

PANEL ONE

**APPELLATE PRACTICE:
WHAT EVERY TRIAL
ATTORNEY NEEDS TO KNOW
BUT WAS AFRAID TO ASK**

APPELLATE COURT CHECKLISTS

COURTESY OF:

APPEALTECH 

YOUR APPELLATE PARTNER

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Appellate Division, First Department Checklists

New York Supreme Court Appellate Division, First Department Checklists

Checklist for Record on Appeal on Judgment after Trial

- Table of Contents — §600.10(b)(1)(i)
- Statement Pursuant to CPLR 5531 or Pre-argument Statement — §600.10(b)(1)(ii)
- Notice of Appeal — §600.10(b)(1)(iii)
- Judgment Appealed From — §600.10(b)(1)(iii)
- Order, Memorandum Decision or Opinion, if any, of the Trial Court — §600.10(b)(1)(vi)
- Remainder of the Judgment Roll — including pleadings; any Order necessarily affecting the final Judgment; any earlier determination of Appellate Court — §600.10(b)(1)(iii)
- Settled and Corrected Transcript — §600.10(b)(1)(iii)
- Exhibits Entered into Evidence at Trial — §600.10(b)(1)(iii)
- Stipulation Settling Transcript or Affirmation of Compliance — §600.10(b)(1)(v)
- Stipulation as to Exhibits (if necessary) — §600.10(b)(1)(vii)
- Certification Pursuant to CPLR 2105 or Stipulation Pursuant to CPLR 5532 Waiving Certification or Certificate by Proper Clerk — §600.10(b)(1)(viii)
- Electronic Requirement in addition to Paper Service and Filing — §600.11(b)(2)(3)

**New York Supreme Court Appellate
Division, First Department Checklists**

Checklist for Record on Appeal on Order Rendered upon Motion Papers

- Table of Contents — §600.10(b)(1)(i)
- Statement Pursuant to CPLR 5531 or Pre-argument Statement — §600.10(b)(1)(ii)
- Notice of Appeal — §600.10(b)(1)(iv)
- Order Appealed From — §600.10(b)(1)(iv)
- Memorandum Decision (if any) — §600.10(b)(1)(vi)
- Notice of Motion or Order to Show Cause, Supporting Affidavits,
and any attached exhibits — §600.10(b)(1)(iv)
- Affidavits in Opposition and any attached exhibits — §600.10(b)(1)(iv)
- Reply Affidavits in Further Support and any attached exhibits — §600.10(b)(1)(iv)
- Certification Pursuant to CPLR 2105 or Stipulation Pursuant to CPLR 5532
Waiving Certification or Certificate by proper clerk — §600.10(b)(1)(viii)
- Electronic Requirement in addition to Paper Service and Filing — §600.11(b)(2)(3)

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New York Supreme Court Appellate Division, First Department Checklists

Checklist for Appendix¹

- Table of Contents — §600.10(c)(4)
- Statement Pursuant to CPLR 5531 or Pre-argument Statement
- Notice of Appeal — §600.10(c)(2)(i)
- Judgment or Order Appealed From — §600.10(c)(2)(i)
- Memorandum Decision (if any) — §600.10(c)(2)(i)
- Pleadings (if their sufficiency, content or form is at issue or material) — §600.10(c)(2)(i)
- If appropriate: Notice of Motion or Order to Show Cause and relevant excerpts from motion papers — §600.10(c)(2)(i)
- Relevant excerpts from transcript — §600.10(c)(2)(ii)
- If appropriate: Findings of Fact, Conclusions of Law, Charge to Jury, Verdict — §600.10(c)(2)(i)
- Copies of critical exhibits — §600.10(c)(2)(iii)
- If appropriate: Stipulation Settling Transcript or Affirmation of Compliance
- Electronic Requirement in addition to Paper Service and Filing — §600.11(b)(2)(3)

¹ In the Appellate Division, First Department, per Rule 600.10(c) and CPLR 5528, the Appendix should contain “such parts of the Record on Appeal as are necessary to consider the questions involved, including those parts the Appellant reasonably assumes will be relied upon by the Respondent,” including, where applicable, at least the above indicated items.

