TAKING AND PERFECTING CIVIL APPEALS IN THE NEW YORK COURT OF APPEALS AND THE APPELLATE DIVISION, FOURTH DEPARTMENT:

APPEALABILITY, AGGRIEVEEMENT, TIME TO APPEAL, JURISDICTION AND PRACTICAL CONSIDERATIONS

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INTRODUCTION

Parties who lose -- on a motion, after a trial, or during a proceeding to review an administrative determination -- often wish to appeal. To do so, the "loser" needs an "appealable paper," he or she has to be "aggrieved," there are strict time limitations, a proper notice of appeal or motion for permission to appeal must be filed and served (and where permission is required the court must grant it), the appeal must be taken to a court which has jurisdiction to hear it, and court rules addressing numerous details -- including proper form and number of copies of Records and Briefs -- must be properly followed to "perfect" the appeal.

The statutes and rules for taking and perfecting appeals, and case law interpreting them, are discussed herein. Practical observations are also supplied.

I. APPEALABILITY ("Appealable Paper")

Appealability is governed by CPLR 5512, which provides:

(a) Appelable 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.
Observations:

1. Under subdivision (a) of CPLR 5512, no appeal lies from a decision, verdict, report, or ruling (oral or written). If the disposition is not embodied in a judgment or order the appeal will be dismissed.

2. Subdivision (b) of CPLR 5512 pertains to ex parte orders. An ex parte order is not appealable, whether the order is entered or not. The reason is that under CPLR 5701(a)(2), only orders made on notice of motion may be appealed. The other side's step, as it is with a default or consent judgment, is to move on notice to vacate the ex parte order, and, if the vacatur motion is denied, to appeal the order denying it. See Application of Scotti, 53 AD2d 282, 285; see also Lauer v City of Buffalo, 53 AD3d 213, 215-216 (4th Dept)(same rule applies for self-executing discovery orders). But even the motion to vacate may be impracticable if the aggrieved person cannot obtain a copy of the ex parte order and the papers on which it is based. CPLR 5512(b) permits the court from or to which an appeal is to be taken to compel the entry and filing of the order and its accompanying papers. The aggrieved person can move for such an order, and if there is any difficulty about whom to serve with the motion papers, can proceed by order to show cause in which the court can include directions on the matter.

3. Ex parte Orders – Relief under CPLR 5704. There is some possibility of relief under CPLR 5704, which provides a procedure for a kind of reconsideration – as opposed to outright appeal – of an ex-parte application by an appellate court or justice. It provides:

5704. Review of ex parte orders

(a) By appellate division. The appellate division or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

(b) By appellate term. The appellate term in the first or second judicial department or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate term; and such appellate term may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate term.
See McKee v. Coughlin, 142 A.D.2d 798 (3d Dept. 1988) (If an ex parte order should be appealed, however, the court can merely treat the appeal as if it were a motion properly made under CPLR 5704(a), and dispose of it on the merits).

4. What if there is no adverse party? An interesting question arises when ex parte relief is sought in a situation in which there is no adverse party. What does an applicant for relief do in that peculiar situation in which the relief sought requires a court proceeding but the proceeding has no adversary? (A change of name proceeding is an example.) What if the trial court denies the relief and the applicant wants the matter reviewed by an appellate court. Ordinarily, what the applicant must do to set the stage for an appeal is move on notice to vacate the order and then appeal the order denying the motion. But here there is no one to notify and hence no predicate for an appeal. An alternative might be to seek the relief from the appellate division under CPLR 5704(a), which is a mere motion procedure. But when the relief has been denied below, CPLR 5704(a) also seems to require an "adverse party", and there is none here. See Matter of Joint Diseases North General Hospital, 148 A.D.2d 873 (3d Dept. 1989).

5. Court’s Sua Sponte Order Is Treated as Ex Parte Order, and Is Unappealable

In Sholes v. Meagher, 100 N.Y.2d 333 (2003), the only issue was whether the non-party appellants (attorneys to the plaintiff) had a right to appeal a trial court order imposing sanctions for conduct the court deemed frivolous under 22 NYCRR part 130. The Court held:

There is, however, no right of appeal from an ex parte order, including an order entered sua sponte (see e.g. Northside Studios v. Treccagnoli, 262 A.D.2d 469 [2d Dept.1999]; Village of Savona v. Soles, 84 A.D.2d 683, 684 [4th Dept.1981]; see also Siegel, N.Y. Prac. § 526, at 860 [3d ed.]; 12 Weinstein-Korn-Miller, N.Y. Civ. Prac. § 5701.06).

As nonparties, appellants contend that they had no avenue of appeal and that, in effect, the ruling of the trial court was unreviewable. We disagree. The CPLR indeed contemplates appellate review, as a matter of right, here. Appellants could properly have moved to vacate the order and appealed as of right to the Appellate Division if that motion was denied (see CPLR 5701[a] [3]; 2221; Village of Savona, 84 A.D.2d at 684). This procedure ensures the appeal will be made upon a suitable record after counsel has had an opportunity to be heard.

100 N.Y.2d at 335.
6. Appealability of Post-Judgment Motion

A problem of appealability can arise when the appellant, instead of appealing a final judgment that has been entered on a verdict, awaits the judge's ruling on a post-trial motion. The appellant may find the appellate path blocked altogether.

CPLR 5501(a) provides that "[a]n appeal from a final judgment brings up for review . . . any non-final judgment or order which necessarily affects the final judgment." Assume a conventional post-trial motion has been made, attacking the verdict under CPLR 4404(a), and that it's made within the 15-day period required by CPLR 4405. What is ordinarily contemplated in that situation is that no judgment at all will be entered until the court has ruled on the motion. It would then be from the judgment entered after the ruling – even if the ruling is unfavorable (keeping the original verdict fully intact) – that the aggrieved person would appeal. In that common scenario, there is no ambiguity about what must be appealed: the appealable item is the judgment entered after the ruling (none was entered before it), and the time requirements for appealing it are clear.

Suppose, however, that the judge does not quickly rule on the motion, and that much time goes by. During that time, the winner, without waiting for the motion's outcome, gets judgment entered on the original verdict and duly serves a copy of the judgment on the loser with notice of entry. Dietz International Public Adjusters, Inc. v. Frankart Distributors, Inc., 157 A.D.2d 625 (1st Dept. 1990), warns that the loser, if intent on appealing at all, should appeal the first judgment without assuming that an appeal can be postponed until the judge gets around to ruling on the motion. In Dietz, the appeal from the original judgment was taken too late, and an attempted appeal from the order reflecting the later ruling on the motion was dismissed. The court called the order an "intermediate" one, despite the fact that it followed rather than preceded the judgment. The court found applicable and invoked the rule that all intermediate orders are superseded by the final judgment. Accord Paul Revere Life Ins. Co. v Campagna, 233 AD2d 954 (4th Dept).
II. AGGRIEVEMENT

1. CPLR 5511 provides that a "[p]ermissible appellant" is:

An aggrieved party or a person substituted for him [who] 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.

2. Aggrievement in general.

The requirement that an appellant be aggrieved is jurisdictional, and is subject to the court's threshold inquiry even if the issue is not raised by the respondent. See, e.g., T.D. v. New York State Office of Mental Health, 91 N.Y.2d 860 (1997) (appeal dismissed apparently without any motion); Leeds v. Leeds, 60 N.Y.2d 641 (1983) (appeal dismissed sua sponte).

