum attention by pointing out an error in the record or by giving a recitation of the facts or the procedural history. Rather, the opening should be a few sentences setting the theme of the case and arguing why justice requires the result being sought. If there are extreme facts in your favor which are dramatic, then briefly summarize those facts to the court with emphasis placed on the key points.

Chief Justice Roberts is known as probably the best Supreme Court advocate of his time and preparation of his opening was a key part to his Supreme Court arguments, he describes the opening as follows:

> Now, the opening in the Supreme Court, you're only guaranteed usually about a minute or so, a minute and a half, before a Justice is going to jump in. So I always

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[3] A. Vincent Buzard, *Suggestions for Effective Appellate Oral Argument*, New York State Bar Journal, May 2007.

[4] Judge Hugh R. Jones, New York State Bar Association presentation on municipal law, January 1980.

> thought it was very important to work very hard on those first few sentences. You want to convey exactly what you think the case turns on and why you should win—not just the issue in this case is blah, blah, blah. One, they already know that. And two, you're not doing anything; you're not moving the ball if you're just telling them what the issue is. You've got to frame it in a way that makes your main argument, so they understand right from the beginning: the focus is on this particular statutory phrase; the focus is on this particular precedent; the focus is on this particular consequence that'll happen if you don't rule in my favor. And get that right there at the beginning because it's often a way to guide the questioning. You want to do it in a provocative way, to bring out the question that you want to be asked at that point so that you can respond to it. And then right away you're out of any type of memorized presentation. You're responding to a question, but it's a question that you have elicited or planted by the way you opened the case. And it's not the one you're not going to be able to answer, but the one that you are going to be answer to get the case off to a good start.

Working hard on a few opening sentences is one of the most important tasks in preparing for oral argument. Throughout the preparation, the lawyer should be thinking of how to open the argument, which helps focus the entire argument. The opening should include the theme of the case stated in the most direct and persuasive method possible. Avoid hyperbole, but demonstrate that an injustice will be done unless your client prevails.

An example of an opening in a case involved an appeal of a jury verdict in favor of a defendant who had crossed the yellow line and struck the plaintiff's vehicle head-on.[5] The trial court had given a charge on the emergency doctrine and the issue on appeal was whether there were sufficient facts to warrant the charge. The author gave the following opening:

> May it please the court. The issue in this case is whether a plaintiff who crossed a double yellow line, struck the plaintiff's vehicle head-on and injured the plaintiff nevertheless can avoid liability because the defendant claimed that an emergency was created by a bird of unknown size and unknown species that was either running or flying in front of the car.

The purpose of that opening was to convey the facts which demonstrated that an injustice had been done and that the court needed to rectify it. The case was reversed.[6]

Another example of an opening of an argument involved the interpretation of New York's intestacy statute where the lower court's holding was directly contrary to prior precedent of the Court of Appeals. The author gave the following opening:

> May it please the court. . . . We are asking the court to reverse the court below and make clear that the rule adopted in *Best*[7] was a universal rule of construction and not solely limited to instruments executed after 1964. The court below in the case held the

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[5] Kizis ex. rel. Rivera v. Nehring, 27 A.D.3d 1106 (4th Dep't 2006).

[6] Excerpt of Argument of A. Vincent Buzard from Kizis *ex. rel.* Rivera v. Nehring, 27 A.D.3d 1106, 1107 (4th Dep't 2006).

[7] *In re* Estate of Best, 66 N.Y.2d 151, 495 N.Y.S.2d 345, 485 N.E.2d 1010 (1985).

exact opposite of this Court's ruling in *Best* . . . .[8]

The actual opening in this case was more extensive than set forth above. However, the purpose of the first two sentences as quoted was to first identify what was being sought, i.e., reversal and the establishment of a clear rule. The additional purpose was to tell the Court that the lower court had, in effect, overruled the holding of the Court of Appeals in an earlier case to motivate them to grant the reversal. Ultimately, the Court of Appeals did reverse the lower court.[9]

The opening in each case must be adapted to the situation but usually there is some key argument that can be used to take advantage of the few moments of silence to lay out the case.

[g] Preparing for Questions

Most of the skill in appellate argument is using the court's questions to make the fundamental points. Because the primary function of oral argument is to answer the judges' questions, naturally a great deal of preparation must be spent on anticipating questions and preparing answers. Therefore, thought must be given to predicting what questions will be asked and how they can be answered in a way that reinforces the main points of the argument. Naturally, the questions asked in a particular case will depend on the case, but there are certain fundamental questions which every lawyer should always be prepared to answer.

Jurisdiction—Even if jurisdiction does not appear to be an issue, the lawyer should still think about jurisdiction and have an answer prepared in the event it does arise.

Standard of Review—The lawyer must clearly have in mind what the applicable standard of review is, and be ready to answer questions on what the standard is and pitch the case to that standard.

Discussion of Cases—The lawyer must be able to answer detailed questions on all key cases, both favorable and unfavorable. The lawyer must also answer the question frequently asked by Justice Robert Smith of the Court of Appeals, "what is your best case?" In other words, what case best supports the lawyer's position.

Construction of Statutes—If the construction of a statute is at issue, the lawyer must be prepared to discuss the meaning of each word and the legislative history of those statutes.

What Should the Rule Be—Court of Appeals Judges particularly may ask the lawyer questions about what the rule should be or what the elements are of the new cause of action you are seeking to create.

Policy Questions and Hypotheticals—The Court will frequently ask questions which stretch the outer limit of what is being sought. Questions regarding concessions will be discussed more fully below. In addition, the Court may provide the lawyer with a hypothetical test the applicability of a particular outcome in the real world.

In addition to the questions mentioned above, judges may ask what effect the ruling

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[8] Excerpt of Argument of A. Vincent Buzard from Matter of Piel, 10 N.Y.3d 163, 855 N.Y.S.2d 41, 884 N.E.2d 1040 (2008).

[9] Matter of Piel, 10 N.Y.3d 163, 855 N.Y.S.2d 41, 884 N.E.2d 1040 (2008).

in your favor will have on subsequent cases. Appellate judges often say that their greatest fear is making a decision which causes a disruption or leads to unintended consequences in subsequent cases.

[h] Be Prepared to Use Questions for Transition to Your Main Argument

Each of the questions mentioned above also may be points that are made as a part of the argument. However, if they are not part of the planned argument then the answers must be ready.

Because the argument must be made through answering questions, thought must be given during preparation as to how to use a question to help make the argument. Also, thought must be given as to how to turn a judge's question into a transition to the next point. Chief Justice Roberts agrees that making the transition is important and when he was a practicing lawyer, he had a unique system for developing the transition which he describes as follows:

> I have a particular practice approach that is addressed to just that point. I don't care how complicated your case is; it usually reduces to at most four or five major points: here's the key precedent, here's the key language, here's the key regulation, and here are the key consequences. You have four or five points. It's called A,B,C,D, and E. And when I'm practicing giving the argument, I'll go through it, and then I'll just shuffle those cards—A,B,C,D, and E—without knowing what they are. Then I'll start again and I'll look down. Okay, my first point is going to be C; and then from point C, I'm going to move to point E; and then from E to point A. You develop practice on those transitions . . . because that's how it always works, at any appellate court.[10]

In other words, Chief Justice Roberts practiced transitions from one point to the next regardless of the order in which they arose because he knew the issues would not arise in the order he preferred or anticipated. Careful preparation minimized the likelihood of surprises and strengthens the effectiveness of your oral argument.

After the court asks all the questions that the lawyer has predicted and prepared for, the court will inevitably come up with questions which the lawyer hasn't anticipated. However, the more questions which the lawyer is prepared for, the more comfortable the lawyer will be in coming up with answers for unanticipated questions.

[i] Rehearsing

At the Supreme Court level conducting "moot courts" have become commonplace. Chief Justice Roberts, as an advocate, said that he would have five or as many as ten moot courts.[11] Participating in a moot court for the Supreme Court has now become much easier because of the number of groups who are willing to conduct them for Supreme Court cases. Justice Scalia and Bryan Garner are fervent advocates for the

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[10] Bryan A. Gardner, *Interviews with United States Supreme Court Justices: John G. Roberts, Jr.*, 13 The Scribes J. Of Legal Writing 5, 23–24 (2010).

[11] Bryan A. Gardner, *Interviews with United States Supreme Court Justices: John G. Roberts, Jr.*, 13 The Scribes J. Of Legal Writing 5, 19 (2010).

use of moot courts.[12] They state that "no preparation for oral argument is as valuable as a moot court in which you are interrogated by lawyers as familiar with the case as the court is likely to be." They also advocate for having a mixed panel and not simply specialists in the field. The problem for the advocate who is not arguing in the Supreme Court, is finding a group of lawyers who will read the brief and be sufficiently informed on the issues to conduct a moot court.

However, there are other options to preparing for questions. Carter Phillips, a highly experienced Supreme Court advocate on the other hand, reports that he does not do moot courts because that is not the way he was trained in the Solicitor General's Office.[13] Instead, Phillips uses a "round table" with people who have read the brief and think of questions.

Another approach is to give your brief to a colleague not familiar with the area of law involved who is available and willing to assist, and ask them to read the brief and talk to you. The appellate courts are made up of generalists, so having generalists review the brief and ask questions can be helpful in preparing for the court. By speaking with a generalist who is not involved in the case, the lawyer can learn to summarize in a comprehensive, effective and clear manner.[14]

Whatever the method chosen, rehearsing answers is a necessity to preparation. Saying the argument out loud and answering the questions out loud will enable counsel to be smooth and fluid in speaking. Rehearsing also gives a sense of confidence. Most of the appellate courts in New York are hot courts in which the judge read the briefs and the record. Therefore recitation of the facts and the law will probably be interrupted or ignored by the court. Preparation should assume the court is hot; it may also be helpful to have peers interrupt you with questions, so as to mimic the real event as much as possible.

[3] Preparing For a Specific Court—Know Your Audience

Appellate arguments do not take place in the comfortably familiar surroundings of one's office. They take place in the formal and often imposing atmosphere of appellate courtrooms. In New York, each appellate courtroom has its own character. The contrast could hardly be greater between the First Department, with its ornate, recessed, stained-glass ceiling and elaborate, old-fashioned gallery chairs, and the Third Department, with its stark, modern, dark-paneled wood, high ceiling and long, simple benches for spectators. Yet, each courtroom in its own way is imposing to those who argue there. The sense of majesty of the law conveyed by the beautifully carved wood of the New York Court of Appeals is compounded by the formal dress of the courtroom clerks and the array of portraits of former judges, including the imposing portrait of

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[12] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, 158, (Thompson/West 2008).

[13] Carter Phillips, Remarks at the 15th annual National Appellate Practice Institute Seminar, Chicago, May 2011.

[14] Bryan A. Gardner, *Interviews with United States Supreme Court Justices: John G. Roberts, Jr.*, 13 The Scribes J. Of Legal Writing 5, 25 (2010).

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Benjamin Cardozo, who appears to be 'keeping watch' over the Court from his position on the left of the bench as the attorney faces it. Given such surroundings, everything the appellate advocate can do before the argument to become comfortable with the courtroom and court procedures will help make the oral presentation better.

As stated by Chief Judge Kaye:

> *Know Your Audience* is thus a first principle for oral argument as well as brief writing. It is of central importance to know in advance the ambience, the requirements, the traditions of the court in which you appear. How many minutes will you be allocated? Will it be a "hot" bench, or will you have to start with the facts of the case? Is there usually active questioning? What other cases are being argued that day? Any raising issues like yours? Obviously, the more you know about your audience, the better you can prepare for the unexpected.[15]

If possible, counsel should attend and observe one or more sessions of the court sufficiently in advance of argument to understand what will be happening when his or her case is heard. At the very least, consultation with an experienced colleague is advised.

See how long it takes to get to the courthouse from the office or hotel at the time of day court begins. If traveling from out of town, speak to the clerk's office and a colleague located in the city of the appellate court to ascertain travel times and to obtain directions.