Attorneys proceeding on the Appendix method are required to submit to the Clerk of the Court of original instance the following: a Subpoena Duces Tecum, along with two copies of the 5531 Statement or Pre-argument statement, two copies of a Statement of Attorney, and a subpoena fee. The lower court clerk will prepare a certificate listing the papers constituting the Record on Appeal or will ask for assistance in preparing the certificate.

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New York Supreme Court Appellate Division, First Department Checklists

Checklist for Appellant's Brief

Content

- Table of Contents, including argument point headings — §600.10(d)(2)(i)
- Table of Authorities (required in First Department) — §600.10(d)(2)(i)
- Statement of Questions Involved — §600.10(d)(2)(ii)
- Statement of the Case and of the Facts, with reference to Appendix or Record on Appeal pages — §600.10(d)(2)(iii)
- Argument (divided into points by appropriate headings) — §600.10(d)(2)(iv)
- Conclusion — §130-1.1a
- Signature — §130-1.1a
- Printing Specifications Statement — §600.10(d)(1)(v)
- Statement Pursuant to CPLR 5531 or Pre-argument Statement — §600.10(d)(2)(v)

Format

- Font Size — §600.10(a)(3)
 - (Proportional) 14 pt. text, 12 pt. footnotes, 15 pt. headings
 - (Monospaced) 12 pt. text, 10 pt. footnotes, 14 pt. headings
- Typeface — §600.10(a)(3)
 - Clear serified typeface
- Margins — §600.10(a)(4)
 - At least one inch on all sides
- Line Spacing — §600.10(a)(4)
 - Text must be double-spaced. Footnotes, headings, and indented quotations may be single-spaced
- Word and Page Limit — §600.10(d)(1)(i)
 - 14,000 words and 70 page maximum
- Electronic Requirement in addition to Paper Service and Filing — §600.11(b)(2)(3)

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New York Supreme Court Appellate Division, First Department Checklists

Checklist for Appellant's Brief

Content

- Table of Contents, including argument point headings — §600.10(d)(2)(i)
- Table of Authorities (required in First Department) — §600.10(d)(2)(i)
- Statement of Questions Involved — §600.10(d)(2)(ii)
- Statement of the Case and of the Facts, with reference to Appendix or Record on Appeal pages — §600.10(d)(2)(iii)
- Argument (divided into points by appropriate headings) — §600.10(d)(2)(iv)
- Conclusion — §130-1.1a
- Signature — §130-1.1a
- Printing Specifications Statement — §600.10(d)(1)(v)
- Statement Pursuant to CPLR 5531 or Pre-argument Statement — §600.10(d)(2)(v)

Format

- Font Size — §600.10(a)(3)
 - (Proportional) 14 pt. text, 12 pt. footnotes, 15 pt. headings
 - (Monospaced) 12 pt. text, 10 pt. footnotes, 14 pt. headings
- Typeface — §600.10(a)(3)
 - Clear serified typeface
- Margins — §600.10(a)(4)
 - At least one inch on all sides
- Line Spacing — §600.10(a)(4)
 - Text must be double-spaced. Footnotes, headings, and indented quotations may be single-spaced
- Word and Page Limit — §600.10(d)(1)(i)
 - 14,000 words and 70 page maximum
- Electronic Requirement in addition to Paper Service and Filing — §600.11(b)(2)(3)

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New York Supreme Court Appellate Division, First Department Checklists