3. Proper Parties on Appeal; Nonparties to Original Action

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, 209 A.D.2d 34 (4th Dept. 1995), appeal and cross-appeal dismissed, 86 N.Y.2d 776 (1995); Parochial Bus Sys. v Board of Educ., 60 N.Y.2d 539, 545 (1983).

The cases vary greatly on aggrievement and are fact specific and dependent. Whether an Order or Judgment appealed from aggrieves a particular party should be generally readily discernible, but a party who is ostensibly aggrieved may not be actually aggrieved. For example, if a defendant moves for summary judgment and the motion is denied, the plaintiff is not aggrieved even if he disagrees with the court's rationale, People's National Bank of Rockland Co. v Weiner, 100 AD2d 841. However, in that situation the plaintiff may argue on the respondent's appeal alternative grounds for affirmance. Schrem v Cold Spring Harbor Lab., 17 AD3d 661.

As a general rule, non-parties are not deemed aggrieved by an Order or Judgment in an action, but in special situations it has been held that even a nonparty to the original action may be allowed to take an appeal. Examples:

Auerbach v. Bennett, 64 A.D.2d 98 (2d Dept. 1978), affd. 47 N.Y.2d 619 (1979) – a derivative action brought in behalf of a corporation, is in reality a variety of a class action, which means that all of the members of the class are bound by the resulting
judgment on the merits whether favorable or not. After judgment was entered in favor of the defendants, the shareholder who brought the derivative action refused to take an appeal. The court held that another shareholder, not previously a named party, may move to intervene for the purpose of taking and prosecuting the appeal. In fact, the shareholder intent on appealing in *Auerbach* took the precaution of filing the notice of appeal before intervening, on the sound assumption that the appeal time might conceivably expire before his motion to intervene could be decided. He then made the motion, under CPLR 1012(a), and it was ultimately granted *nunc pro tunc*, validating the previously taken appeal.

*Brady v. Ottoway Newspapers*, 97 A.D.2d 451 (2d Dept. 1983), affd. 63 N.Y.2d 1031 (1984). In this defamation action, the New York State Police were permitted to appeal from an order that granted defendants’ motion and plaintiffs’ cross-motion for disclosure of the State Police’s confidential investigative reports maintained in its files - the order appealed from directed an individual to take or refrain from taking certain action.

4. Other Aggrievement Situations

A. Stipulations to the reduction or enhancement of damages

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, plaintiff is not aggrieved by the Appellate Division order to the extent the plaintiff wishes to challenge the damages determination. See *Dudley v Perkins*, 235 NY 448, 457. For a time, the *Dudley* rationale was deemed as eliminating the aggrievement of any party *on any issue* if that party stipulated to an increase (additur) or a decrease (remittitur) in a damages award. See *Whitfield v City of New York*, 90 N.Y.2d 777, 780 n * (1997), and *Batavia Turf Farms v County of Genesee*, 239 A.D.2d 903 (4th Dept. 1997), lv dismissed 91 NY2d 906 (1998). However, the *Whitfield* and *Batavia Turf Farms* rationales were recently abandoned in *Adams v Genie Industries, Inc.*, 14 NY3d 535, which explained:

It has long been and remains the rule that parties who stipulate to a modification of damages as an alternative to a new trial are not aggrieved by that modification and may not appeal from it [citing *Dudley*]. Here, however, [defendant] is not seeking to appeal from the modification -- the additur -- to which it consented. It raises no issue as to the additur in this Court, but claims that it has no liability to plaintiff at all -- that the case should never have been submitted to the jury -- or, in the alternative, that it is entitled to a new liability trial. ***
[Under] ... Dudley ... [i]t was thought that a party who had consented to the order's existence could not claim to be aggrieved by any part of it. However, we now reexamine the Batavia/Whitfield rule, and conclude that it is not justified. It is unfair to bar a party from raising legitimate appellate issues simply because that party has made an unrelated agreement on the amount of damages. Indeed, the Batavia rule may operate as a trap; parties stipulating to additur and remittitur are likely not to foresee the counterintuitive result that all their appellate claims will be forfeited.

14 NY3d at 540-542; see also, Meilak v. Atlantic Cement Co., 30 A.D.2d 254 (3d Dept. 1968)(“appellant can accept the benefits of a judgment without waiving his right to appeal from it where he is dissatisfied with amount of judgment.”); citing Cornell v. T.V. Development Corp., 17 N.Y.2d 69 (1966) (litigant who is successful in the trial court may still be a party aggrieved within the meaning of CPLR 5511).

B. Special rule when Appellate Division reverses adverse judgment only to extent of granting new trial.

Although a party is generally considered to be aggrieved for the purpose of appeal if the order of the Appellate Division grants only part of the relief requested, a special rule applies where the Appellate Division reverses a judgment adverse to a party but does so only to the extent of granting a new trial or hearing. “[S]uch a party is not entitled to a further appeal to the Court of Appeals, even by way of stipulation for judgment absolute, to establish that final judgment should have been entered in his favor.” Karger, Arthur, The Powers of the New York Court of Appeals [Third Edition], pp. 403-04.
III. TIME TO APPEAL

1. The time to take an appeal or move for permission to appeal is governed by CPLR 5513, which provides:

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.
PRACTICE POINTERS

1. **Waiting is dangerous.** The 30-day deadline cannot be extended except in the very limited circumstances described in CPLR 5514 (e.g. disability of attorney). See *Siegel v Obes*, 112 AD2d 930. "The time period for filing a notice of appeal is nonwaivable and jurisdictional." *Jones Sledzik Garneau & Nardone, LLP*, 37 AD3d 417. Accordingly, waiting until the last moment to file and serve a notice of appeal exposes practitioners to malpractice claims if something goes wrong. *Id.*

2. **Filing or serving the notice starts the clock on other deadlines.** While waiting until the last moment to file a notice of appeal is dangerous practice, keep in mind that once the notice is filed (see Court of Appeals Rule 500.12 [b]) or served (see Fourth Department Rule 1000.2[b]), the deadline for perfecting the appeal begins to run.

3. **How to compute the 30 days (or information you hopefully never need to know).** The 30-day deadline does not begin to run until the judgment or order to be appealed from has been served with notice of entry. "If the judgment [or order] is not served with proper notice of entry, the time to appeal does not begin to run." *Derrett v Derritt*, 229 AD2d 1023 (4th Dept). A notice of entry must refer "to the appealable paper, and the date and place of its entry." *Reynolds v Dustman*, 1 NY3d 559, 560 (where cover letter of counsel did not satisfy notice of entry requirements); compare *Norstar Bank v Office Control Systems, Inc.*, 78 NY2d 1110 (where language of cover letter of counsel combined with entry date stamped on order did satisfy notice of entry requirements).

4. **Multiple Prevailing Parties.** CPLR 5513 "is construed to require each prevailing party to separately serve an order with notice of entry to commence the running of time within which the appeal limitations period becomes effective for each. *Blank v. Schafrann*, 206 A.D.2d 771, (3d Dept. 1994) (where plaintiff's appeal was untimely as to one defendant, but with respect to the other defendants plaintiff's appeals were timely).