Once at the courthouse, take note of the sign-in procedures for counsel. Become familiar with the amenities available to counsel, such as attorneys' rooms and attorneys' libraries. Check to see if the lectern is adjustable and how big it is so you will know how to organize your papers when you argue.

In the courtroom, take note of the rituals that attend each day's proceeding. Listen to the way in which the calendar is called and how counsel respond.

Focus on the transition from one case to the next. Notice how the clerks collect from the judges the records and briefs from the previous case and distribute those for the next case, thus giving counsel the opportunity to prepare papers on the lectern, for appellant, or at counsel's table, for respondent.

Listen to the attorneys argue their cases. Listen to find a style of address that sounds appropriate when used in open court. Even such nuances as voice modulation and amplification are important. Listen for how the microphone's effect on delivery helps or hinders an argument.

If you cannot visit the court ahead of time, the Court of Appeals streams arguments on its website.[16] Watching arguments is not a substitute for visiting the court, but it certainly can provide a sense of how questions are asked and how responses are made. Whether a lawyer is watching a case being argued live or taped, good practice is to find and watch cases having the same issue or problem as the lawyer's case. By doing so

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[15] Hon. Judith S. Kaye, *Effective Oral Argument*, New York Appellate Practice (NYSBA) 218 (1995).

[16] http://www.courts.state.ny.us/CTAPPS/OA-Archives.htm.

the lawyer can see the kinds of questions that were asked, what the concerns of the court were and how to address these questions and concerns.

Listen to the openings of the arguments to see how much time the advocate has between starting the argument and the interruption for questions. There will be no fixed time, but the average time will help you determine how long your opening can be. Most importantly, listen to how hot the court is. Most courts are hot, but you need to know whether they need any review of the facts or whether they go right into the detailed questions. Sometimes a court that generally is hot will ask you to set up the case or give some background, so you should have a quick summary of the case prepared.

Focus on the judges: what grabs and holds their attention, and what causes them to apparently lose interest in the speaker. Become comfortable with the idea that arguments proceed while two judges may converse quietly during an argument, or while a judge receives a note from a clerk, or while a judge leaves the bench during the argument.

If possible, counsel should obtain as early as possible the names of the judges who will be sitting on the day of argument. All cases which are applicable to the issue should be found and analyzed, but once an advocate knows who is sitting on the bench, special emphasis should be given to cases they have decided. Knowing a particular judge's manner of questioning and areas of interest, as well as what may be persuasive, is helpful. Knowing who will be sitting, knowing the manner of questioning, the areas concerned, and what is persuasive with a particular judge is helpful to preparing for oral argument. Practice varies widely on when the names of the judges are available. In the Court of Appeals all the judges sit unless recused, so there is not issue about who will hear the case. In the First Department, the names of the sitting justices first appear in the *New York Law Journal* on the day of the argument.[17] Counsel may also obtain the names the afternoon before the argument by calling the clerk's office after 3:00 p.m.[18] In the Second Department, the names of the sitting justices are published in the *New York Law Journal* approximately two to three weeks before the argument.[19] The Second Department also publishes its calendars on its web site at that time.[20] No other

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[17] Alan D. Scheinkman and Professor David D. Siegel, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE APPELLATE DIVISIONS OF THE STATE OF NEW YORK § 1.4 (2d ed. 2005).

[18] Alan D. Scheinkman and Professor David D. Siegel, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE APPELLATE DIVISIONS OF THE STATE OF NEW YORK § 1.4 (2d ed. 2005).

[19] Alan D. Scheinkman and Professor David D. Siegel, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE APPELLATE DIVISIONS OF THE STATE OF NEW YORK § 1.5 (2d ed. 2005). *See also* Guide to Civil Practice ¶ 9.3, *available at* http://www.courts.state.ny.us/courts/ad2/pdf/Guide%20to%20Practice%20-%2020081106.pdf.

[20] Alan D. Scheinkman and Professor David D. Siegel, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE APPELLATE DIVISIONS OF THE STATE OF NEW YORK § 1.5 (2d ed. 2005). The Second Department's calendar is *available at* http://www.courts.state.ny.us/courts/ad2/calendar/index.shtml.

official notice is provided to litigants.[21] In the Third Department, the names of the sitting justices may be obtained by calling the clerk's office approximately one week before the argument. The Third Department does not otherwise publish the names of the sitting justices. In the Fourth Department counsel is only told the morning of the scheduled oral argument.

§ 8.06 Presentation and Substance of the Argument

[1] The Day of the Argument

[a] Arrive Early at the Courthouse and Avoid Unnecessary Anxiety

A primary goal for the day of the argument is to avoid unnecessary anxiety, and one of the surest ways to cause anxiety is to not leave enough time to get to the courthouse. Leave early with ample time for possible traffic jams or delays. If you are familiar with the city you should know exactly how long it takes to get to the courthouse. You should also know where to park; looking for a place to park before argument creates unnecessary anxiety. If you are traveling from out of town, pick a hotel within walking distance of the courthouse and practice the walk beforehand so you know exactly what route to follow and how long it will take. All this is to avoid the problem of showing up at the courthouse agitated, anxious or off your game.

Also, be familiar with the check-in procedure at each court. Courts specify when lawyers should be at the courthouse and those rules should be observed. For example, in the First Department, counsel should arrive one-half hour before argument and proceed to the lobby outside the courtroom. In the lobby, counsel will be required to complete a form called the "notice of appearance," which will then be presented to the officer on duty. A few minutes before oral argument begins, the attorneys will be allowed into the courtroom.[1]

In the Second Department, court convenes at 10:00 a.m. and calls the day calendar.[2] Parties who marked the cover of their brief with a request for oral argument and who still wish to argue must answer the calendar call and state the amount of time required.[3]

In the Third Department, the courtroom is not opened until 15–30 minutes before argument. At that time, there will be a clerk in the courtroom with whom to note your appearance.[4]

In the Fourth Department, attorneys scheduled for oral argument must check in with

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[21] *See* Guide to Civil Practice § 9.3, *available at* http://www.courts.state.ny.us/courts/ad2/pdf/Guide%20to%20Practice%20-%2020081106.pdf.

[1] Conversations conducted with First Department staff, June 2011.

[2] *See* Guide to Civil Practice § 9.4, *available at* http://www.courts.state.ny.us/courts/ad2/pdf/Guide%20to%20Practice%20-%2020081106.pdf.

[3] *See* Guide to Civil Practice § 9.4, *available at* http://www.courts.state.ny.us/courts/ad2/pdf/Guide%20to%20Practice%20-%2020081106.pdf.

[4] Conversations conducted with Third Department staff, June 2011.

the clerk's office prior to 10:00 a.m. on the day of the oral argument.[5]

The procedure followed at the Court of Appeals for the day of the argument is also discussed in Chapter 11A.[6]

Having case being late on the calendar can also be a source of anxiety. Sitting in the courtroom listening to the other arguments while at the same time hoping to remember your name can be nerve wracking. Develop a routine for avoiding this problem. One approach is to stay in the attorney's room until your case is up. You can have someone come and get you or listen on the monitor. That cannot be done in the Court of Appeals, because lawyers are expected to remain the courtroom during the argument of all cases. Another approach to remaining calm is to simply repeat to yourself your prepared opening so that you know at least that you will get a few words out despite your nerves. In short, before the argument do whatever keeps you calm, whether it is sitting in a corner, making a final review of notes or simply staring out a window.

[b] Dress Appropriately

Dressing appropriately for court is not some ancient traditional that is no longer observed. Dressing well can not only influence the court, but can make you feel more confident and self-assured. Appropriate here means wearing clothing which demonstrates that an attorney is treating the court with dignity and respect, namely clothing that is professional. Avoid clothing which distracts from the case. Hon. Judge Randy Holland of the Delaware Supreme Court stated that somber attire is appropriate, or in other words, attire which you would wear to a serious important occasion.[7]

An important note on trendy versus timeless: in fashion just as in life, it is often best to avoid extremes. As trends cycle in and out of fashion, a particular cut of suit, flamboyant accessory, or distinctive hair style can be confusing or disagreeable to a judge. For this reason, an advocate's appearance should be timeless and uncontroversial. The advocates' appearance should be as widely appealing as possible, which means always err on the side of simple. A lawyer should re-interpret the rules of law, not of fashion.

For men, proper attire includes a dark, preferably blue suit, with a white shirt and a conservative tie, typically red or blue.[8] Appellate argument is not the place for sport coats, chinos, light colored suits, colored shirts, wild ties or anything else that is undignified. The suit should be a more neutral fit. Trendy suit cuts should be avoided for court. Pants should have a medium break, meaning they should fall so that they're covering the top of your shoe and parts of the laces, while the hem will slope toward the sole in the back. Short or long breaks are indicators of poor tailoring. A properly

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[5] *See* Guidelines for Perfecting Appeals, *available at* http://www.nycourts.gov/courts/ad4/Clerk/Forms/perf-appeal.pdf.

[6] *See* § 11A.03[11][b] *below*.

[7] Judge Holland Remarks at the 15th annual National Appellate Practice Institute, Chicago, May 2011.

[8] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, 162, (Thompson/West 2008).

fitted suit should be neither slim nor baggy.

Shoes should always match the suit. Typically, brown or burgundy can be worn with a blue suit. Shoes with laces are ideal, meaning obviously casual footwear such as deck shoes or loafers should be avoided. Shoes should be clean, polished and not worn out. Socks must always be worn in court; dark colored dress socks are best.

Grooming is also an important consideration for any advocate. Unconventional hairstyles for men—such as long hair (even fastened in a ponytail) or wild colors are not recommended.[9] A pressed, well-tailored suit is an absolute necessity. In fact, all clothing should be clean and pressed. Looking put together and neat is more important than the cost of what you are wearing.

In terms of accessories, a lawyer, male or female, should consider investing in a watch. First, it ensures that you are always on time for oral argument, and second, it is a professional and non-offensive accessory. Make sure the watch is neutral and appropriately sized for the wearer's wrist. A simple watch with a leather strap is typically the safest and most versatile choice. For men, cufflinks, pocket squares, pins, and other accessories are a matter of preference and style. As previously mentioned, these accessories should be simple and tasteful.

Appropriate attire also applies for women. Appropriate here means modest and professional, yet feminine. A well-tailored suit, either pants or skirt, is recommended in a dark color. An attorney must ensure that her suit is well fitted; meaning the jacket is not too snug or too short, and the pants are the appropriate fit and length.[10]

A collared shirt may be worn underneath the suit or preferably, a modest and simple silk blouse. Avoid wearing any a blouse that is too low-cut, sheer or otherwise revealing. As Judge Evelyn Frazee stated, "My male counterparts and I have felt embarrassed and upset for being put in a situation where the attorney is revealing too much and looks sexy."[11] An attorney must avoid creating these negative distractions.

In terms of jewelry, it is best to keep it simple. Judges have commented on jewelry being distracting, particularly excessively large diamond rings or odd-shaped pins. One judge stated that a female advocate appeared in court with a diamond ring so large that the entire court was talking about the ring after argument rather than the case. A simple strand of pearls or a modest diamond pendant are both discreet choices, as is a simple pair of stud earrings to match. Bracelets should generally be avoided, as they tend to be noisy and distracting. As mentioned above, a watch may be a good alternative.

Shoes should be modest and never so high that you are unable to walk. Additionally,

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[9] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, 162, (Thompson/West 2008).

[10] Interview conducted by Katarzyna Murphy with New York Supreme Court Justice Evelyn Frazee, June 2011.

[11] Interview conducted by Katarzyna Murphy with New York Supreme Court Justice Evelyn Frazee, June 2011.

open-toed shoes should not be worn in court, no matter how expensive, fashionable or comfortable. Hosiery should generally always be worn. Although this rule seems anachronistic, hosiery is simply a type of dress sock. Just as a person would rarely wear shoes without socks, a woman should never wear professional attire without hosiery, especially in court.[12]

If a lawyer is ever unsure about an article of dress, a piece of jewelry or other accessory choice, then it is probably best to not wear the questionable piece Always err on the conservative side, but as Maureen A. Howard described, "Clothing—hair, jewelry, shoes, perfume—doesn't have to be bland or manly."[13] It does however need to be tasteful and professional.