Checklist for Respondent's Brief

Content

- Table of Contents, including point headings of the argument — §600.10(d)(3)(i)
- Table of Authorities (required in First Department) — §600.10(d)(3)(i)
- Counterstatement of Questions Involved (if Respondent disagrees with statement of Appellant) — §600.10(d)(3)(ii)
- Counterstatement of Nature of Case and of Facts (if Respondent disagrees with statement of Appellant) — §600.10(d)(3)(ii)
- Argument (divided into points by appropriate headings) — §600.10(d)(3)(iii)
- Conclusion — §130-1.1a
- Signature — §130-1.1a
- Printing Specifications Statement — §600.10(d)(1)(v)

Format

- Font Size — §600.10(a)(3)
 - (Proportional) 14 pt. text, 12 pt. footnotes, 15 pt. headings
 - (Monospaced) 12 pt. text, 10 pt. footnotes, 14 pt. headings
- Typeface — §600.10(a)(3)
 - Clear serified typeface
- Margins — §600.10(a)(4)
 - At least one inch on all sides
- Line Spacing — §600.10(a)(4)
 - Text must be double-spaced. Footnotes, headings, and indented quotations may be single-spaced
- Word and Page Limit — §600.10(d)(1)(i)
 - 14,000 words and 70 page maximum
- Electronic Requirement in addition to Paper Service and Filing — §600.11(b)(2)(3)

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New York Supreme Court Appellate Division, First Department Checklists

Checklist for Reply Brief

Content

- Table of Contents, including the point headings of the argument — §600.10(d)(4)(i)
- Table of Authorities (required in First Department) — §600.10(d)(4)(i)
- Argument, divided into points by appropriate headings — §600.10(d)(4)(ii)
- Conclusion — §130-1.1a
- Signature — §130-1.1a
- Printing Specifications Statement — §600.10(d)(1)(v)

Format

- Font Size — §600.10(a)(3)
 - (Proportional) 14 pt. text, 12 pt. footnotes, 15 pt. headings
 - (Monospaced) 12 pt. text, 10 pt. footnotes, 14 pt. headings
- Typeface — §600.10(a)(3)
 - Clear serifed typeface
- Margins — §600.10(a)(4)
 - At least one inch on all sides
- Line Spacing — §600.10(a)(4)
 - Text must be double-spaced. Footnotes, headings, and indented quotations may be single-spaced
- Word and Page Limit — §600.10(d)(1)(i)
 - 7,000 words and 35 page maximum
- Electronic Requirement in addition to Paper Service and Filing — §600.11(b)(2)(3)

Appellate Division, Second Department Checklists

New York Supreme Court Appellate Division, Second Department Checklists

New York Supreme Court Appellate Division, Second Department

Checklist for Record on Appeal on Judgment after Trial

- Table of Contents — §670.10.2(b)(3)
- Statement Pursuant to CPLR 5531 — §670.10.2(b)(2)
- Notice of Appeal — §670.10.2(b)(4)
- Judgment Appealed From — §670.10.2(b)(4)
- Order, Memorandum Decision or Opinion, if any, of the trial court — §670.10.2(b)(4)
- Remainder of the Judgment Roll — including pleadings and any Order necessarily affecting the final judgment — §670.10.2(b)(4)
- Settled and corrected transcript — §670.10.2(b)(4)
- Exhibits entered into evidence at trial — §670.10.2(b)(4)
- Stipulation Settling Transcript, Affirmation of Compliance or Order Settling Transcript — §670.10.2(b)(5)
- Stipulation as to Exhibits (if necessary) — §670.10.2(b)(6)
- Certification Pursuant to CPLR 2105 or Stipulation Pursuant to CPLR 5532 waiving certification or Certificate by proper clerk — §670.10.2(b)(7) and §670.10.2(f)