5. **CPLR 2103.** Service by hand delivery, mail, overnight (1 day) delivery. NOTE: A 1999 amendment, adding new subdivision (d) to CPLR 5513, resolved the dispute about the application of CPLR 2103(b)(2)'s 5 day addition when the appellant serves the judgment or order; the appellant now clearly gives itself the extra time in which to take the appeal when the appellant serves the judgment or order, with notice of entry, on the winner.
6. As to how and which days are counted. See General Construction Law § 20 (day computation), § 24 (list of public holidays), and § 25-a (day after Saturday, Sunday or public holiday).

7. Keep the envelopes. You may need to prove when you were served with an order or judgment with notice of entry. Keep the date-stamped envelopes in which these documents were delivered.

IV. TAKING AN APPEAL OR MOVING FOR LEAVE TO APPEAL

1. How is an appeal as of right “taken”? CPLR 5515 provides:

An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered except that where an order granting permission to appeal is made, the appeal is taken when such order is entered. A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken.

Accordingly, an appeal is taken by filing a Notice of Appeal with the court clerk upon paying the statutory fee (currently $65 under CPLR 8022[a]), and serving a copy of it on the adverse parties. Be mindful to file the Notice with the correct court clerk. See generally Mendon Ponds Neighborhood Assn. v Dehm, 98 NY2d 745. Also be mindful that if serving the Notice by mail, it must be delivered to a post office depository within New York State. See M. Entertainment Inc. v Leydier, 13 NY3d 827.

2. PRACTICE POINTER WHERE MULTIPLE ORDERS OR JUDGMENTS HAVE BEEN SIGNED

BE CAREFUL - DO NOT BE PENNY WISE AND POUND FOOLISH!! IF IN DOUBT “APPEAL” EACH AND EVERY ORDER OR JUDGMENT.

See May v. May, 66 A.D.2d 918 (3d Dept. 1978) (Appeal was taken from an amended judgment of the Supreme Court, which granted defendant's motion to resettle the original judgment granting plaintiff a divorce. The Appellate Division dismissed the appeal as untimely holding that the resettlement order merely amended the original decree to conform to the parties' stipulation. Because the resettled order did not contain a material change that would constitute a new determination, the appeal that was taken more than 30 days after entry of the original judgment and was untimely).
3. How is a motion for permission to appeal “made”?

Motions for leave to appeal must be made within 30 days, not returnable within 30 days. Under CPLR 2211, "[a] motion on notice is made when a notice of the motion . . . is served." The supporting papers on the motion should be served at the same time. See Dellaratta v International House of Pancakes, 46 NY2d 936 (motion dismissed where supporting papers served too late). The moving papers must also be filed with the court within the time required by its rules. See, e.g. Fourth Department Rule 1000.13; Court of Appeals Rule 500.21, and must be accompanied by the required filing fee (currently $45 under CPLR 8022[a]).

CPLR 5516 provides:

A motion for permission to appeal shall be noticed to be heard at a motion day at least eight days and not more than fifteen days after notice of the motion is served, unless there is no motion day during that period, in which case at the first motion day thereafter.

Court Rules provide that such motions should, in most cases, be returnable on a Monday or the first business day thereafter. Court of Appeals Rule 500.21 (a); Fourth Department Rule 1000.13 (a).

Civil appellants seeking leave to appeal to the Court of Appeals have the option of moving first at the Appellate Division, and if that motion is denied, moving for leave to appeal a second time at the Court of Appeals. See CPLR 5602(a). Practitioners refer to this as having "two-bites-at-the-apple," but practicalities come into play. Two motions involve twice the expense. Whether the Appellate Division is likely to grant the motion has to be considered. Making the motion at the Appellate Division first does provide extra time for crafting a motion for the Court of Appeals, but this may be a theoretical benefit more than a real one.

Appellants hoping for "two-bites-at-the-apple" must be mindful of Lumsby v Donovan, 10 NY3d 951. In Lumsby, the appellant filed simultaneous motions for leave to appeal with the Appellate Division and the Court of Appeals. The Court of Appeals' motion was decided first. This precluded consideration of the Appellate Division motion.

4. PRACTICE POINTER: WHEN TAKING YOUR APPEAL OR MOVING FOR LEAVE TO APPEAL, DO NOT LIMIT THE ISSUES YOU CAN RAISE.
Best Practices: for notices of appeal. Simply appeal from the Order or Judgment, not “so much thereof as ***.” You can only appeal so much of the Order/Judgment which “aggrieves” your client, but do not limit yourself, whether by mistake or oversight. To be redundant, some practitioners commonly insert language into their notices of appeal stating that the appeal is taken from "each and every part of the order or judgment appealed from." This language appears out of place if the appealing party prevailed on some of the issues below. An option in that circumstance is to state that the appeal is taken from every part of the order or judgment "from which the appealing party is aggrieved."

For Court of Appeals’ Motions for Leave to Appeal. Practitioners must also be mindful not to inadvertently limit the issues they are permitted to raise at the Court of Appeals if leave to appeal is granted. In Quain v. Buzzetta Const. Corp., 69 N.Y.2d 376, 379-380 (1987), plaintiffs sued the City and its general contractor, Buzzetta, after plaintiff sustained injuries when she fell into a hole at an unfinished New York City sewer project. A jury awarded plaintiffs damages and apportioned responsibility 75% to Buzzetta and 25% to the City. After trial the court granted the City's motion for summary judgment on its cross claim against Buzzetta for full recovery over based on the indemnification clause in the sewer project contract. The Appellate Division affirmed with respect to the issues of liability and the claim over, but modified by directing a new trial on damages unless plaintiffs stipulated to a reduction in the award and plaintiffs so stipulated.

The Court of Appeals noted and held:

In moving papers accompanying its motion for leave to appeal, Buzzetta stated: "[I]t is requested that this Honorable Court review that limited issue on this motion for leave to appeal of whether the Appellate Division was in error to the extreme prejudice of this appellant in holding that the applicable amended Section 5-322.1 of the General Obligations Law did not make void, unlawful and against public policy the recovery by the City of indemnification from Buzzetta for the City's 25% adjudicated negligence by virtue of the City's contractual indemnification provision in its contract.” In its jurisdictional statement *** and in its brief, however, Buzzetta raised the issue of its liability to plaintiffs. Thereafter, plaintiffs moved to resettle our order granting leave and to strike those portions of Buzzetta's jurisdictional statement and brief pertaining to the question of liability to plaintiffs. We denied those motions without prejudice to their renewal during the appeal. We consider plaintiffs' motions to strike to have been renewed and conclude that they should be granted.
Ordinarily when the court grants a motion for leave to appeal all issues of which the court may take cognizance may be addressed by the parties. Where, however, the party seeking leave specifically limits the issues to be raised, it is bound thereby and may not thereafter raise other questions. To permit otherwise necessarily disadvantages the opposing parties, who might have joined issue or even cross-moved for leave to appeal as to additional issues had adequate notice been given. Having limited itself to the issue of indemnification, Buzzetta may not now raise the question of liability as to plaintiffs.

5. Appeal by a substituted party. If something has occurred to require a substitution of parties, the proper person should ordinarily be substituted before the appellate step is taken. The would-be appellant's side must of course be sensitive in this instance to the running of the time to appeal. Events requiring substitution are listed in CPLR 1015-1020, and a special provision, CPLR 1022, provides that if an event requiring a substitution of parties occurs before an appeal is taken, the time in which to appeal is extended until 15 days after the substitution is made. This is in fact one of the few instances in which an extension of the tight period for taking an appeal is permitted. See CPLR 5514(c).