Clothing should not be worn for the first time for the appellate argument, in case the collar does not fit, or a tie does not work or simply is not comfortable. In fact, doing a sort of dress rehearsal the week before your argument is recommended, in case your clothing needs tailoring or cleaning. Similarly, wearing good shoes is important, but do not sacrifice comfort. Make sure that your shoes have been properly broken in and are comfortable to wear.

Whether man or woman, an attorney should always put effort in their appearance. Even if dressing in this fashion is not "you," bear in mind that you will be arguing to a group of judges who are not "you" either, and they will be most impressed if you conform to their standards rather than your own. Judge Frazee summed up the point succinctly," Why dress in a manner that puts you in danger of distracting a judge or detracting from your case? Always have respect not only for the judges, but for the institution itself."[14]

[c] Bringing the Client to Court

Appellate judges express annoyance at lawyers who parade their severely injured client into an appellate court. Generally, appellate argument is not the place for clients. Their participation is not required and can be a distraction. If, however, the client insists on coming, give them the same directions on demeanor and dress as you would at trial. Hon. Robert Lunn, former associate Justice of the Appellate Division Fourth Department, told of a case involving the reduction of child support. The husband was in court and in an expensive suit with a very expensive watch, providing persuasive demonstrative evidence against his own case.

The presence of the client should not affect the manner and style of the oral argument. A case argued to please the client, such as one containing *ad hominem* attacks on the opposition, often does not make a favorable impression on the court. If the client is to attend, it is imperative that he or she be told beforehand what is going

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[12] Interview conducted by Katarzyna Murphy with New York Supreme Court Justice Evelyn Frazee, June 2011.

[13] Maureen A. Howard, *Beyond A Reasonable Doubt: One Size Does Not Fit All When It Comes To Courtroom Attire For Women*, 45 GONZ. L. Rev. 209, 217 (2010).

[14] Interview conducted by Katarzyna Murphy with New York Supreme Court Justice Evelyn Frazee, June 2011.

to occur. Include in the explanation a warning that the argument is going to be tailored to the judges, not to a jury or the client. Counsel should also discuss the likelihood of questions that may sound hostile but which do not necessarily indicate the questioning judge's view of the case.

In short, not having the client present in an appellate argument is preferable but if the client insists, certain controls must be put in place.

[2] The Opening

The best practice is to start by looking at the judges directly and addressing them at the beginning of the argument with the well-established phrase "May it please the Court."[15] The phrase "good morning" or "good afternoon" is less formal and traditional, but is acceptable. Following the opening phrase, while still maintaining eye contact, the advocate should identify himself or herself and the client being represented. However, if the court uses the attorney's name in calling the case or in calling the attorney to the lectern, then the name need not be repeated. If there are only two parties in the case then the party's names also need not be repeated. However if there are multiple parties both of the attorney's name and the party's name should be repeated.

If you are counsel for the appellant, use your planned opening discussed above, look the judges right in the eye and give the opening without using notes. If at the end of the opening you are still not drawing questions, then move directly to your most important point and keep arguing until someone stops you. Use the answer to support the fundamental arguments of your case and seamlessly move to another principal point of your case.

If you are the respondent, take the same approach unless the questioning of the appellant warrants a different opening. If that is the case, then use the opportunity as discussed below.[16]

[3] Do Not Read the Argument

Never ever read the argument or brief to the court. This will annoy the judges and can result in an interruption. The one exception to the rule on reading to the court involves short passages which are central to the case. Sometimes a contracts clause, the wording of the statute or the exact words of the court are critical to the case. Under those conditions the actual language should be in the outline or attached to it so that counsel can read the excerpt accurately. Memorizing the exact words of the excerpt in question can also be effective. However, if you must read, do not paraphrase. Presiding Justice Henry Scudder of the Fourth Department has repeatedly warned not to paraphrase such key passages.[17]

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[15] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, (Thompson/West 2008).

[16] *See* § 8.07 *below*.

[17] New York Appellate Practice CLE, New York State Bar Association, Rochester, NY, Oct. 2007.

[4] Answering Questions

When a judge begins to ask a question, immediately stop talking, do not try to finish the sentence or thought. Stop in your tracks and do not speak again until the judge has finished the question. A certain way to look like an amateur and to offend the court is to interrupt the judge or do not let him finish the question. Form the habit of stopping completely when a member of the court starts talking.

The best answer begins with a yes or no and then an explanation. The judge expects the advocate to say more than just yes or no and the opportunity should be taken. If however, the judge interrupts an answer beyond yes or no then immediately stop arguing and try to get back to the point when the judge finishes that part of the question. The explanation should be a direct answer to the question but should also include an argument or explanation as to how that answer supports your case. In other words, use the answer to make the argument and not simply to answer the specific question asked. If the answer requires an explanation as to why that does not adversely affect your case, then that explanation should be included as well.

Questions should be answered immediately. Another way to annoy the court is to say "I will answer that later." Failure to answer the question at once may be interpreted as evasive or as a sign of weakness and disrespect to the court. Such an approach makes that the advocate look inexperienced and rude. Do not avoid answering the question. Some lawyers persist in not answering a harmful question even after follow-up by the court at which point the judge asking the question gives up or becomes angry. By so doing a lawyer is wasting an opportunity to bring a judge around and worse yet is alienating the judge. Answer the question the moment it is asked.

[5] Welcome Questions

Do not visibly show anger or frustration at questions. An advocate who acts like the judge is interrupting a speech will annoy the judge. Do not get upset at questions, even internally. Questions from the court, no matter what the form or tone of the inquiry, do not necessarily indicate hostility. Even if the question does demonstrate hostility to the argument, it is an opportunity to deal with the problem rather than have it hidden only to defeat the advocate later. Often questions are asked by judges to convince their colleagues of the answer or to deal with an issue that they know is troubling to their advocate and should not be deemed hostile. In short, questions give the advocate the opportunity to deal with what is bothering a member of the court, so welcome the opportunity.

[6] Maintain Focus

Because of time constraints, a lawyer must focus his/her argument on two or three key points identified during preparation. If you have a choice of order, argue the most important point first. If questions prevent you from starting with the most important point then go back as soon as you can.

There is no time for side trips into subsidiary issues covered in the brief, no matter how interesting they may be. Only those issues which are dispositive of your case should be argued. If the judge's question leads to a tangential matter, answer the

question and then return as quickly as possible to the key points.

[7] Argue With Conviction

Speak with enthusiasm and confidence. The common advice that oral argument is not intended to be a summation to the jury or a showcase for counsel's eloquence is true. Too often, however, lawyers take that advice to mean the oral argument should be dull and delivered in a monotone, which is incorrect. Appellate counsel should be enthusiastic and demonstrate confidence in the righteousness of their cause. Former Chief Justice Judith Kaye described the importance of conviction as follows:

> When arguing, you should look and feel as if you are interested in, genuinely believe in, the proposition you are advancing. To me it is important that an attorney argue with conviction; I try to keep my eyes fixed on arguing counsel, searching for evidences of weakness, discomfort, flaws in the legal argument. If I am trying to decide whether to sign on to your position, I want to be sure that you at least believe in it.[18]

In short, make the argument interesting and show enthusiasm and confidence.

[8] Be Conversational

To be an effective oral advocate an attorney must be heard. Counsel must confidently state his or her argument and answer the judges' questions, but not be too loud or boisterous. The manner of delivery may very well depend on the courtroom, the distance between the podium and the bench, and the microphone in place. If the judges appear to be straining to hear, an attorney should speak up. Otherwise the judges may stop straining and just wait to hear what counsel's opponent has to say.

[9] Avoid Distracting Mannerisms

Do not use distracting or disrespectful mannerisms of any kind. Judges particularly do not like being pointed at. Do not drum the lectern with a pencil. Do not sway back and forth. Do not use common interjections like "I mean, you know," "do you follow me," or "OK"? Don't use any mannerisms that are calculated or phony such as appearing to be in deep thought. Gestures are fine but do not be a whirling dervish.

[10] Do Not Attack Opposing Counsel

Courts are alienated by direct attacks on counsel. Any form of *ad hominem* argument which accuses opposing counsel of misstating the facts or the cases should be avoided. The better approach, as is discussed in the chapter on preparing the appellate brief, is to compare what opposing counsel said with the facts and let the court determine whether or not they are truthful. If the opposing counsel misstates the facts, simply cite what the counsel said and then read the record.

[11] The Use of Humor

Generally, humor is dangerous and should be avoided by counsel. Planned jokes are

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[18] Hon. Judith S. Kaye, Effective Oral Argument, New York Appellate Practice (NYSBA) 218, 220 (1995).

particularly dangerous.[19] If there is a humorous moment at which counsel can make a dry point slightly humorous then doing so may be safe. Such comments are safer when the lawyer has experience and knows how far he or she can go. Also, the use of humor depends on whether the lawyer has a sense of humor. Forced humor from a person for whom it is not natural is also a mistake. If in doubt, do not use humor. If, on the other hand, the judge tells a joke, feel free to laugh.

[12] Handling Concessions

Frequently during oral argument the advocate will be asked to concede a fact or point of law. Failing to concede an indefensible point weakens an argument and reduces the court's confidence in other points. However, there are some concessions which will completely destroy a lawyer's case because the concession fatally undermines a key issue. The advocate must give great care during preparation to think of what concessions can be made without great harm to the case and those concessions which will make the case unwinnable.

Carter Phillips, a well-known appellate advocate, describes the process as constructing a shell or cocoon. Everything that he needs to win the case is within the cocoon and everything that is not necessary is outside the cocoon. The lawyer will concede everything on the outside of the cocoon but nothing inside it.[20]

Sometimes in an argument there is a theory upon which the case can be won, but it is simply too complicated and weak and there are other theories which are direct and strong. One way of dealing with such situations is simply to say that the argument is in your brief, but that it is not necessary to prevail. The lawyer should be prepared to explain why a particular concession is not fatal.

[13] Citing Cases During Argument

Unless counsel is asked specifically about a case, citing cases to the court during argument is a waste of valuable time. If there is controlling authority directly on point, however, mentioning the case name is appropriate and persuasive. If the opponent is attempting to reverse the case or ignore it, then discussing the impact of the opponent's position is also appropriate. It is also helpful and worthwhile to mention a case in which the remedy sought by the opponent was granted by the Appellate Division only to be reversed by the Court of Appeals. The citing of routine cases which are otherwise well known need not be discussed in detail, but rather relied on for the principles involved.

[14] Do Not Bluff If You Do Not Know The Answer

Anticipating every question which can occur to a panel of imaginative appellate judges is impossible. There will be times when counsel simply does not have an answer ready. If that is the case, admit that you do not have an answer. If the question

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[19] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, 187, (Thompson/West 2008).

[20] Carter Phillips, Remarks at the 15th annual National Appellate Practice Institute Seminar, Chicago, May 2011.

is sufficiently important to the case, request permission to submit a written response by the following day. Similarly, if on reflection counsel determines that a question was answered incorrectly, a short letter correcting the misstatement may be appropriate.

[15] Visual Aids

Visual aids of the type used at trial should be used sparingly, if at all, at the appellate level. While a number of lawyers are increasingly using charts or depictions, or even paragraphs from relevant contracts or statutes, many appellate judges find such exhibits superflous. Some judges find them somewhat demeaning, i.e., that the judges are not smart enough to figure it out using more traditional means. Because of the division of opinion on visual aids, the best practice is to not use them unless absolutely necessary.

The better practice is to use the depiction from the record and point the court to the particular page in the record where depiction appears.

Another disadvantage of visual aids is that opposing counsel can use the exhibit to show why the side that brought in the exhibit is wrong or not correctly stating the facts. While there is desire for many lawyers to be state-of-the-art and use every advanced technique, visual aids are one time where traditional practice should govern.