New York Supreme Court Appellate Division, Second Department Checklists

New York Supreme Court Appellate Division, Second Department

Checklist for Record on Appeal on Order Rendered upon Motion Papers

- Table of Contents — §670.10.2(b)(3)
- Statement Pursuant to CPLR 5531 — §670.10.2(b)(2)
- Notice of Appeal or Order of Transfer — §670.10.2(b)(2)
- Order Appealed From — §670.10.2(b)(2)
- Memorandum Decision, if any — §670.10.2(b)(2)
- Notice of Motion or Order to Show Cause, supporting Affidavits, and any attached exhibits — CPLR 5526
- Affidavits in opposition and any attached exhibits — CPLR 5526
- Reply Affidavits in further support and any attached exhibits — CPLR 5526
- Certification Pursuant to CPLR 2105 or Stipulation Pursuant to CPLR 5532 waiving certification or Certificate by proper clerk — §670.10.2(b)(7) and §670.10.2(f)

New York Supreme Court Appellate Division, Second Department Checklists

New York Supreme Court Appellate Division, Second Department

Checklist for Appendix¹

- Table of Contents — §670.10.2(c)(2)
- Statement Pursuant to CPLR 5531 — §670.10.2(c)(2)
- Notice of Appeal or Order of Transfer — §670.10.2(c)(1)(i)
- Judgment or Order Appealed From — §670.10.2(c)(1)(ii)
- Memorandum Decision, if any — §670.10.2(c)(1)(iii)
- Pleadings, if their sufficiency, content or form is at issue or material — §670.10.2(c)(1)(iv)
- If appropriate: Notice of Motion or Order to Show Cause and relevant excerpts from motion papers — §670.10.2(c)(1)(v)
- Relevant excerpts from transcript — §670.10.2(c)(1)(v)
- Copies of critical exhibits — §670.10.2(c)(1)(vi)
- If appropriate: Stipulation Settling Transcript or Affirmation of Compliance — CPLR 5525
- Certification Pursuant to CPLR 2105 or Stipulation Pursuant to CPLR 5532 waiving certification or Certificate by proper clerk — §670.10.2(c)(1)(vii) and §670.10.2(f)

¹ In the Appellate Division, Second Department, per Rule 670.10.2(c) and CPLR 5528, the Appendix should contain “such parts of the Record on Appeal as are necessary to consider the questions involved, including those parts the Appellant reasonably assumes will be relied upon by the Respondent,” including, where applicable, at least the above indicated items.

Attorneys proceeding on the Appendix method are required to submit to the Clerk of the Court of original instance the following: a Subpoena Duces Tecum, along with the 5531 Statement and a subpoena fee. Several of the Courts of original instance require that the subpoena be “so ordered.” The lower court clerk will prepare a certificate listing the papers constituting the Record on Appeal and will thereafter forward the file to the Appellate Division, Second Department.

New York Supreme Court Appellate Division, Second Department Checklists

New York Supreme Court Appellate Division, Second Department

Checklist for Appellant's Brief

Content

- Statement Pursuant to CPLR 5531 — §670.10.3(g)(2)(i)
- Table of Contents, including the point headings of the argument — §670.10.3(g)(2)(ii)
- Statement of Questions Involved — §670.10.3(g)(2)(iii)
- Statement of the Nature of the Action or Proceeding and of the Facts, with reference to Appendix or Record on Appeal pages — §670.10.3(g)(2)(iv)
- Argument, divided into points by appropriate headings — §670.10.3(g)(2)(v)
- Conclusion
- Signature — §130-1.1a
- Certificate of Compliance — §670.10.3(f)

Format

- Font Size — §670.10.3(a)(1), (2)
 - (Proportional, such as Times) 14 pt. text, 12 pt. footnotes
 - (Monospaced, such as Courier) 12 pt. text, 10 pt. footnotes
- Typeface — §670.10.3(a)
 - Serifed; no words in bold or all caps, except in headings
- Margins — §670.10.3(c)
 - At least one inch on all sides
- Line spacing — §670.10.3(c)
 - Double, except single for quotes longer than two lines, headings, and footnotes
- Word limit — §670.10.3(a)(3): 14,000 words