6. Importance of the Preliminary Appeal Statement in the Court of Appeals. Court of Appeals Rule 500.9 requires the filing of a Preliminary Appeal Statement when an appeal is being taken to the Court of Appeals. Rule 500.9 provides:

(a) Within 10 days after an appeal is taken by (1) filing a notice of appeal in the place and manner required by CPLR 5515, (2) entry of an order granting a motion for leave to appeal in a civil case, or (3) issuance of a certificate granting leave to appeal in a criminal case, appellant shall file with the clerk of the Court an original and one copy of a preliminary appeal statement on the form prescribed by the Court, with the required attachments and proof of service of one copy on each other party. No fee is required at the time of filing the preliminary appeal statement.

(b) Where a party asserts that a statute is unconstitutional, appellant shall give written notice to the Attorney General before filing the preliminary appeal statement, and a copy of the notification shall be attached to the preliminary appeal statement. The notification and a copy of the preliminary appeal statement shall be sent to the Solicitor General, Department of Law, The Capitol, Albany, New York 12224.
(c) After review of the preliminary appeal statement, the clerk will notify the parties either that review pursuant to section 500.10 or section 500.11 of this Part shall commence or that the appeal shall proceed in the normal course.

PRACTICE POINTER: Practitioners should not overlook the importance of the Preliminary Appeal Statement. After receiving it, the Court will scrutinize whether jurisdiction exists for the appeal. This is especially true if the appellant alleges entitlement to an appeal of right, or if leave to appeal was granted by the Appellate Division. (If leave to appeal was granted by the Court of Appeals, the jurisdictional issue would have already been considered.) Upon filing the Preliminary Appeal Statement, counsel should be prepared in the event the Court questions the jurisdictional basis for the appeal. If the Court has concerns it typically sends a letter requesting comments from counsel. It is best to be prepared in advance to respond to such an inquiry.

After receiving a Preliminary Appeal Statement, the Court may indicate that the appeal shall proceed in the normal course. Such an indication does not preclude opposing counsel from filing a motion seeking dismissal of the appeal on jurisdictional grounds. Nor does it preclude the Court from examining the issue later, *sua sponte*.

7. Omissions and appeal by improper method.

Although the time to appeal cannot be extended (except in the rare circumstances described in CPLR 5514), certain errors in the form, service or manner of taking an appeal may be cured or disregarded. CPLR 5520 is helpful in this regard. It provides:

(a) **Omissions.** 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 time limited, 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.

(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.

(c) **Defects in form.** Where a notice of appeal is premature or 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.
Under CPLR 5520, the court may grant relief identified in the statute to the party seeking it. In other words, the court has discretion to grant or deny the request. See M. Entertainment, Inc. v Leydier, 13 NY3d 827.

CPLR 2001 can also be helpful, as demonstrated by Tagliaferri v. Weiler, 1 N.Y.3d 605 (2004). Tagliaferri involved an ambiguity in the notice of appeal. The intention was clearly to appeal on behalf of the client, but in form it was made to appear that the attorney was taking the appeal. The appellate division held it fatal and dismissed that appeal. The Court of Appeals applied CPLR 2001, which allows the correction of insubstantial defects at any stage of an action. Reversing the appellate division, the Court of Appeals held that the appeal should have been deemed taken by the party – the client – not by the attorneys, and allowed to go forward. The Appellate Division had relied on an earlier decision, Scopelliti v. Town of New Castle, 92 N.Y.2d 944 (1998), in which the complaint was dismissed and the plaintiff's lawyer sanctioned. On a motion for leave to appeal to the Court of Appeals in Scopelliti, only the plaintiff was the named a movant; the attorney was not. There the motion for leave was dismissed.

V. CIVIL JURISDICTION OF THE APPELLATE DIVISIONS

Appellate Division jurisdiction is governed by CPLR 5701 and 5702. Regarding appeals from Supreme and County Courts, CPLR 5701 provides:

(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.

Regarding appeals from other courts of original instance, CPLR 5702 states:
An appeal may be taken to the appellate division from any judgment or order of a court of original instance other than the supreme court or a county court in accordance with the statute governing practice in such court.

See, e.g. for appeals from Family Court, Family Court Act Article 11; for appeals from Surrogate’s Court, Surrogate’s Court Procedure Act Article 27.

PRACTICE POINTER. Many practitioners assume any order or judgment is appealable as of right to the Appellate Division. This is not true. CPLR 5701(a)(1) and (b) expressly state that certain judgments and orders are not appealable of right. Moreover, other orders are not appealable as of right because they have been found not to satisfy the requirement of CPLR 5701(a)(2)(5) that the order affect a "substantial right." See, e.g. Turner v CSX, 72 AD3d 1597 (4th Dept)(order determining evidentiary motion in limine in advance of trial not appealable); compare Scalp & Blade v Advest, Inc., 309 AD2d 219 (4th Dept)(noting distinction where order limits the legal issues to be tried); see also Roggow v Walker, 303 AD2d 1003 (4th Dept)(order directing answers to deposition questions not appealable as of right but permission to appeal from such an order may be granted).

VI. CIVIL JURISDICTION OF THE NEW YORK COURT OF APPEALS

PRACTICE POINTER. The jurisdiction of the Court of Appeals is limited. Except in rare occasions, it decides issues of law only, not issues of fact. Its function is to settle important issues of statewide importance, not to resolve disputes between individual parties. Be mindful that you may not have an appeal of right, and perhaps not even the opportunity to seek permission to appeal to the Court. The Court cannot consider most cases which are not final, or where the issue presented is not an issue of law. The absence of finality or dissents on the law even bars an appeal where two Justices dissented at the Appellate Division. Accordingly, when an appeal to the Court of Appeals is sought to be taken, appellant's counsel must be prepared to explain the jurisdictional basis for the appeal, and respondent's counsel must scrutinize whether jurisdiction is lacking.

1. APPEALS OF RIGHT. CPLR 5601 provides that appeals may be taken to the Court of Appeals as of right based upon:

   (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.

2. **LEAVE TO APPEAL.** Under **CPLR 5602**, appeals may be taken to the Court of Appeals by permission:

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application.
Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. 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,

   (i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

   (ii) from a final judgment of such court, final determination of such agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award and the final judgment, determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and

2. 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, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency

   (i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or
(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) 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.

PRACTICE POINTERS REGARDING LEAVE TO APPEAL.

1. Regarding finality, note that the Court of Appeals can only grant leave to appeal in an action if the order or judgment is final, but may grant leave to appeal from certain non-final orders in Article 78 proceedings. See F.J. Zerenda, Inc. v Town Bd. of Town of Halfmoon, 37 NY2d 198. The Appellate Divisions, however, can grant leave to appeal from non-final orders in certain actions.

2. Regarding the factors to be considered on the question whether leave to appeal should be granted, Court of Appeals Rule 500.22 encourages leave applicants to provide "a concise statement of the questions presented for review and why the questions presented merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."

3. CERTIFIED QUESTIONS FROM OTHER COURTS. The Court of Appeals has jurisdiction to review, in its discretion, certified questions from federal courts and other courts of last resort where questions of New York law are involved "in a case pending before that court for which no controlling precedent of the Court of Appeals exists." Court of Appeals Rule 500.27; see e.g. Kramer v Phoenix Life Insurance Co., 15 NY3d 539.