§ 8.07 Respondent's Argument

The principles for oral argument discussed above are equally applicable to the respondent's argument, including the opening.[1] However, the appellant's argument and the questioning of appellant may provide a better opening for the respondent than was planned.

For example, if counsel for the appellants fails to answer a question, a very effective opening for respondent counsel is to say "counsel for appellant wouldn't answer the question but here's the answer . . ." A major misstatement of law or fact by appellant's counsel can also provide a good opening. If you can to see where the court is going or if a particular judge seems to be leaning toward the respondent then that point can be used to open the argument. Every inconsequential misstatement or error should not be countered; only the errors which directly answer the argument and advance your case. If a member of the court asks a particularly telling question or makes a particularly telling point on a fundamental issue, then that fact can be used as an opening.

Obviously any key points made by the appellant which damage the respondent's case must be answered directly, preferably in the middle of the argument. After the opening, the respondent's counsel can emphasize the best points and then deal with the appellant's arguments.

§ 8.08 Rebuttal Argument

Whether rebuttal is permitted varies in the appellate courts of this state. It is

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[1] *See* § 8.05[2][f] *above*.

permitted in the Court of Appeals and is deducted from the allotted argument time.[1] In the First Department, it is permitted, but must be requested and if granted, must be split with argument time. The Second Department does not permit rebuttals, but the Court may make an exception if the respondent has misstated a fact or raised a new issue during argument. In the Third Department, rebuttal may be permitted if requested at the beginning of oral argument. If granted, time is split between argument and rebuttal. The Fourth Department does not allow rebuttals under any circumstances.

Appellant's counsel having reserved rebuttal time lets the Respondent's counsel know that appellant will have time to correct any misstatements or stretches given by the respondent's counsel.

The purpose of rebuttal time is to answer any major misstatements or any misstatements made by the respondent and also to correct any misimpression's or misunderstandings demonstrated by the questioning of the court. Rebuttal can be used to demonstrate why the appellant's fundamental issues overcome the points made by the respondent. Rebuttal can also provide the appellant's counsel with an opportunity to tell the court about useful overarching principles or a framework for the decision.

However, under no circumstances should rebuttal be used to rehash the main points of the original argument without reference to the respondent's argument. If the court finds a lawyer is simply rearguing the same point, counsel may be interrupted or minimally the court will be annoyed.

If there is no need for rebuttal, then do not use the time. When the points on rebuttal have been made then sit down. Even though more time is remaining, rebuttal is a privilege which must be carefully used.

§ 8.09 Post-Argument Submissions

Post-argument submissions are another aspect of the appellate process to be used only for exceptional cases. Rarely should counsel need to make a post-argument submission. Rule 500.7 of the New York Court of Appeals governs post-argument submissions to that Court and certainly establishes a tone suggesting that a request to file a post-argument submission should be exceedingly rare:

> Except for communications providing the information required by section 500.6 of this Part or those specifically requested by the Court, post-briefing, post-submission and post-argument written communications to the Court are not favored, and shall be returned to the sender unless accepted by the clerk of the Court following a written request with a copy of the proposed submission and proof of timely service of one copy on each other party.[1]

There are only limited exceptions to the rule barring post-argument submissions. Among matters which should be brought to the Court's attention are contemplated and actual settlements, circumstances that could render the matter moot, and pertinent new

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[1] Conversations conducted with each of the respective clerks regarding rebuttals, June 2011.

[1] 22 NYCRR § 500.7.

developments in applicable case law, statutes and regulations.[2]

If a settlement has been reached, or a party has died, that fact should be communicated to an appellate court immediately. Counsel should not wait until the day of oral argument to do so. While the primary duty to notify the court may fall on the appellant, the respondent's counsel must take the appropriate action if the appellant fails to do so.[3,4]

By rule, the First and Second departments prohibit any post-argument or submission "communications" unless permission is granted by the court.[5] Although the Third Department has no specific rule governing post-argument submissions, experience indicates that an advocate should not make a post-argument submission without obtaining permission of the court during oral argument or of the clerk of the court following oral argument.

The rules of the Fourth Department allow counsel to make a post-argument submission without prior court approval so long as it is done within five business days of the argument date.[6] Because there is no right of rebuttal in the Fourth Department, a post-argument submission can be used to correct misstatements of law or fact made by the respondent. For instance, if the respondent had made a significant misstatement to the court or if the respondent seems to have confused the court in the course of argument, then these mistakes can certainly be corrected in a post-argument submission. In other words, any argument which could be properly made in a rebuttal can be made on the post-argument in the post-argument submission. This should not be taken as an open invitation to routinely make post-argument submissions. If you use it as a means merely to repeat a portion of the argument in your brief or at oral argument, it will surely leave a negative impression with the court.

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[2] 22 NYCRR § 500.6.

[3] In Romeo v. Tsunis Hotel Partners, 240 A.D.2d 647, 659 N.Y.S.2d 1020 (2d Dep't 1997), when the appellant's counsel failed to advise the court of a settlement until the court had informed the attorneys that oral argument would not be heard, the court requested the submission of affirmations as to why the appellants' counsel should not be sanctioned. *See also* Skinner v. City of Glen Cove, 216 A.D.2d 379, 628 N.Y.S.2d 717 (2d Dep't 1995) (imposing $1,700 costs and sanctions upon the appellant's attorneys for failing to notify court until calendar call on day of **oral** argument that appellant had died, and imposing sanctions on the respondent's attorney who knew of death and failed as officer of the court to report it to the Appellate Division).

[4] 22 NYCRR § 500.7.

[5] 22 NYCRR § 600.11(f)(4) (First Department); 22 NYCRR § 670.20(i) (Second Department).

[6] 22 NYCRR § 1000.11(g) provides:

> [E]xcept as otherwise ordered by this court, no post-argument submissions shall be accepted unless filed, with proof of service of one copy on either other party, within five business days of the argument date.

THE ABC's OF ORAL ARGUMENT

by

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THE ABC's OF ORAL ARGUMENT

NYSBA CLE
Albany, NY
November 4, 2013
By Cynthia Feathers

Introduction

At the November 4 CLE program in Albany, you saw portions of exceptional oral arguments in the Court of Appeals in which polished professionals showed a superb grasp of the record and the law and engaged in seamless, lucid exchanges with the court. In your program materials, you will find an excellent article on how to comprehensively prepare for oral argument so that you will make the most of this precious, final opportunity for advocacy.

In oral argument for any appeal, you will seek to not only review the record, briefs, and relevant cases, but also to gain a deeper perspective on your case, to crystallize your thinking on its strengths and weaknesses, to balance your sense of conviction with clear-headed objectivity, and to reflect on policy issues. In a close case, an incisive and persuasive oral argument may move an undecided judge in your favor.

For appeals that do not demand extensive preparation, or for practical realities that interfere with spending days on oral argument, including moot courting, this article offers a primer on seven steps for preparation by busy practitioners in basic cases, and seven aspects of oral argument protocol.

Preparation

1. Try to prepare one week, not one day, ahead of argument and certainly not the day of argument. Starting ahead of time will stir your thoughts and allow for more creative, reflective arguments.

2. You need not reread a massive record on appeal, but several documents are a must. Reread your own brief, being especially alert to bad facts and finding ways to confront and mitigate their damage at oral argument—the moment of truth when there is no more skirting of adverse elements of your case. Decide which arguments have true merit and should be focused on at oral argument, if the panel

permits. In a typical 10-minute time slot, it is more effective to delve into one or two key issues than to take a superficial, scattershot approach.

3. Review opposing counsel's brief, staying especially alert to strong arguments made and how you can address them. If you represent appellant and did a reply brief, you have a great start on this process.

4. If you did the appeal by the appendix method, review the appendix. If it is lengthy, and you cannot make time to reread your appendix and opposing counsel's, if any, then at least reread the decision and order or judgment and make a note of key pages in the record/appendix.

5. Reread the cases of primary importance. You may find that the discussion in your brief of these cases was too terse a summary and omitted illuminating facts or reasoning. Update the law to ensure that the cases you rely upon still reflect current, controlling authority.

6. Devote time to developing a page or two of bullet points with key concepts you hope to convey and with answers to questions you anticipate. This will help you get back on track after answering questions. Do not memorize wording of points to be made or read your notes at oral argument. Instead, internalize and make pithy notes about your main ideas and then have a conversation with the court. You will probably want to have opening and closing sentences in mind.

7. Unless it would be too distracting for you or too upsetting for the client, invite him or her to come to oral argument. It is good for clients to see how prepared you are, to observe for themselves where the court appears to be coming from, and to know that you did all you could to advance their cause.

Protocol

1. Know the customs of your tribunal. Do nothing that distracts opposing counsel or the judges or shows discourtesy, such as making grimacing faces or loudly shuffling papers. Never make an ad hominem attack on a party, adversary or judge.

2. Remember that jurists are not jurors. Don't raise your voice or pound the lectern or use props such as charts, unless they will play an important role in driving a point home.

3. While argument is a discussion, it is a formalized discussion, and not a discussion among equals. Be assertive but polite and deferential. In the civil case you observed at the CLE, when a judge asked a question, several times the appellant's advocate instantly stopped mid-sentence and listened intently. Do the same. Questions are not rude interruptions; they are the heart of oral argument, since they allow you to address concerns of decision makers and give answers that may satisfy the questioning judge, as well as persuade other judges on the panel.

4. If you don't like questions asked, be calm and professional, never showing frustration or churlishness, even if you feel attacked or bombarded. If you don't know the answer to a question, say you don't know. If you don't understand the question, politely ask for clarification.

5. Stick to the record. Don't share your unique knowledge as trial counsel. While there are exceptions to the rule that nothing outside the record can be discussed, and there are differences among the Departments about how such matters are handled, the basic rule to remember is that matters dehors the record are off limits.

6. Be alert, fluid, and flexible. If you are respondent, you may not deliver the argument you expected, since you should be responding to the discussion between appellant and the panel. If you are appellant and the Department you are in permits rebuttal, then you likely saved time for rebuttal. Listen carefully to respondent's points and use rebuttal well if any points are made that warrant your opposing or clarifying comments.

7. Keep in mind that oral argument is a very serious endeavor and an important part of your representation in a given case, your professional reputation generally, and the justice system. Deciding appeals involves the joint efforts of counsel and the court, and only when each branch performs its function properly can the result benefits litigants, the court, the bar, and society.

ORAL ADVOCACY:

KNOW YOUR CASE; KNOW YOUR COURT;

KNOW YOUR PURPOSE

by

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Oral Advocacy:

Know Your Case; Know Your Court; Know Your Purpose

by

Denise A. Hartman[1]

Appellate judges strongly agree that oral argument can make a difference. Even if some or most of the judges have formulated their opinions before oral argument based on the briefs, there may be one judge who has not yet made up his or her mind. Moreover, a good oral argument can often be useful in shaping a good decision, even if doesn't affect the ultimate disposition.

Based on years of experience and observation, I have come to believe that the best appellate arguments – the ones that leave me feeling most fulfilled and successful – are those where there has been a true "conversation" with the members of the court. While some tend to view oral argument as a opportunity for brilliant oration, rarely have I seen that approach used effectively. Perhaps because I am not a brilliant orator, it never works for me.

Thus I approach oral argument as an opportunity to have the most productive conversation that I can with the court in the limited time available. "Productive" has two meanings. For the advocate, it means persuading the court of the correctness of your position. For the judges on the court, it means having an opportunity to explore their concerns and to get straight answers to specific questions. For some judges, it means using the argument to make points they want to make to their colleagues on the court .