New York Supreme Court Appellate Division, Second Department Checklists

New York Supreme Court Appellate Division, Second Department

Checklist for Respondent's Brief

- Table of Contents, including the point headings of the argument — §670.10.3(g)(3)(i)
- Counterstatement of Questions Involved, if Respondent disagrees with statement of Appellant — §670.10.3(g)(3)(ii)
- Counterstatement of Nature of Case and of Facts, if Respondent disagrees with statement of Appellant — §670.10.3(g)(3)(ii)
- Argument, divided into points by appropriate headings — §670.10.3(g)(3)(iii)
- Conclusion
- Signature — §130-1.1a
- Certificate of Compliance — §670.10.3(f)

Format

- Font Size — §670.10.3(a)(1), (2)
(Proportional) 14 pt. text, 12 pt. footnotes
(Monospaced) 12 pt. text, 10 pt. footnotes
- Typeface — §670.10.3(a)
Serifed; no words in bold or all caps, except in headings
- Margins — §670.10.3(c)
At least one inch on all sides
- Line spacing — §670.10.3(c)
Double, except single for quotes longer than two lines,
headings, and footnotes
- Word limit — §670.10.3(a)(3): 14,000 words

New York Supreme Court Appellate Division, Second Department Checklists

New York Supreme Court Appellate Division, Second Department

Checklist for Reply Brief

- Table of Contents, including the point headings of the argument — §670.10.3(g)(4)(i)
- Argument, divided into points by appropriate headings — §670.10.3(g)(4)(ii)
- Conclusion
- Signature — §130-1.1a
- Certificate of Compliance — §670.10.3(f)

Format

- Font Size — §670.10.3(a)(1), (2)
(Proportional) 14 pt. text, 12 pt. footnotes
(Monospaced) 12 pt. text, 10 pt. footnotes
- Typeface — §670.10.3(a)
Serifed; no words in bold or all caps, except in headings
- Margins — §670.10.3(c)
At least one inch on all sides
- Line spacing — §670.10.3(c)
Double, except single for quotes longer than two lines,
headings, and footnotes
- Word limit — §670.10.3(a)(3): 7,000 words

New York State Court of Appeals Checklists

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New York State Court of Appeals Checklists

**New York State Court of Appeals
Checklist for Motion for Leave to Appeal**

Return Date

- Return date is always a Monday or, if Monday is a legal holiday, the first business day of the week — §500.21
 - Personal service: must give at least eight days notice — CPLR 2214[b].
 - Regular mail service: must give at least 13 days notice — CPLR 2103[b][2].
 - Overnight delivery service: must give at least nine days notice — CPLR 2103[b][6]
- Must be filed at the New York State Court of Appeals, with proof of service, no later than noon on the Friday preceding the return date.

Contents of Motion — 22 NYCRR §500.22

- Disclosure Statement — §500.1(f)
- A notice of motion.
- A statement of the procedural history of the case, including a showing of the timeliness of the motion.
 - Date movant was served (CPLR 2103 [b]) with the order or judgment sought to be appealed from, with notice of entry.
 - If a prior motion for leave to appeal filed at the Appellate Division, demonstrate timeliness by stating:
 - the date movant was served with the order or judgment sought to be appealed from, with notice of entry,
 - the date movant served the notice of motion addressed to the Appellate Division upon each of the other parties, and
 - the date movant was served with the Appellate Division order denying leave to appeal with notice of entry.

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New York State Court of Appeals Checklists

- Jurisdictional statement
 - the order or judgment sought to be appealed from is a final determination or a nonfinal order appealable by permission of the Court of Appeals (CPLR 5602[a][2]).
- Questions presented for review and why the questions presented merit review by this Court.
 - Movant shall identify the particular portions of the record where the questions sought to be reviewed are raised and preserved.
- A disclosure statement pursuant to section 500.1 of this Part, if required.
- One copy of the record below, or appendix if that method was used in the court below.
- One copy of the briefs filed below by each of the parties.