4. DETERMINATIONS OF THE COMMISSION ON JUDICIAL CONDUCT. These determinations are reviewable by the Court of Appeals pursuant to New York State Constitution, Article VI, § 22(a). Such a review is mandatory if requested by the sanctioned judge. See In re Raab, 100 N.Y.2d 305 (2003) (per curiam); In re Watson, 100 N.Y.2d 290 (2003) (per curiam); Spargo v. New York State Commission on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003) (the Commission will consider First Amendment arguments and sanctioned judge may seek mandatory review of the Commission's decision before the Court of Appeals). Note also that in this limited instance the Court of Appeals is required to review the facts. Id. § 22(d) ("In reviewing
a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based.”) In effect, “there is a determination de novo **.” Matter of Cunningham, 57 N.Y.2d 270 (1982).

VII. FILING THE RECORD OR APPENDIX AND YOUR CLIENTS’ BRIEF

PRACTICE POINTERS.

1. Digital filings. Effective December 8, 2010, parties filing records, appendices and briefs with the Court of Appeals are “required to file on disk digital versions of each paper filing. See Rule 500.12(h). Digital filings are optional at the Fourth Department. See Rule 1000.3(h).

2. Stipulating to the Appellate Division Record. CPLR 5532 provides that “[t]he parties or their attorneys may stipulate as to the correctness of the entire record on appeal. . . .” If the parties cannot agree about the contents of the Record, the issue must be settled by the court from which the appeal is taken. See Fourth Department Rule 1000.4. Even if the appeal is being taken by the Appendix method, the parties must stipulate to, or the court below must settle, the contents of one complete Record. Rule 1000.4(d).

Practitioners should cooperate in the process of stipulating to the Record on Appeal. It is a basic act of attorney civility. When dealing with trusted opposing counsel and an ordinary Record, it is common to stipulate to the Record if the appellant’s attorney has provided a Table of Contents accurately listing the documents which should be included. If there is a reason to be uncomfortable about entering into a stipulation based upon a Table of Contents alone, it is fair to ask for a draft copy of the printed Record. If counsel have different views about what should be included in the Record, a courteous discussion usually resolves the problem. Motions to settle the Record are thus rarely necessary. They usually occur when opposing counsel perceives a tactical advantage in failing to cooperate or there has been a breakdown in civility. If you anticipate that your adversary might be uncooperative, be proactive and present him or her with a draft Record as soon as possible. The draft Record can thereafter be presented to the IAS court if a motion to settle the Record becomes necessary.

3. Certification of the Court of Appeals Record. Records at the Court of Appeals may be stipulated as at the Appellate Division, but a convenient alternative is also available. Rule 500.14(f) allows appellant’s counsel to authenticate the Record pursuant to CPLR 2105 in lieu of obtaining a stipulation from opposing counsel. Of course this option is available at the Court of Appeals because the Record, with a few additions, is the same as it was at the Appellate Division.
4. **Alternative Procedure for Selected Appeals at the Court of Appeals.** Rule 500.11 allows counsel to request, or the Court of Appeals to require, consideration of certain appeals based upon the Appellate Division Records and Briefs, without oral argument. The Practice Aid published on the Court's website explains:

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.

The Court may inquire, by letter, whether you wish to have your appeal heard under the Alternative Procedure. If you believe your case is novel or of state-wide import, that your advocacy at the Court -- in new briefs or at oral argument -- will improve your client's chance of success, and that the extra expense of full briefing and argument is warranted, your response to the Court should explain why the Alternative Procedure is not suitable for your appeal.

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Set forth below are excerpts from the Fourth Department and Court of Appeals Rules dealing with the documents needed, and the deadlines to meet, for perfection of appeals to those courts. The rules are straightforward. In addition, both courts have helpful websites, containing instructive practice aids. The Court of Appeals website also provides guidance on jurisdictional issues unique to that Court, including when an order or judgment is final, and when an appeal is "on the law."

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**FOURTH DEPARTMENT – APPLICABLE RULES**

1000.2 APPEAL DEFINED; TIME LIMITATIONS; PERFECTION OF APPEALS; RESPONDING AND REPLY BRIEFS.

(a) Appeal defined.
For the purposes of these rules the word "appeal" shall mean appeal or cross appeal, unless otherwise indicated by text or context.
(b) Perfecting appeals generally.

Unless otherwise provided by statute, rule or order of this Court or Justice of this Court, all appeals shall be perfected pursuant to 22 NYCRR 1000.3 within 60 days of service on the opposing party of the notice of appeal. An appeal not perfected within the 60-day period is subject to dismissal on motion pursuant to 22 NYCRR 1000.12(a). An appeal or cross appeal not perfected within nine months of service of the notice of appeal is subject to dismissal without motion pursuant to 22 NYCRR 1000.12(b).

(c) Perfecting appeals in which counsel has been assigned.

(1) Appeals taken pursuant to Family Court Act.
An appeal taken pursuant to the Family Court Act in which this Court has assigned counsel shall be perfected within 60 days of receipt of the transcript of the proceedings upon which the order or judgment appealed from is based, as provided in Family Court Act § 1121(7).

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Respondent's briefs.

Unless otherwise provided by order of this Court or Justice of this Court, a respondent or respondent-appellant shall file and serve briefs within 30 days of service of the brief of the appellant or appellant-respondent. If a respondent or respondent-appellant elects not to submit a brief, that party shall notify the Court in writing prior to the expiration of the 30-day period. The failure to timely submit a brief or to timely notify the Court that the party does not intend to file a brief may result in the imposition of sanctions pursuant to 22 NYCRR 1000.16(a).

(e) Reply briefs.
Unless otherwise provided by order of this Court or Justice of this Court, an appellant or appellant-respondent may file and serve reply briefs within 10 days of service of the brief of respondent or respondent-appellant.

(f) Surreply briefs.
Unless otherwise provided by order of this Court or Justice of this Court, a respondent-appellant may file and serve surreply briefs within 10 days of service of the reply brief of appellant-respondent. The contents of a surreply brief are to be limited to issues raised by a cross appeal. In the absence of a cross appeal, surreply briefs shall not be permitted.

(g) Appendices.
When the filing of an appendix is authorized, it shall be filed and served by a party at the same time that the party files and serves a brief. (1000.3)

1000.3 NECESSARY DOCUMENTS; PERFECTION OF APPEALS; BRIEFS.

(a) Complete and timely filing required.
In all appeals, a complete and timely filing is required. The Clerk shall reject a partial or untimely filing.

(b) Perfecting appeals generally.
Except in appeals in which permission to proceed as a poor person has been granted, or except as otherwise provided by rule or Court order, an appellant or appellant-respondent shall make a complete filing that shall consist of: a complete record, along with the original stipulation executed by all the parties or their attorneys or the original order settling the record; 10 additional copies of the record; 10 copies of the brief; proof of service of two copies of the record and brief on each opposing party to the appeal; when necessary, a demand for exhibits (see, 22 NYCRR 1000.4 [g] [3]) with proof of service thereof; the filing fee as required by CPLR 8022; and a copy of any prior order entered by this Court or the trial court affecting the appeal including, but not limited to, an order that: expedites the appeal; grants permission to proceed on appeal as a poor person or on less than the required number of records [and briefs]; assigns counsel; grants an extension of time to perfect the appeal; grants a stay or injunctive relief; grants relief from dismissal of the appeal; or grants permission to exceed page limitations provided for by 22 NYCRR 1000.4 (f) (3).