To make oral argument productive, I suggest that there are four basic rules. First, know your case. Prepare. You want to be the one person in the courtroom who knows more about your case and the legal issues it presents than anyone else. Second, know your court. Learn the parameters of oral argument there – know how the court works, the time it allocates for argument, and whether rebuttal is

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[1]Denise Hartman has been practicing appellate advocacy in the Office of the Solicitor General of the State of New York for two decades. The views she presents are her own, and do not necessarily represent those of her office.

permitted. Third, know your purpose and design your argument accordingly. Hone your theme to its barest essence to make sure the court gets it with unmistakable clarity. And when the time comes, present your argument with integrity, respect, and goodwill. Enjoy the conversation.

Know Your Case

The amount of time needed to prepare for argument depends on your case and, to some extent, the court. For the most difficult and complex cases that may have far-reaching impact, it make take a week or two, or even several weeks, to prepare adequately. In any event, preparation should begin at least two or three days before argument.

1. Reread the decision below and the briefs.

The first thing I do is reread the decision below and appellate briefs. If I represent the respondent, I pay particular attention to the reply. Oral argument is the only time you have to respond to assertions made in your adversary's reply brief. And some jurists have commented that they read the reply briefs first, because that is where the controversy is presented along its sharpest lines. Often, when you have had the benefit of time to gain new perspective, you will see the case differently than you did when you wrote your briefs.

2. Reread the record.

When the record or joint appendix is not unduly long, reread it all. When the record is thousands of pages long, it may be more fruitful to focus only on the most important parts. But be careful not to omit anything that may prove important at argument. Tab your record to indicate critical citations. Anticipate the Court's questions. It will boost your credibility if, in a very long record, you can pinpoint the citation promptly and precisely in response to a question from the bench.

3. Update your research.

Often there is an interval of many months between briefing and oral argument. The prudent attorney must be aware of any other cases on point that were decided after the briefs were filed. In particular, you do not want to be blind-sided by a new decision from the court in which you are arguing or from the higher

courts. If necessary, advise the court and your adversary of any new authority that you wish to bring to the court's attention. Each court has its own rules for submitting such information and alerting your adversary, but it should be done before the day of argument.

4. Prepare your oral argument binder.

I have found that the most effective way to organize myself is to prepare an oral argument binder. I print out the major cases, statutes, and constitutional provisions at issue and organize them in a black three-ringed binder, tabbed to allow me to locate them with ease. If the issue is one of statutory construction, the text of that statute is placed first, with the particular language highlighted. If the case involves the interpretation or application of a major case, that decision is placed first, again with the pertinent portions highlighted. Visualize these passages so that you can find them and quote them with agility. I will sometimes include a couple of pages from the record that may be critical, again to have at my fingertips. Especially in a difficult case, I will carry this binder with me for a week or two before argument, reading and rereading portions of it as time permits.

I also take this binder, with an outline of my argument at the forefront, to court with me. I have seen many attorneys come into court with a manilla file folder or Redwell full of papers. But it gives me comfort to come to court with a well-prepared binder, and I feel more professional. It shows the court I take my appellate advocacy seriously.

Know Your Court

Each court has its own rules and practices regarding oral argument. After determining that you want oral argument, you must check the court's rules to make sure the court allows for oral argument in your case. Next, you must check the court's rules to determine how you ask for oral argument and the parameters of argument, including the maximum time permitted and whether the court allows rebuttal.

In most of the state appellate courts, you must indicate who will present oral argument on the upper right hand corner of your briefs, as well as the time requested. See 22 N.Y.C.R.R. § 500.13(b) (Court of Appeals); § 600.10(d)(ii) (First Department); 670.10-c(g)(1) (Second Department); § 800.8(a) (Third

Department); § 1000.4(f)(4) (Fourth Department). The Second Circuit's rules regarding requesting oral argument are in a state of flux, but the proposed rule requires the filing of an Oral Argument Statement within 21 days of the filing of appellee's brief. Most courts expressly limit to one the number of counsel who may argue for a party, with exceptions granted upon motion. For appellants, rebuttal is permitted if reserved at the outset in the Court of Appeals, the First and Third Departments, and the Second Circuit. Rebuttal is permitted only in limited circumstances in the Second Department (when there is a material misstatement of fact or new matters are raised by court during respondent's argument), and not at all in the Fourth Department.

All of the appellate courts are now considered "hot." That is, the justices and judges are well-prepared. They have read your briefs, a clerk's report, and parts at least of the record. They sometimes prove that they know the record better than arguing counsel.

If you have not argued in a particular appellate court, it pays to attend a session of oral argument there before you appear for your case. Finally, in some courts like the Second Circuit, you can find out your panel before the day of argument. This gives you the opportunity to research the judges who will be on your panel.

Know Your Purpose

Now that you've laid the ground work, it's time to zero in on your theme and the issues you want to present. You want to go into the argument **with a purpose**. So try to articulate the main message you want to impart to the Court as clearly and succinctly as you possibly can. Choose at most three issues that you want to discuss, preferably fewer. And always keep in the back of your mind issues of preservation and the court's standard of appellate review.

1. Prepare your outline.

Prepare an outline of your argument. Include in your outline key words and phrases, and citations to authority and the record. Your outline can be in some detail, but never try to repeat everything you have said in your brief. You may also want to prepare a condensed outline that fits onto a single side of a page.

Being one of those people who used to have recurrent nightmares that I would not be able to find any words to say, let alone the right ones, I also actually write out my opening remarks. I sometimes write out a one-paragraph discussion of each issue I intend to address, as well as my conclusion. I certainly don't read any of these paragraphs at oral argument, but they are a crutch. Writing them out helps me have the precise words in mind whether I use them in my affirmative presentation or weave them into answers to questions from the court.

I place these materials in the front of my black oral argument binder. On the inside of the binder cover, I clip the page containing my opening remarks and a couple key quotes that I may want to use somewhere in my argument. Opposite that page, I place my one-page outline. The full outline and draft discussion paragraphs are placed behind the one-page outline and in front of my authorities. Thus, when I open my binder at the podium, I have all I need spread out right before me.

2. Moot Your Argument.

I cannot stress how helpful it is to moot your argument, sometimes more than once, depending on the difficulty and importance of the case. Even if you have only one person who knows the case who has the time to listen to you, articulating your argument fully to that person, and answering his or her questions, is highly beneficial. For major cases in our office, we will sometimes moot with three or more people acting as judges, sometimes two or three times. This helps the attorney really hone how he or she wants to say things. It allows the lawyer to anticipate many of the questions the court will have, and to have stock answers at the ready. Often, it provides an opportunity to practice responses to the very hypotheticals that the court will raise.

When holding only one moot court, I try to do it two days before the actual argument. This eases my anxiety immensely, because it forces me to prepare before the last minute and allows me time to track down answers to concerns that arise. Although it is not easy, we also try simulate the actual setting and format of the appellate court.

After mooting, spend some time debriefing. Think more about anything you could not answer well. Research more, too, if necessary. Revise and hone your outline. Hold another moot if you are still uncomfortable.

Present Your Argument

Now you are ready for the "conversation." To make oral argument productive, you must demonstrate from the outset that you are prepared, that you are presenting your position with integrity and respect for the court, and that you welcome the give and take of the conversation. Hopefully the quality of your briefs will have given you a head start on this.

Introduce yourself, reserve rebuttal time if available, then begin your opening remarks. Slow down, make eye contact with the judges, be flexible, and try to relax. Listen to the judges' questions. This is your opportunity to get a sense about what might be bothering the judges. Answer their questions as best you can, as directly as you can, and without delay. You may need to diverge from your outline to address the court's concerns. But always remember your theme. Always come back to it. Present your argument with conviction and intensity, but don't be overly emotional or melodramatic.

Sometimes, if I have a trusted colleague who is well-versed in the case, I will make a checklist of points that I must cover. I have him or her sit at counsel's table next to me and check things off as they are discussed. Before I close, if I have time left, I will glance at that checklist and cover any points that are left. This technique has served me particularly well in hotly contested, high-stakes cases where it is easy to get caught in the flow of argument and lose track of your points. Having knowledgeable counsel at the table is also useful for locating citations in a lengthy record.

If you are respondent or appellee, you must be especially flexible. You can begin your argument with a statement of your affirmative position, but you must respond to the concerns the court addressed to your adversary. There are times as respondent when I have thrown out my whole outline. Take notes during your adversary's argument so that you can make sure you respond to issues as warranted. But again, remember your theme, and weave it into your responses. Come back to it in closing.

Finally, know when it is time to sit down. As appellant, you should always give a full oral argument. If appellant submits, you should still appear in all but the simplest of cases to give the court an opportunity to ask questions. But even in harder, argued cases, you do not need to use all your time. Sense when the court has heard enough. Cover any "must say" points succinctly, then sit down.

Some Rules for Oral Argument:

* Be completely honest. Your integrity is on the line.

* Prepare. Know the facts and the law.

* Don't read your argument.

* Always stand when speaking.

* Never start with a long rendition of the facts or proceedings below. Weave the facts into your argument.

* Speak slowly, make eye-contact, and welcome questions.

* Answer questions directly – yes or no first, then explain or qualify.

* If you don't know the answer to a question, say so.

* Don't use the first person, I.

* Refer to the judges by name, if you can.

* Don't speak over the judges. Be respectful.

* Hold your temper.

* Do not attribute bad motive to your adversary.

* Do not react visibly, verbally or nonverbally, during his or her presentation.

* Don't go outside the record, unless the court gives you permission.

* Be yourself and enjoy the "conversation."

MELVILLE FACULTY BIOGRAPHIES

Robin Mary Heaney

Robin Mary Heaney is a single practitioner in Rockville Centre. Her practice focuses on appeals and substantial summary judgment motions in all State and Federal Courts in New York. She is admitted in New York, the Federal Second Circuit and the Supreme Court of the United States. Ms. Heaney graduated from Iona College and St. John's Law School. She is a member of the Bar Association's Committee on Courts of Appellate Jurisdiction.

Cheryl F. Korman

Cheryl F. Korman is a Partner in Rivkin Radler's Litigation & Appellate Practice, where she has represented the Firm's clients in hundreds of appellate matters. A former Senior Court Attorney for the New York State Appellate Division, Second Judicial Department, Ms. Korman's practice has focused on appeals for more than twenty years. She regularly prosecutes and defends appeals before the appellate courts of New York State and the U.S. Court of Appeals for the second circuit. She handles appeals involving substantive and procedural issues relating to diverse areas of the law, including attorney and accountant malpractice, civil procedure, commercial litigation, insurance law, labor law, municipal liability, no-fault law, medical malpractice and premises liability. Ms. Korman is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. The *Long Island Business News* has named Ms. Korman among the 40 Rising Starts in Business; listed her among Long Island's Who's Who in Women in Professional Services; and recently selected her for the second time as one of Long Island's 50 Most Influential Women Ms. Korman is a Board Member for the American Heart Association for the Long Island Region.

APRILANNE AGOSTINO received a Bachelor of Arts degree in Mathematics from New York University in 1981, and a Juris Doctor from Fordham University School of Law in 1984. The following year she began working at the Appellate Division, Second Department, first as a Court Attorney and then as Law Secretary to Associate Justice Richard A. Brown. In1991, Ms. Agostino went to the Queens County District Attorney's office with newly-appointed DA Brown to serve as his Counsel. Ms. Agostino returned to the Second Department two years later, as Law Secretary to Associate Justice Charles B. Lawrence. She subsequently served in the court's Motions Department, and then as Deputy Chief Court Attorney. In 1999 she was appointed Chief Court Attorney, and in late 2003 she was promoted to the position of Associate Deputy Clerk. Ms. Agostino served as the Acting Chief Clerk of the Appellate Term for the Second Judicial Department from December of 2005 until the Spring of 2007, when she returned to the Appellate Division to continue her tenure as Associate Deputy Clerk. In 2010 she was appointed Deputy Clerk, and on December 1, 2011, she assumed the role of Clerk of the Court.

Stuart M. Cohen returned to private solo practice in 2010 after a long period of employment in the appellate courts of New York, in which his positions included, among others, chief Clerk of the Court of Appeals and law clerk to a former Chief Judge. A graduate of Connecticut College and New York University School of Law, he has appeared as an advocate in the Court of Appeals and the Appellate Division on civil and criminal matters; his practice also includes consulting with other attorneys on appeals and litigated motions in appellate and trial courts. Contact information is available at www.smcappeals.com.