Format

- Font Size — §500.1(j)(1)(2)
 - (Proportional) 14 pt. text, 12 pt. footnotes
 - (Monospaced) 12 pt. text, 10 pt. footnotes
- Margins — §500.1(L)
 - At least one inch on all sides
- Line spacing — §500.1(L)
 - Text must be double-spaced. Footnotes, headings, and indented quotations may be single-spaced

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New York State Court of Appeals Checklist

Methods of Perfecting — §500.14(a)(b)

The Full Record:

1. The record used at the court below;
2. The notice of appeal or order granting leave to appeal to the NYSCA;
3. The decision and order appealed from;
4. Any other decision and order brought up for review.

The Appendix Method:

1. One copy of the reproduced record used at the court below.
2. An appendix containing 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;
 - (5) the testimony, affidavits, and written or photographic exhibits useful to the determination of the questions raised on appeal.

Court-PASS

- Registration with Court-PASS is required.

Electronic Requirement

- Appendix or Record must be fully redacted §500.5(d).
- Questionnaires regarding Confidentiality and Sensitive Material must be completed prior to digital submissions.

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New York State Court of Appeals Checklist

Brief Format Checklist

- Font Size — §500.1(e)(1)
(Proportional) 14 pt. text, 12 pt. footnotes
(Monospaced) 12 pt. text, 10 pt. footnotes
- Margins — §500.1(f)
At least one inch on all sides
- Line spacing — §500.10(a)(4)
Text must be double-spaced. Footnotes, headings, and indented quotations may be single-spaced
- No Word or Page Limit
- Disclosure Statement. Any Corporation or business entity must provide a Disclosure Statement — §500.1(f)
- Electronic Requirement in Addition to Paper Service and Filing — §500.12(h)

PERFECTING AN APPEAL 101

**WHEN, WHERE AND HOW TO PERFECT YOUR
APPEAL IN NEW YORK'S APPELLATE
DIVISION, FIRST DEPARTMENT;
APPELLATE DIVISION, SECOND DEPARTMENT;
AND THE NEW YORK COURT OF APPEALS**

Submitted By:

**MICHAEL KESTAN, ESQ.
AppealTech
New York, NY**

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Appeals To the Appellate Division First and Second Department

1. Do I have an appealable paper?

a. CPLR §5501

“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 and order of the supreme court, a county court or an appellate term determining an appeal.”

b. Appeal as of Right — Taken by Notice of Appeal

i) All Judgments — CPLR §5701(a)(1)

ii) Eight orders — CPLR §5701(a)(2)-(3)

§ 5701(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

(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.

- c. Appeals by Permission — Taken by Motion for Leave to Appeal
- i) Any order that may not be appealed as of right —
CPLR §5701(b)

§ 5701(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.

- ii) Three specific types of orders — CPLR 5701(b)

§ 5701(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.

Application for leave to appeal to the Appellate Division, First and Second Departments, is made by motion on notice pursuant to 22 NYCRR §§600.3 and 670.6, respectively

- d. Aggrieved party — A party seeking appellate review must be aggrieved: A “permissible appellant” is defined in § 5511, which reads “An aggrieved party or a person substituted for him may appeal” The key here is the word “aggrieved.” A litigant attains the status of an “aggrieved party” upon *moving for relief* in the lower court and receiving an adverse “order” on the motion.

CPLR 5511. Example: a litigant *which fails to move for relief* in the lower court is not an “aggrieved party” and thus lacks the legal standing of an “appellant” Broadway Equities v. Metropolitan Electric Mfg. Co., 306 A.D.2d 426, 428, 763 N.Y.S.2d 830, 832 (2d Dept. 2003)