(c) Appeals in which poor person relief has been granted.

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(2) Civil appeals.
In a civil appeal in which poor person relief has been granted by this Court, (including appeals taken pursuant to the Family Court Act, appeals in proceedings taken pursuant to article 78 of the CPLR and appeals in habeas corpus proceedings) and, unless otherwise directed by Court order, the appellant or appellant-respondent shall file 10 copies of a brief with proof of service of one copy on each opposing party to the appeal and one copy of the complete record on appeal along with the original stipulation to the record executed by all parties or their attorneys or the original order of settlement, proof of service of one copy of the record on each other party to the appeal and, when necessary, a demand for exhibits (see, 22 NYCRR 1000.4 [g] [3]), with proof of service thereof. Appellant shall also file a copy of any prior order entered by this Court or the trial court affecting the appeal including, but not limited to, an order that: expedites the appeal; grants permission to proceed on appeal as a poor person or on less than the required number of records [and briefs]; assigns counsel; grants an extension of time to perfect the appeal; grants a stay or injunctive relief; grants relief from dismissal of the appeal; or grants permission to exceed page limitations provided for by 22 NYCRR 1000.4 (f) (3).

(d) Alternate methods of appeal.
(1) The appendix method.
In appeals perfected on the appendix method pursuant to 22 NYCRR 1000.4 (d), the appellant or appellant-respondent shall file one complete record and, in lieu of 10 copies of the record on appeal, 10 copies of the appendix and shall serve one copy of the record on appeal and two copies of the appendix on each party. In all other respects, the appellant or appellant-respondent shall comply with the requirements of 22 NYCRR 1000.3 (b). When a respondent's appendix, reply appendix or joint appendix is submitted, 10 copies shall be filed with proof of service of two copies on each party.
(2) Statement in lieu of a complete record.
In appeals perfected pursuant to CPLR 5527 and 22 NYCRR 1000.4 (c), the appellant or appellant-respondent shall file and serve, in lieu of the complete record and copies thereof, the joint appendix and 10 copies thereof. In all other respects, the appellant or appellant-respondent shall comply with the requirements of 22 NYCRR 1000.3 (b).

e) Responding and reply briefs.

A party submitting a respondent's brief, a respondent-appellant's brief, a reply brief or, when permitted, a surreply brief, shall file 10 copies of the brief with proof of service of two copies of the brief on each party. In an appeal in which permission to proceed as a poor person has been granted, only one copy of a brief need be served on each party. When an extension of time to file and serve a brief has been granted, a copy of the order granting such permission shall be filed with the brief.

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(1) Companion filings on CD-ROM.
(i) The submission of records, appendices and briefs on interactive compact disk, read-only memory (CD-ROM) as companions to the required number of printed records, appendices or briefs in accordance with 22 NYCRR 1000.3 is allowed and encouraged provided that all parties have stipulated to the filing of the companion CD-ROM. (ii) The Court may, by order on motion by any party or sua sponte, require the filing of a companion CD-ROM.

(2) Technical Specifications.
The companion CD-ROM record, appendix or brief shall comply with the current technical specifications available from the Office of the Clerk.

(3) Content.
The companion CD-ROM record, appendix or brief shall be identical in content and format (including page numbering) to the printed record, appendix or brief, except that each may also provide electronic links (hyperlinks) to the complete text of any authorities cited therein and to any other document or other material constituting a part of the record.

(4) Number.
Ten disks or sets of disks shall be filed with proof of service of one disk or set of disks on each party to the appeal, together with a copy of the stipulation of the parties to the filing of the companion CD-ROM or the order of the Court directing the filing of the companion CD-ROM.

(5) Filing Deadline.
Unless otherwise directed by order of the Court, a companion CD-ROM shall be filed no later than ten (10) days after the printed record, appendix or brief is filed.

(1000.4)
CONTENT AND FORM OF RECORDS, APPENDICES AND BRIEFS; EXHIBITS.
(a) The complete record on appeal.
(1) Stipulated or settled complete record.
The complete record on appeal shall be stipulated or settled.
(i) The parties or their attorneys may stipulate to the correctness of the contents of the complete record (see, CPLR 5532).
(ii) When the parties or their attorneys are unable to agree and stipulate to the contents of the complete record on appeal, the contents of the record must be settled by the court from which the appeal is taken. It shall be the obligation of the appellant to make the application to settle the record.

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(2) Contents of the complete record on appeal.
The complete record on appeal shall include, in the following order: the notice of appeal with proof of service and filing; the order or judgment from which the appeal is taken; the decision, if any, of the court granting the order or judgment; the judgment roll, if any; the pleadings of the action or proceeding; the corrected transcript of the action or proceeding or statement in lieu of transcript, if any; all necessary and relevant motion papers; and, to the extent practicable, all necessary and relevant exhibits (see, CPLR 5526). When the appeal is from a final judgment, the complete record on appeal shall also include any other reviewable order. The complete record on appeal shall also include the description of the action required by CPLR 5531 and the stipulation to the complete record or the order settling the record.

(3) Form of the complete record.
(i) The complete record on appeal shall be bound on the left side in a manner that properly secures all the pages and keeps them firmly together; however, such binding shall not be done by using metal fastener or similar hard material that protrudes or presents a bulky surface or sharp edge.
(ii) The complete record on appeal shall be reproduced by standard typographic printing or by any other duplicating process that produces a clear black image on white paper. The record shall be reproduced on opaque, unglazed white paper measuring 8½ by 11 inches. Printing shall be of no less than 11-point size.
(iii) The cover of the complete record on appeal shall be white and shall contain the title of the matter clearly identifying the parties to the appeal and the action or proceeding; the names, addresses and telephone numbers of counsel for the parties or, when appropriate, of the parties; in a civil matter, the index number or, in a Court of Claims matter, claim number or motion number assigned in the court from which the appeal is taken; in a criminal matter, the indictment or information number; and the Appellate Division docket number if one has been assigned.
(iv) The complete record on appeal shall be preceded by a table of contents listing and briefly describing the papers included in the record pursuant to 22 NYCRR 1000.4 (a) (2). The table of contents shall list all trial or hearing exhibits, briefly describing the nature of each exhibit, indicating the page of the record where the exhibit is admitted into evidence and indicating where in the record the exhibit is reproduced.
(v) The pages of the complete record on appeal shall be consecutively paginated. The subject matter of each page of the complete record on appeal shall be stated at the top thereof, except, for papers other than testimony, the subject matter may be stated at the top of the first page of the paper, together with the first and last pages thereof. When testimony is reproduced, the name of
the witness, by whom the witness was called and whether the testimony is direct, cross, redirect or recross examination shall be stated at the top of each page (see, CPLR 5526).

(b) Records in consolidated appeals.
   (1) Multiple appellants.
   When two or more parties take an appeal from a single order or judgment, the appeals may be consolidated on motion pursuant to 22 NYCRR 1000.13 (n) or on stipulation of the parties or their attorneys. A stipulation consolidating appeals shall be signed by the parties to the appeals or their attorneys, shall designate the party bearing primary responsibility for filing the record and shall be duly filed with this Court.