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Admitted to bar: 1986- New York, New Jersey and U.S. District Court, District of New Jersey; 1988- U.S. District Court, Eastern District of New York; 1994- U.S. District Court, Southern District of New York; 1995- U.S. Court of Appeals, Second Circuit; 1996 U.S. Supreme Court; 2008- U.S. Court of Appeals, Ninth Circuit.

Yeshiva University- B.A., 1983; J.D., 1986.

Vice- Chairman, Appellate Practice Committee Queens County
Member, Committee on Courts of Appellate Jurisdiction
New York State Bar Association
Speaker- Seminar New York Appellate Practice 2007,2009, 2011, 2013

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Vice-President Brandeis Association.

Elliott Scheinberg, whose practice is limited to matrimonial appeals, serves on the Board of Managers of the American Academy of Matrimonial Lawyers and co-chairs its Amicus Curiae and CLE Committees. He is a member of NYSBA's Committee of Courts of Appellate Jurisdiction and CLE Committee. He has authored a two volume treatise, Contract Doctrine and Marital Agreements in New York, in its second edition, a variety of chapters for Matthew Bender's New York Civil Practice, Matrimonial Actions, and is the author of "Grandparental Visitation: Its Evolution in New York State," which traces the history and evolution of grandparental visitation in New York, published by the Benjamin N. Cardozo School of Law. He has written numerous articles for the New York Law Journal, the New York State Bar Association's Family Law Review, and the New York Family Law Monthly.

Mr. Scheinberg has written seven amicus curiae briefs to the New York State Court of Appeals, having been cited in one decision, with others adopting arguments advanced in the briefs. Mr. Scheinberg lectures regularly at the Appellate Division, Second Department, and for Bar Associations. He is a member of NYSBA's Executive Committee of the Family Law Section and is the co-chair of NYSBA's Amicus Committee.

A graduate of the Benjamin N. Cardozo School of Law, Mr. Scheinberg, prior to entering law school, was a doctoral candidate in Romance Philology at the University of Chicago, and a Teaching Fellow in the French Department, Romance Linguistics Program, at the University of Michigan in Ann Arbor. He received his Bachelor of Science in Mathematics and French from Brooklyn College, Brooklyn, N.Y.

He is in "Who's Who in American Law" and in "The Best Lawyers in America." He is also rated AV Preeminent 5.0 out 5.0 in Martindale-Hubble.

BIOGRAPHY

Peter B. Skelos was born and raised in Rockville Centre, New York. He is a graduate of Emory University (B.A. 1977) and Fordham Law School (J.D. 1980). He is admitted to practice in the State of New York, the United States Supreme Court, U.S. Court of Appeals for the Second Circuit, the Federal District Courts for the Eastern and Southern Districts of New York, and the State of Florida.

Following approximately 15 years as a trial attorney in municipal and private practice, Justice Skelos has served as a Judge of the New York State District Court, a Justice of the Supreme Court, an Associate Justice of the Appellate Term and an Associate Justice of the Appellate Division of the Supreme Court. Justice Skelos was re-elected to the Supreme Court and re-appointed to the Appellate Division in 2012.

Justice Skelos has received awards for his exemplary public and professional service from many civic and bar associations and served three terms as the administrative chair of the We Care Fund Advisory Board of the Bar Association of Nassau County. He regularly volunteers at numerous events sponsored by the We Care Fund.

Justice Skelos has been a member of the adjunct faculty of Long Island University, C.W. Post College since 1996, where he has taught courses in criminal law, constitutional criminal procedure, psychiatry and the law, security administration and employment discrimination law. He regularly lectures and serves as a panel member at continuing legal education programs sponsored by a variety of bar associations and the Office of Court Administration.

ROCHESTER FACULTY BIOGRAPHIES

Alan J. Pierce has 28 years of litigation experience, concentrating on appellate practice, insurance coverage, and defamation. He served as Confidential Law Clerk to Hon. Richard D. Simons of the New York Court of Appeals (1984-1986). He has handled over 150 appeals and motions for leave to appeal in his career, appearing before all of New York's State appellate courts, the United States Supreme Court, and in the First, Second, Fourth and Eleventh Federal Circuit Courts of Appeals.

Mr. Pierce is a former Adjunct Professor of Appellate Advocacy at Syracuse University College of Law (199-2006), and has authored several publications and frequently speaks on appellate advocacy and insurance coverage litigation for the ABA and NYSBA. He has been selected by his peers for inclusion in the "Best Lawyers in America" and as a New York "Super Lawyer" in the area of Appellate Practice since 2007. He is a member of the 5th Judicial District's Character & Fitness Committee, and the Board of Directors of the New York State Academy of Trial Lawyers.

David Tennant practices in the fields of Indian law litigation and appeals, complex commercial litigation, products liability, and insurance. He leads the firm's prominent Appellate Litigation Team (Benchmark Appellate 2011-2012) and co-chairs the firm's nationally ranked (*Chambers USA: Leading Lawyers for Business 2011*) Indian Law and Gaming Team. David has argued appeals in the New York Court of Appeals and in all four Appellate Division Departments in New York, and in the United States Court of Appeals for the Third Circuit, Ninth Circuit, and Federal Circuit. His appellate work includes trial consulting in high-exposure cases, and "mooting" briefs prepared by other appellate counsel.

A. Vincent Buzard, Esq.
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Mr. Buzard is founder and chair of the firm's Appellate Litigation and Advocacy Practice Group, and selected as one of the Best Lawyers in America in appellate practice and in New York Super Lawyers in appellate practice. He was selected as 2014 Appellate Lawyer of the Year in the Rochester area by Best Lawyers in America, only one of two so named in New York state. Mr. Buzard has been rated Preeminent by Martindale-Hubbell. He is chair of the Council of Appellate Lawyers of the American Bar Association, author of New York Appellate Practice published by LexisNexis and an author of the New York Chapter in The Appellate Practice Compendium published by the American Bar Association. Mr. Buzard has lectured extensively in New York and nationally on appellate practice. He is a former president of the New York State Bar Association and is a member of the American Bar Association House of Delegates. His recent appellate cases include the following

Court Memberships

New York State Bar
United States District Court
- Western District of New York

United States Court of Appeals
- Second Circuit

United States Supreme Court

Education

JD, cum laude, University of Michigan Law School
BA, Wabash College

Frances E. Cafarell was appointed Clerk of the Appellate Division, Fourth Department in December 2011. Prior to her appointment as Clerk, Ms. Cafarell served as Deputy Clerk of the Court. She also served the Court as acting Consultation Clerk and Supervisor of the Decision Department, Administrator of the Assigned Counsel Program, Family Court Motions Clerk, and Confidential Law Assistant. She was previously engaged in the private practice of law at Harris Beach, in the firm's Rochester office, where her practice was concentrated in the areas of commercial and environmental litigation and appellate practice. Ms. Cafarell is a member of the American Bar Association, New York State Bar Association and Monroe County Bar Association. In 2011, she received Volunteer Legal Services Project's William E. McKnight Award in recognition of her commitment to Pro Bono Service. Ms. Cafarell is an honors graduate of Albany Law School, where she was a member of the Albany Law Review and the National Moot Court Competition team. She also holds a Master's degree in Administration of Justice from American University and a Bachelor's degree in Broadcast Journalism from Syracuse University. Before attending law school, she worked as a television news anchor and legal reporter.

Justice John V. Centra

Justice John V. Centra is a graduate of the State University of New York at Buffalo and received his Juris Doctor degree from Ohio Northern Law School. Following his admission to the Bar in 1984, he served as an Assistant District Attorney in Onondaga County in the felony trial and DWI units. In 1988, he began a 10-year career as Town Justice for the Town of DeWitt. In 1989, he entered the private practice of law with Carni, Centra & Rose from 1989 to 1991; Primo, Primo & Centra from 1992 to 1997; and Primo, Primo, Centra & Kirwan, LLP from 1998 to 1999. In May 1999, Governor George Pataki appointed him to serve on the New York State Supreme Court in Onondaga County, and he was elected to that office for a term beginning in January 2000. While on the Supreme Court, Justice Centra served as Deputy Administrative Judge for the Fifth Judicial District and as Chairman of the Onondaga County Jury Board. He also served as a Judicial Delegate to the Association of Justices of the Supreme Court of the State of New York. On October 6, 2006, Governor Pataki designated him to serve as an Additional Justice on the Appellate Division, Fourth Department. Justice Centra is a member of the New York Bar Association, a member and Past President of the New York State Magistrates Association, and the New York State Trial Lawyers Association. Until recently, he served on the Board of Trustees of the Syracuse Landmark Theater. He resides in Fayetteville with his wife and four children.

Matthew K. Corbin

Matthew K. Corbin. Matt joined Aon as a Vice President in 2013. Before joining Aon, he was a partner with Lathrop & Gage LLP in Kansas City, Missouri, and Overland Park, Kansas. He was a business trial and appellate lawyer handling commercial, business tort, employment, construction, insurance, professional liability, and regulatory matters. Matt previously was an associate with Lathrop & Gage. He began his legal career as a law clerk to the late Hon. G. Thomas Van Bebber in the U.S. District Court for the District of Kansas. After completing his district court clerkship, he clerked for the Hon. Mary Beck Briscoe of the U.S. Court of Appeals for the Tenth Circuit.

Matt earned his J.D. from the University of Kansas, where he was Note and Comment Editor of the *Kansas Law Review,* was a member of the Order of the Coif, and won the C.C. Stewart Award in Law. Matt also earned his B.A. from the University of Kansas.

JUSTICE EUGENE M. FAHEY

New York State Supreme Court Associate Justice
Appellate Division Fourth Department
Buffalo

Justice Eugene M. Fahey earned three degrees from the State University of New York at Buffalo: a B.A. in political science in 1974 (cum laude); a J.D. in 1984; and an M.A. in European History in 1998. Justice Fahey served on the Buffalo Common Council from 1978 to 1984 and again from 1988 to 1994. He also served as a law clerk to Judge Edgar C. NeMoyer before entering private practice in 1985, where he worked as house counsel for Kemper Insurance Company until 1993. In 1994, Justice Fahey was elected to Buffalo City Court and on that bench had a yearly workload of 3,500 cases, most of which were criminal matters. In 1996, Justice Fahey was elected to serve as a Supreme Court Justice in the Eighth Judicial District. Once on that bench, Justice Fahey handled both civil and criminal calendars, and presided over cases in Erie County and throughout the Eighth Judicial District. Justice Fahey continued in that role until 2005, at which point he was selected to preside in the Eighth Judicial District Commercial Division. In 2006, Governor George E. Pataki appointed Justice Fahey as an additional justice of the Appellate Division, Fourth Department. Justice Fahey served in that capacity until Governor David A. Paterson designated him as an associate justice of the Appellate Division, Fourth Department in December 2009. After his re-election in 2010, Justice Fahey was redesignated as an associate justice of the Appellate Division, Fourth Department by Governor Andrew M. Cuomo. Justice Fahey is a member of various state and local professional organizations, and is a frequent speaker at Continuing Legal Education Programs. He has also written instructional materials on a variety of topics, including medical malpractice litigation, the use of expert witnesses, negotiation and commercial litigation. Off the bench, Justice Fahey has been involved in a variety of community organizations, including Deaf Adult Services of Western New York, Inc., Buffalo Neighborhood Housing Services and Fillmore-Leroy Area Residents, Inc. Justice Fahey, however, takes great pride in his family, which consists of his wife, Colleen Maroney-Fahey, his daughter, Ann B.D. Fahey, and his loyal dog, Holly.