   (2) Multiple orders or judgments.
   When one party appeals from two or more orders or judgments in the same action, the party may move to consolidate the appeals pursuant to 22 NYCRR 1000.13 (n).

   (3) Form and content of records.
   When appeals have been consolidated and are perfected on the complete record, the record shall comply with 22 NYCRR 1000.4 (a) and the papers related to each appeal shall be clearly identified in the table of contents and shall be physically separated and conspicuously identified within the record (i.e., by insertion of a tab page or colored divider).

(c) Contents of a statement in lieu of a complete record on appeal - joint appendix.
   (1) Pursuant to CPLR 5527, when the questions raised by an appeal can be determined without an examination of all the pleadings and proceedings, the parties or their attorneys may stipulate to a statement showing how the questions arose and were determined by the court from which the appeal is taken and setting forth only those facts alleged and proved or sought to be proved as are necessary to the determination of the appeal. The statement may also include portions of the transcript of the proceedings and other relevant material. The statement shall include a copy of the order or judgment appealed from, the notice of appeal and a statement of the issues to be determined. The stipulated statement shall be presented for approval to the court from which the appeal is taken within 20 days after the notice of appeal has been filed and served. The court from which the appeal is taken may make corrections or additions as necessary to present fully the questions raised by the appeal. The approved statement shall constitute the record on appeal and shall be bound, along with the description required by CPLR 5531 and the order approving the statement, as a joint appendix.

   (2) The joint appendix on appeal shall be bound, printed and reproduced as set forth in 22 NYCRR 1000.4 (a) (3).

(d) Appendices - CPLR article 55.
   (1) Complete Record on appeal.
   When an appeal is perfected on the appendix method pursuant to CPLR article 55, the complete record on appeal shall comply with CPLR 5525 and 22 NYCRR 1000.4 (a). In the case of consolidated appeals, there shall also be compliance with 22 NYCRR 1000.4 (b).

   (2) Content of appendix.
(i) The appellant's appendix shall contain those parts of the record on appeal necessary to consider the questions involved, including those parts of the record that the appellant can reasonably expect to be relied upon by the respondent (see, CPLR 5528 [a] [5]).

(ii) The respondent's appendix shall contain only such additional parts of the record on appeal necessary to consider the questions involved (see, CPLR 5528 [b]).

(iii) The appellant's reply appendix shall contain only those parts of the record necessary to consider the questions on appeal that have not been included in either the appellant's appendix or the respondent's appendix.

(iv) A joint appendix may be submitted when the parties stipulate to the contents of an appendix.

(3) Form of appendix.
An appendix shall be bound, printed and reproduced as set forth in 22 NYCRR 1000.4 (a) (3).

(f) Briefs.
(1) Binding.
A brief on appeal or a proceeding shall be bound on the left side in a manner that properly secures all the pages and keeps them firmly together; however, such binding shall not be done by any metal fastener or similar hard material that protrudes or presents a bulky surface or a sharp edge.

(2) Paper; printing.
The brief shall be reproduced by standard typographical printing or other duplicating process that produces a clear black image on white paper, with one inch margins. The brief shall be reproduced on opaque, unglazed white paper, measuring 8½ by 11 inches. Printing shall be of no less than 11-point size, and shall be double-spaced. A brief shall contain no footnotes.

(3) Page limits.
The brief of an appellant, petitioner, respondent or respondent-appellant shall not exceed 70 pages. The reply brief of an appellant, petitioner or appellant-respondent or the surreply brief of a respondent-appellant shall not exceed 35 pages. The pages shall be consecutively paginated.

(4) Cover of brief; information.
The cover of a brief shall contain the title to the matter; the name, address and telephone number of the person submitting the brief; in a civil matter, the index number or, in a Court of Claims matter, claim number or motion number assigned in the court from which the appeal is taken; in a criminal matter, the indictment or information number; the Appellate Division docket number if one has been assigned; and, in the upper right-hand corner, the name of the person requesting oral argument and the time requested for argument, or the name of the person submitting.

(5) Cover of brief; color.
Except in those appeals in which permission to proceed as a poor person has been granted, the cover of a brief of an appellant or petitioner shall be blue; the cover of a brief of a respondent shall be red; the cover of a reply brief shall be gray; the cover of a surreply brief shall be yellow; and the cover of a brief of an intervenor or an amicus curiae shall be green. The cover of a supplemental brief submitted pro se in a criminal appeal shall be white.
(6) Contents of brief.
A brief shall contain, in the following order: a table of contents; a table of citations; a concise statement, not exceeding two pages, of the questions involved in the matter, with each question numbered and followed immediately by the answer, if any, from the court from which the appeal is taken; a concise statement of the nature of the matter and of the facts necessary and relevant to the determination of the questions involved, with supporting references to pages in the record, transcript or appendix, as appropriate; and the argument of the issues, divided into points by appropriate headings, distinctively printed (see, CPLR 5528). A brief shall contain no footnotes.

(7) New York decisions shall be cited from the official reports, if any. All other decisions shall be cited from the official reports, if any, and also from the National Reporter System if they are there reported. Decisions not reported officially or in the National Reporter System shall be cited from the most available source (CPLR 5529 [e]).

(8) When an extension of time to file and serve a brief has been granted, a copy of the order granting such permission shall be filed with the brief.

(g) Exhibits.
(1) In general.
Absent a court order or stipulation of the parties, all exhibits shall be submitted to the Court. The parties or their attorneys may agree and stipulate that particular exhibits are not relevant or necessary to the determination of an appeal. In such case, the appellant shall file a stipulation of the parties or their attorneys listing the exhibits neither relevant nor necessary to the appeal.

(2) Printed exhibits.
To the extent that it is practicable, all relevant and necessary exhibits shall be printed in the record on appeal.

(3) Original exhibits.
Absent a stipulation of the parties pursuant to 22 NYCRR 1000.4 (g) (1) or (4), all original exhibits shall be submitted to the Court. Upon perfecting an appeal, an appellant shall file the original exhibits or, when the exhibits are in the control of a respondent or a third party, a five-day written demand for the exhibits or a subpoena duces tecum for the exhibits issued in accordance with CPLR article 23, with proof of service thereof. The failure of a respondent to comply with a five-day demand may result in sanctions pursuant to 22 NYCRR 1000.16 (a).

* * *

(h) Compliance.
The Clerk shall reject any record, appendix or brief that does not comply with these rules, is not legible or is otherwise unsuitable.
NEW YORK COURT OF APPEALS – APPLICABLE RULES REGARDING RECORDS AND BRIEFS

500.12 Filing of Record Material and Briefs in Normal Course Appeals.

(a) Scheduling letter. Generally, in an appeal tracked for normal course treatment, the clerk of the Court issues a scheduling letter after the filing of the preliminary appeal statement. A scheduling letter also issues upon the termination of an inquiry pursuant to section 500.10 or 500.11 of this Part. The scheduling letter sets the filing dates for record material and briefs.

(b) Appellant’s initial filing. In addition to the submission in digital format required by section 500.14(g) of this Part, on or before the date specified in the scheduling letter, appellant shall serve and file record material in compliance with section 500.14 of this Part, and shall remit the fee, if any, required by section 500.3(a) of this Part. In addition to the submission in digital format required by paragraph (b) of this section, appellant also shall file original and 19 copies of a brief, with proof of service of three copies on each other party. If no scheduling letter is issued, appellant’s papers shall be served and filed within 60 days after appellant took the appeal by (1) filing a notice of appeal in the place and manner required by CPLR 5515, (2) entry of an order granting a motion for leave to appeal in a civil case, or (3) issuance of a certificate granting leave to appeal in a criminal case.

(c) Respondent’s filing. In addition to the submission in digital format required by paragraph (h) of this section and section 500.14(g) of this Part, on or before the date specified in the scheduling letter, respondent shall serve and file an original and 19 copies of a brief and an original and 19 copies of a supplementary appendix, if any, with proof of service of three copies on each other party. If no scheduling letter is issued, respondent’s papers shall be filed within 45 days after service of appellant’s brief.

(d) Reply briefs. A reply brief is not required but may be served and filed by appellant on or before the date specified in the scheduling letter. If no scheduling letter is issued, a reply brief may be served and filed within 15 days after service of respondent’s brief. Where cross appeals are filed, the cross appellant may serve and file a reply brief to the main appellant’s responsive brief. In addition to the submission in digital format required by paragraph (h) of this section, original and 19 copies of a reply brief shall be served and filed, with proof of service of three copies on each other party.

(e) Amicus curiae briefs. The Attorney General of the State of New York may file, no later than the filing date set for respondent’s brief, and in addition to the submission in digital format required by paragraph (h) of this section, an original and 19 copies of an amicus curiae brief without leave of the Court, with proof of service of three copies on each party. Any other proposed amicus curiae shall request amicus curiae relief pursuant to section 500.23(a)(1) of this Part.

(f) Briefs in response to amicus curiae briefs. Briefs in response to an amicus curiae brief are not required but may be served and filed by a party whose position is adverse to that of the amicus curiae. The brief shall be served and filed within 15 days after the date of this Court’s
order granting a motion for amicus curiae relief or within 15 days after the service of an amicus curiae brief by the Attorney General of the State of New York. In addition to the submission in digital format required by paragraph (h) of this section, original and 19 copies shall be filed, with proof of service of three copies on each other party and one copy on each amicus curiae.

(g) Sur-reply briefs. Sur reply briefs are not permitted.

(h) Companion Submission in Digital Format. Each appellant, respondent and amicus curiae shall submit in digital format its brief and record material. The brief and record material in digital format shall be identical to the filed original printed brief and record material, except they need not contain an original signature, and they shall comply with the technical specifications available from the clerk's office. Unless otherwise permitted by the clerk, briefs and record material in digital format shall be received by the clerk's office no later than the filing due date for the printed brief and record material.

500.13 Content and Form of Briefs in Normal Course Appeals.

(a) Content. All briefs shall conform to the requirements of section 500.1 of this Part and contain a table of contents, a table of cases and authorities and, if necessary, a disclosure statement pursuant to section 500.1(f) of this Part. Such disclosure statement shall be included before the table of contents in the party's principal brief. Appellant's brief shall include a statement showing that the Court has jurisdiction to entertain the appeal and to review the questions raised, with citations to the pages of the record or appendix where such questions have been preserved for the Court's review. Respondent's brief may have a supplementary appendix attached to it. The original of each brief shall be signed and dated, shall have the affidavit of service affixed to the inside of the back cover and shall be identified on the front cover as the original. Each brief shall indicate the status of any related litigation as of the date the brief is completed. Such statement shall be included before the table of contents in each party's brief.

(b) Brief covers. Brief covers shall be white and shall contain the caption of the case and name, address, telephone number, and facsimile number of counsel or self-represented litigant and the party on whose behalf the brief is submitted, and the date on which the brief was completed. In the upper right corner, the brief cover shall indicate whether the party proposes to submit the brief without oral argument or, if argument time is requested, the amount of time requested and the name of the person who will present oral argument (see section 500.18 of this Part). If a time request does not appear on the brief, generally no more than 10 minutes will be assigned. The Court will determine the argument time, if any, to be assigned to each party. Plastic covers shall not be used.

500.14 Records, Appendices and Exhibits in Normal Course Appeals.

(a) Record material. Appellant shall supply the Court with record material in one of the following ways:

(1) Appellant may subpoena the original file to this Court from the clerk of the court of original instance or other custodian, and submit original exhibits to be relied upon, and, in
addition to the submission in digital format required by paragraph (g) of this section, supplement these with an original and 19 copies of an appendix conforming to subdivision (b) below, with proof of service of three copies of the appendix on each other party. If appellant is represented by assigned counsel, or has established indigency, an oral or written request may be made of the clerk of this Court to obtain the original file.

(2) In addition to the submission in digital format required by paragraph (g) of this section, appellant may file with the clerk of the Court one copy of the reproduced record used at the court below. This record shall be supplemented by an original and 19 copies of an appendix conforming to subdivision (b) below, with proof of service of three copies of the appendix on each other party.

(3) In addition to the submission in digital format required by paragraph (g) of this section, appellant may file with the clerk of the Court an original and 19 copies of a new and full record which shall include the record used at the court below, the notice of appeal or order granting leave to appeal to this Court, the decision and order appealed from to this Court, and any other decision and order brought up for review, with proof of service of three copies of the new record on each other party.

(b) Appendix. An appendix shall conform to the requirements of CPLR 5528 and 5529, and shall be sufficient by itself to permit the Court to review the issues raised on appeal without resort to the original file (see subsection [a][1] of this section) or reproduced record used at the court below (see subsection [a][2] of this section). The appendix shall include, as relevant to the appeal, the following:

(1) the notice of appeal or order or certificate granting leave to appeal;
(2) the order, judgment or determination appealed from to this Court;
(3) any order, judgment or determination which is the subject of the order appealed from, or which is otherwise brought up for review;
(4) any decision or opinion relating to the orders set forth in subsections (b)(2) and (3) above; and
(5) the testimony, affidavits, jury charge and written or photographic exhibits useful to the determination of the questions raised on appeal or cited in the brief of the party filing the appendix.

(c) Respondent's appendix. A respondent's brief may include a supplementary appendix.

(d) Inadequate appendix. When appellant has filed an inadequate appendix, respondent may move to strike the appendix (see section 500.21 of this Part) or, in addition to the submission in digital format required by paragraph (g) of this section, may submit an original and 19 copies of an appendix containing such additional parts of the record as respondent deems necessary to consider the questions involved, with proof of service of three copies of the appendix on each other party. The Court may direct appellant to supplement the appendix with additional parts of the record it deems necessary to consider the questions involved.

(e) Description of action or proceeding. The reproduced record and additional papers or the appendix shall contain the statement required by CPLR 5531.
(f) Correctness of the record. The correctness of the reproduced record or the appendix and additional papers shall be authenticated pursuant to CPLR 2105 or stipulated to pursuant to CPLR 5532.

(g) Companion Submission in Digital Format. Each appellant shall submit in digital format its appendix pursuant to part (a)(1) of this section, appellate division record and appendix pursuant to part (a)(2) of this section, or new and full record pursuant to part (a)(3) of this section. If a respondent files an appendix pursuant to part (d) of this section, such respondent shall submit in digital format such appendix. The record material in digital format shall be identical to the filed original printed record material, except it need not contain an original signature, and it shall comply with the technical specifications available from the clerk's office. Unless otherwise permitted by the clerk, record material in digital format shall be received by the clerk's office no later than the due date for the printed record material.