CYNTHIA FEATHERS

Cynthia Feathers' practice is devoted to criminal and civil appeals. In 25 years, she has handled 400 appeals. She co-chairs the NYSBA Committee on Courts of Appellate Jurisdiction and chairs its Pro Bono Appeals Program, as well as the Pro Bono Committee of the ABA Council of Appellate Lawyers. She serves as Of Counsel to the Rural Law Center and Vice President of The Legal Project Board of Directors. She is a member of the OCA CLE Board and the Advisory Boards for the Third Department Civil Appeals Settlement Program and Attorney for Children Office and serves on the State Office of Indigent Legal Services Working Group that is developing statewide standards for appellate representation in assigned cases.

Feathers obtained a B.S.J. magna cum laude from the Medill School of Journalism at Northwestern University and a J.D. with honors from Boston College Law School; clerked at the Appellate Division, Third Department; and served at the Appeals & Opinions Bureau of the New York Attorney General's Office in Albany and the Center for Appellate Litigation in New York City. For several years, she was an Adjunct Professor of Appellate Practice at Albany Law School. Before going to law school, for a decade, she was a corporate editor in Boston and Chicago.

Denise A. Hartman

Denise A. Hartman is an Assistant Solicitor General in the Office of the New York State Attorney General. In her tenure at the Solicitor General's Office, Denise has briefed and argued hundreds of cases in the state and federal appellate courts. The subject matter of her cases includes constitutional law, tort law, administrative law and environmental law. In addition to briefing and arguing her own cases, Denise oversees appellate briefs written by other attorneys in her office and their preparation for oral argument. Before serving in her current position, Denise clerked in the Appellate Division, Fourth Department. She graduated magna cum laude from the Syracuse University College of Law in 1983, and from the Cornell University School of Civil and Environmental Engineering in 1977.

Julian B. Modesti
Counselor at Law | Mediator | Arbitrator

Julian B. Modesti is a member of Menter, Rudin & Trivelpiece, P.C.'s Litigation, Alternative Dispute Resolution and Environmental Law practice groups. Experienced in both state and federal courts, his commercial litigation practice includes the representation of clients in disputes involving leases, finance agreements, unfair competition, trade secrets and professional malpractice. He also represents attorneys in disciplinary matters. As head of the firm's appellate practice, Mr. Modesti prosecutes or defends appeals in both state and federal courts on a wide variety of civil law issues. He is often retained by other attorneys to serve as an arbitrator or mediator in cases involving commercial disputes, personal injury, property damage, aviation claims and employment conflicts.

Prior to becoming an attorney, Mr. Modesti served as an environmental consultant with McLaren/Hart Environmental Engineering Corporation in Philadelphia, Pennsylvania. He frequently lectures at New York State Bar Association seminars on appeals and legal ethics.

Justice Erin M. Peradotto

Justice Erin M. Peradotto, is a Phi Beta Kappa graduate of the State University of New York at Buffalo where she earned her Bachelor of Arts degree, magna cum laude, in 1981 and her Juris Doctor degree in 1984. For nearly two decades before her election to the State Supreme Court in 2003, Justice Peradotto practiced as a trial attorney in the Supreme Courts throughout the Eighth Judicial District, and in other parts of the State , and handled appeals before the Appellate Division, Fourth Department and the New York State Court of Appeals. She was appointed to the Appellate Division, Fourth Department by Governor Pataki on December 22, 2006. From 1997-1998, she served as the Assistant Attorney General in Charge of the Buffalo Regional Office of the New York State Attorney General's office. In that capacity, she supervised a staff of 23 attorneys and 30 support staff in the defense of the State of New York and its agencies in the 8th Judicial District. Justice Peradotto served as President of the Bar Association of Erie County from 1997-1998. She also served on the State of New York's Attorney Grievance Committee for the 8th Judicial District from 2001-2003. She has served as a delegate to the New York State Bar Association's House of Delegates, a director of the Women Lawyers of Western New York, a director of the Volunteer Lawyers Project, and a director of the SUNY at Buffalo Law Alumni Association. In 1997, she was recognized among the "40 Under 40" in Business First of Buffalo. In 2006, she received the "Outstanding Jurist" award from the Bar Association of Erie County's Matrimonial and Family Law Committee. She is a member of the New York State Supreme Court Justices Association.

Judge Eugene F. Pigott, Jr.

Eugene F. Pigott, Jr., Associate Judge of the Court of Appeals, was born in Rochester, New York, in September 1946.

He graduate from LeMoyne College (B.A.1968). Judge Pigott served on active duty in the United States Army from 1968-1970. While in the service, he was stationed in the Republic of Vietnam, serving as a Vietnamese interpreter. He graduated from SUNY at Buffalo School of Law (J.D. 1973) and was admitted to the Bar of the State of New York in 1974. Judge Pigott practiced law in Buffalo, New York, with the firm of Offermann, Fallon, Mahoney & Adner from 1974 to 1982. In 1982 he was appointed Erie County Attorney and served in that position until 1986. In 1986 he became chief trial counsel for the firm of Offermann, Cassano, Pigott & Greco. On February 4, 1997, he was appointed to the New York State Supreme Court by Governor George E. Pataki and thereafter was elected to a full 14-year term. In 1998 he was designated to the Appellate Division, Fourth Department and was appointed Presiding Justice on February 16, 2000. On August 18, 2006, he was nominated by Governor Pataki to the Court of Appeals. His nomination was confirmed by the New York State Senate on September 15, 2006. He and his wife Peggy live on Grand Island, New York. They have two children.

Elliott Scheinberg, whose practice is limited to matrimonial appeals, serves on the Board of Managers of the American Academy of Matrimonial Lawyers and co-chairs its Amicus Curiae and CLE Committees. He is a member of NYSBA's Committee of Courts of Appellate Jurisdiction and CLE Committee. He has authored a two volume treatise, Contract Doctrine and Marital Agreements in New York, in its second edition, a variety of chapters for Matthew Bender's New York Civil Practice, Matrimonial Actions, and is the author of "Grandparental Visitation: Its Evolution in New York State," which traces the history and evolution of grandparental visitation in New York, published by the Benjamin N. Cardozo School of Law. He has written numerous articles for the New York Law Journal, the New York State Bar Association's Family Law Review, and the New York Family Law Monthly.

Mr. Scheinberg has written seven amicus curiae briefs to the New York State Court of Appeals, having been cited in one decision, with others adopting arguments advanced in the briefs. Mr. Scheinberg lectures regularly at the Appellate Division, Second Department, and for Bar Associations. He is a member of NYSBA's Executive Committee of the Family Law Section and is the co-chair of NYSBA's Amicus Committee.

A graduate of the Benjamin N. Cardozo School of Law, Mr. Scheinberg, prior to entering law school, was a doctoral candidate in Romance Philology at the University of Chicago, and a Teaching Fellow in the French Department, Romance Linguistics Program, at the University of Michigan in Ann Arbor. He received his Bachelor of Science in Mathematics and French from Brooklyn College, Brooklyn, N.Y.

He is in "Who's Who in American Law" and in "The Best Lawyers in America." He is also rated AV Preeminent 5.0 out 5.0 in Martindale-Hubble.

NANCY E. SMITH
Senior Associate Justice
New York State Supreme Court
Appellate Division, Fourth Department

Justice Nancy Smith is the Senior Associate Justice of the Appellate Division, Fourth Department. She began her legal career as an Assistant District Attorney in Monroe County in 1982, where she remained until 1984. She then spent a year practicing law with the firm of Greisberger, Zicari, McConville, Coorman, Morin and Welch in Rochester, New York, and then returned to the District Attorney's Office from 1985 to 1992. She was elected to her first judicial office as a Monroe County Court Judge and took the bench in January, 1993. Justice Smith was also assigned to the Livingston County Family, Supreme and County Courts, and presided over matters in Ontario, Rensselaer, Saratoga, Yates and Sullivan counties. She was appointed by Governor George Pataki to the New York State Supreme Court in the Seventh Judicial District in 1997, and was elected to that office for a term beginning in January of 1998. Governor Pataki then appointed her to the Appellate Division, Second Department in March of 1999, and reassigned her to the Fourth Department in 2004. Justice Smith is a graduate of Allegheny College and Vermont Law School, and has served on many civic and charitable boards, bar association and Office of Court Administration committees, has mentored and instructed lawyers at many levels.

Circuit Judge Richard C. Wesley
United States Court of Appeals
For the Second Circuit

Judge Wesley was nominated by President George W. Bush to the 2nd Circuit Court of Appeals on March 5, 2003. On June 11, 2003, Judge Wesley was unanimously confirmed by the U.S. Senate and on June 12, 2003, President Bush signed his commission. Judge Wesley took the Federal bench on June 17, 2003.

Judge Wesley received his B.A. degree summa cum laude from the State University of New York at Albany in 1971, and his J.D. degree from Cornell Law School in 1974.

Judge Wesley engaged in the private practice of law from the time of his admission to the New York Bar in 1975 until 1986. During three years of that period, 1979 until 1982, he also served as assistant counsel and chief legislative aide to New York Assembly Minority Leader James L. Emery. In 1982 Judge Wesley was himself elected to the Assembly - and was re-elected in 1984 - representing Livingston, Allegany and Ontario Counties.

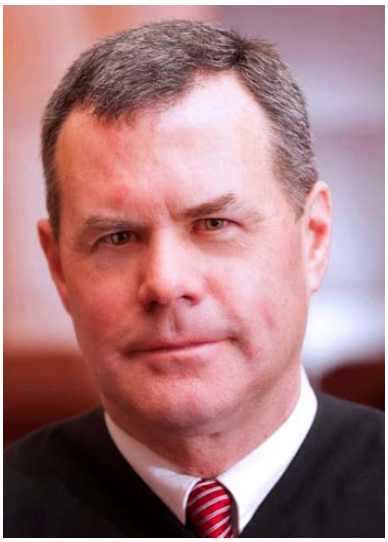
In 1986 Judge Wesley was elected to a 14-year term as a Justice of the New York Supreme Court from the Seventh Judicial District. He served as Supervising Judge of that district's criminal courts from 1991 to 1994. In 1994 he was appointed by Governor Mario Cuomo to the Supreme Court Appellate Division, Fourth Department. In 1997 he was appointed a Judge of the New York Court of Appeals by Governor George Pataki, a position he held until joining the Federal judiciary.

ALBANY FACULTY BIOGRAPHIES

Nicholas E. Tishler has limited his practice to research, writing and appellate advocacy since joining the Appeals Bureau of the Office of the District Attorney of Suffolk County (New York) in 1982. He has continued to limit his practice to those areas as a solo practitioner in private practice since 1983. He has argued appeals in all of the appellate courts of the State of New York and in the Federal Courts of Appeal for the First, Second and Federal Circuits. He has also argued appeals in the highest courts of Vermont and Rhode Island. In addition to his work in the area of civil appellate practice, Nick does consulting, post-conviction and appellate work as an assistant district attorney and special prosecutor for the Office of the Saratoga County District Attorney and has been appointed in the same roles as a special assistant district attorney and special prosecutor for the Essex, Warren and Montgomery Offices of District Attorney. Nick is a member of the New York State Bar Association and serves on its Committee on Courts of Appellate Jurisdiction and is a member of the Bar Associations of Albany, Rensselaer, Colombia, Saratoga, Schenectady, and Saratoga Counties. Nick is also a member of the Capital District Trial Lawyers Association, the International Association of Prosecutors, the International Criminal Law Network and the National District Attorneys Association. Nick was an Adjunct Professor of Appellate Practice at Albany Law School in 2012 and was a panel contributor to Black's Law Dictionary (West, 9th edition) and to Garner's Modern American Usage (Oxford, 3rd edition).

Stuart M. Cohen returned to private solo practice in 2010 after a long period of employment in the appellate courts of New York, in which his positions included, among others, chief Clerk of the Court of Appeals and law clerk to a former Chief Judge. A graduate of Connecticut College and New York University School of Law, he has appeared as an advocate in the Court of Appeals and the Appellate Division on civil and criminal matters; his practice also includes consulting with other attorneys on appeals and litigated motions in appellate and trial courts. Contact information is available at www.smcappeals.com.

Justice John C. Egan Jr.



- Appointed to the Third Department effective February 4, 2010.
- Graduated from Bryant College in 1976.
- Graduated from Albany Law School in 1980.
- Admitted to the practice of law in 1981.
- Engaged in private practice from 1981 to 1996.
- Served as an Assistant Corporation Counsel for the City of Albany from 1981 to 1996.
- Also served as part-time law clerk in Albany County Surrogate's Court.
- Served as Counsel, Third Department Judicial Screening Committee.
- Elected Albany City Court Judge in 1996.
- Elected Supreme Court Justice for the Third Judicial District in 2005.

CYNTHIA FEATHERS

Cynthia Feathers' practice is devoted to criminal and civil appeals. In 25 years, she has handled 400 appeals. She co-chairs the NYSBA Committee on Courts of Appellate Jurisdiction and chairs its Pro Bono Appeals Program, as well as the Pro Bono Committee of the ABA Council of Appellate Lawyers. She serves as Of Counsel to the Rural Law Center and Vice President of The Legal Project Board of Directors. She is a member of the OCA CLE Board and the Advisory Boards for the Third Department Civil Appeals Settlement Program and Attorney for Children Office and serves on the State Office of Indigent Legal Services Working Group that is developing statewide standards for appellate representation in assigned cases.

Feathers obtained a B.S.J. magna cum laude from the Medill School of Journalism at Northwestern University and a J.D. with honors from Boston College Law School; clerked at the Appellate Division, Third Department; and served at the Appeals & Opinions Bureau of the New York Attorney General's Office in Albany and the Center for Appellate Litigation in New York City. For several years, she was an Adjunct Professor of Appellate Practice at Albany Law School. Before going to law school, for a decade, she was a corporate editor in Boston and Chicago.

Justice Elizabeth A. Garry

Appointed to the Third Department effective March 19, 2009.
Graduated from Alfred University and Albany Law School.
Served as Confidential Law Clerk to the Hon. Irad S. Ingraham, Justice of the Supreme Court, from 1990 through 1994.
Engaged in private practice with the Joyce Law Firm in central New York from 1995 through 2006.
Served on the Planning Board for the Town of New Berlin, Chenango County, 1999 to 2001
Elected as Town Justice in the Town of New Berlin in 2001 and reelected to a second term in 2005.
Elected Supreme Court Justice for the Sixth Judicial District in 2006.

Denise A. Hartman

Denise A. Hartman is an Assistant Solicitor General in the Office of the New York State Attorney General. In her tenure at the Solicitor General's Office, Denise has briefed and argued hundreds of cases in the state and federal appellate courts. The subject matter of her cases includes constitutional law, tort law, administrative law and environmental law. In addition to briefing and arguing her own cases, Denise oversees appellate briefs written by other attorneys in her office and their preparation for oral argument. Before serving in her current position, Denise clerked in the Appellate Division, Fourth Department. She graduated magna cum laude from the Syracuse University College of Law in 1983, and from the Cornell University School of Civil and Environmental Engineering in 1977.

George J. Hoffman, Jr., Esq. - Of Counsel
Allen & Desnoyers, LLP, Albany

Practice Areas:

Appeals
Criminal Defense
Environmental/Toxic Tort
Insurance & Accident

Experience:

George J. Hoffman, Jr. concentrates his practice on appellate advocacy, environmental/toxic tort litigation; insurance coverage; premises liability; class action litigation and criminal law. For over 16 years, George has handled all aspects of civil litigation, including perfecting and arguing appeals in the Appellate Division, Second, Third and Fourth Departments. He serves as a member of the Appellate Division Third Department's Assigned Counsel Plan. Prior to entering private practice in 1998, George gained extensive trial and appellate litigation experience while serving as an Assistant District Attorney in the Columbia County District Attorney's Office.

George is a 1993 graduate of State University of New York at Plattsburgh where he was elected to Omicron Delta Kappa, Phi Kappa Phi and Pi Sigma Alpha. George received his Juris Doctorate in 1996 from the University of Dayton School of Law. While at Dayton, George received the American Jurisprudence Award for his achievements in legal research and writing.

Admissions:

Mr. Hoffman has been practicing law for more than sixteen years. He is an attorney admitted to practice law in New York State and in the United States District Court, Northern District of New York and in the United States Court of Appeals for the Second Circuit. George is a member of the New York State, Albany County and American Bar Associations. George has been appointed to the New York State Bar Association Committee on courts of Appellate Jurisdiction.

Education:

Mr. Hoffman received a Bachelor of Science Degree in Political Science from SUNY Plattsburgh in 1993, and a Juris Doctorate from University of Dayton School of Law in 1996.

Michael J. Hutter is a Professor of Law at Albany Law School, where he has been a member of the faculty since 1976. He is also Special Counsel to the Albany law firm of Powers & Santola, LLP. Professor Hutter is the current President of the Albany County Bar Association.

Professor Hutter is an honors graduate of Brown University, receiving scholarships during his four years of matriculation, and Boston College Law School. In law school he was the Editor-In-Chief of Boston College's law review (*Annual Survey*), and was elected to the Order of the Coif. After graduation, Professor Hutter served as law clerk to Judge Matthew J. Jasen, an Associate Judge of the New York Court of Appeals. From 1979-1984, he was the Executive Director of the New York State Law Revision Commission. He also served as Chair, NYS Capital Defender Office from 2005-2008. In 1999, Professor Hutter was selected as one of seven nominees to the Court of Appeals by the State Commission on Judicial Nomination. He presently serves as a Commissioner on the New York State Law Revision Commission.

Professor Hutter's teaching areas include Evidence, New York Practice, Conflict of Laws, Trial Practice, and Unfair Competition. He authors a bi-monthly "Evidence" column for the New York Law Journal wherein he comments on and discusses recently decided court decisions raising evidence issues. In his practice,

Justice William E. McCarthy

- Appointed to the Third Department effective January 30, 2009.
- Graduated from State University College of New York at Potsdam and Albany Law School.
- Served as confidential law clerk to Supreme Court Justice Edward Conway (1990-1993), Supreme Court Justice Joseph Harris (1994-1997) and Court of Claims Judge Edward Sheridan (1997-1998).
- Served as Senior Assistant Counsel to Governor George Pataki (1998-2004).
- Appointed to the Supreme Court for the Third Judicial District in June 2004 and elected to a 14-year term in November 2004.
- Appointed an Associate Justice of the Appellate Division, Second Department in December 2006.
- Served as the Justice-in-charge, Commercial Division, Supreme Court, Albany County (2006).
- Served as a member on the New York State CPLR article 81 Guardianship Committee.
- Former adjunct professor at Siena College.

Presiding Justice Karen K. Peters | Justice Robert S. Rose | Justice John A. Lahtinen
Justice Leslie E. Stein | Justice Edward O. Spain | Justice Elizabeth A. Garry | Justice John C. Egan Jr.
Home

Alan J. Pierce has 28 years of litigation experience, concentrating on appellate practice, insurance coverage, and defamation. He served as Confidential Law Clerk to Hon. Richard D. Simons of the New York Court of Appeals (1984-1986). He has handled over 150 appeals and motions for leave to appeal in his career, appearing before all of New York's State appellate courts, the United States Supreme Court, and in the First, Second, Fourth and Eleventh Federal Circuit Courts of Appeals.

Mr. Pierce is a former Adjunct Professor of Appellate Advocacy at Syracuse University College of Law (199-2006), and has authored several publications and frequently speaks on appellate advocacy and insurance coverage litigation for the ABA and NYSBA. He has been selected by his peers for inclusion in the "Best Lawyers in America" and as a New York "Super Lawyer" in the area of Appellate Practice since 2007. He is a member of the 5th Judicial District's Character & Fitness Committee, and the Board of Directors of the New York State Academy of Trial Lawyers.

James S. Ranous, Esq.
Deputy Clerk of Appellate Division, Third Dept.

Graduated LeMoyne College: 1972

Graduated Albany Law School: 1975

Admitted to New York State Bar: 1976

In private practice in Rome, New York: August 1975 - March 1976

Law Research Assistant, Appellate Division, Third Department: April 1976 - July 1976

Confidential Law Clerk to Hon. Michael E. Sweeney, Associate Justice, Supreme Court, Appellate Division, Third Department: August 1976 - August 1983

Chief Motion Attorney, Appellate Division, Third Department: September 1983 - November 2010

Deputy Clerk of the Appellate Division, Third Department: November 2010 - Present

ROBERT A. RAUSCH is a partner at the Albany law firm of Maynard, O'Connor, Smith & Catalinotto, LLP, and has been a member of the firm since 1997. Prior to joining the firm, Rob served as Law Clerk to the Honorable Irad S. Ingraham, Supreme Court Justice for Chenango and Otsego Counties. Through that experience, he obtained an intense exposure to trial practice and the intricacies of New York civil practice rules and regulations. Rob divides his practice between both appellate practice and civil litigation, and has represented both plaintiffs and defendants in a wide variety of personal injury matters, including premises liability, motor vehicle accidents, construction site litigation, medical malpractice, and municipal law. He is admitted to practice in New York State courts, the U.S. District Courts for the Northern and Western Districts of New York, the U.S. Second Circuit Court of Appeals, and the U.S. Supreme Court. Rob has also been a lecturer and published materials for use in numerous Continuing Legal Education programs. In 2012, he was acknowledged by Super Lawyers magazine for achievement in the field of Personal Injury Defense. Rob is a member of the New York State Bar Association and its Committee on Courts of Appellate Jurisdiction, the New York State Trial Lawyers Association, and Albany County Bar Association, and is a former president of the Capital District Trial Lawyers Association. He earned his B.A. degree from LeMoyne College and his J.D. degree from Albany Law School. He is currently president-elect of the Albany Law School National Alumni Association. Rob is also an avid runner and has completed five marathons.

RICHARD A. REED
Deputy Clerk of the Court
New York State Court of Appeals

Richard Reed is the Deputy Clerk of the New York State Court of Appeals. Mr. Reed was engaged in the private practice of law from 1984 to 2000. He also has served as Deputy Commissioner and Counsel to the New York State Department of Motor Vehicles; Deputy Commissioner and Counsel to the New York State Office of General Services; and law clerk to the New York State Supreme Court, Appellate Division, Third Department, and Hon. Richard D. Simons, Associate Judge of the New York State Court of Appeals.

Elliott Scheinberg, whose practice is limited to matrimonial appeals, serves on the Board of Managers of the American Academy of Matrimonial Lawyers and co-chairs its Amicus Curiae and CLE Committees. He is a member of NYSBA's Committee of Courts of Appellate Jurisdiction and CLE Committee. He has authored a two volume treatise, Contract Doctrine and Marital Agreements in New York, in its second edition, a variety of chapters for Matthew Bender's New York Civil Practice, Matrimonial Actions, and is the author of "Grandparental Visitation: Its Evolution in New York State," which traces the history and evolution of grandparental visitation in New York, published by the Benjamin N. Cardozo School of Law. He has written numerous articles for the New York Law Journal, the New York State Bar Association's Family Law Review, and the New York Family Law Monthly.

Mr. Scheinberg has written seven amicus curiae briefs to the New York State Court of Appeals, having been cited in one decision, with others adopting arguments advanced in the briefs. Mr. Scheinberg lectures regularly at the Appellate Division, Second Department, and for Bar Associations. He is a member of NYSBA's Executive Committee of the Family Law Section and is the co-chair of NYSBA's Amicus Committee.

A graduate of the Benjamin N. Cardozo School of Law, Mr. Scheinberg, prior to entering law school, was a doctoral candidate in Romance Philology at the University of Chicago, and a Teaching Fellow in the French Department, Romance Linguistics Program, at the University of Michigan in Ann Arbor. He received his Bachelor of Science in Mathematics and French from Brooklyn College, Brooklyn, N.Y.

He is in "Who's Who in American Law" and in "The Best Lawyers in America." He is also rated AV Preeminent 5.0 out 5.0 in Martindale-Hubble.