- e. CPLR 5701(a)(2) Notice Requirement — When an order results from a motion made without notice, it is not appealable. Example Ex Parte Order; Order issued from the bench without notice or telephone order/ in person ruling on proprietary of deposition question that occurs during the deposition.
- f. A Decision alone is not appealable—It must be an Order.
- g. Orders on motions for reargument, renewal and resettlement.
 - i) An order denying *leave* to reargue is not appealable. Maroney v. Hawkins, 50 A.D.2d 862, 855 N.Y.S.2d 667 (2d Dept. 2008); Sabetford v. Smith, 306 A.D.2d 265 (2d Dept. 2003).
 - ii) An order granting/denying renewal is appealable.
 - iii) An order denying a motion to resettle a prior order or judgment is not appealable. General Electric Capital Auto Lease, Inc. v. D’Agnese, 281 A.D.2d 514, 721 N.Y.S.2d 833 (2d Dept. 2001); CPLR 5517. “A motion for resettlement is designed not for substantive changes, but to correct errors or omissions in form, for clarification or to make the order conform more accurately to the decision.” Simon v. Mehryari, 16 A.D.3d 664, 666, 792 N.Y.S.2d 543, 545 (2d Dept. 2005). Conversely, an order granting resettlement and substantively changing the prior order appears to be appealable.

2. **Am I Timely? — Taking the Appeal:**

- a. If you served the judgment or order to be appealed
 - i) Serve and file a Notice of Appeal, or to move for leave to appeal within thirty days from the date of service of the judgment or order with Notice of Entry
- b. If you have been served with the judgment or order to be appealed

- i) Serve and file a Notice of Appeal, or to move for leave to appeal within thirty days from the date of service of judgment or order with Notice of Entry
 - 1. Method of service may extend time — CPLR §2103.
- c. Court's service of the order upon all parties
 - i) Service by the Court of the order or judgment with entry by the County Clerk does not have any effect upon the time to file and serve a Notice of Appeal. CPLR 5513 specifically states: "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."
- d. Elapse of time with no service of the order or judgment after entry
 - i) As long as no party has previously served the order or judgment with notice of entry, the time to file a Notice of Appeal has not expired. Despite an elapse of time, any party may serve an order or judgment with notice of entry and thereby begin the 30-day clock for filing of the Notice of Appeal.
- e. A Party's Entry of an adverse Judgment as a pre-requisite for the Notice of Appeal
 - i) In the unusual situation where the successful party in a trial has not entered a judgment, the losing party may enter judgment against itself in order to file a Notice of Appeal.
- f. Cross Appeals
 - i) Serve and file Notice of Cross Appeal, or a motion for leave to cross appeal within ten days from the date of service of the Notice of Appeal, or motion for leave to appeal, or within the thirty days available to the appellant, whichever is longer.
 - 1. The method of service used may extend the window of time available — CPLR §2103.

3. **The Notice of Appeal**

a. Key Requirements

- i) The caption of the court of original instance. Naming
- ii) of the party or parties taking the appeal Name of the
- iii) court to which the appeal is being taken.
- iv) Description of the order or judgment being appealed, including the date of entry of the order or judgment appealed from.
- v) Date.
- vi) Signature pursuant to §130.1-1(a) of the Rules of the Chief Administrator of the Courts.
- vii) Identification of counsel for adverse parties.
- viii) A copy of the subject order or judgment attached
- ix) Notice of Appeal is filed with the lower court, not the Appellate Division.

b. Appeals to the Appellate Division, First Department

- i) A pre-argument statement must be filed with the Notice of Appeal.
 - a. 22 NYCRR §600.17 details content and purpose.
- ii) Serve one, File two copies with the clerk of the court from which the appeal is taken together with the original affidavit of service and the required filing fee.

c. Appeals to the Appellate Division — Second Department:

- i) A RADI form (Request for Appellate Division Intervention) must be filed with the Notice of Appeal.
- ii) Serve one File three copies with the clerk of the court from which the appeal is taken together with the original affidavit of service and the required filing fee.

- a. Upon receipt by the Second Department, a docket number will be assigned to the appeal, which must appear on each document subsequently filed with the court.

4. **Do I have the necessary components to prosecute an appeal?**

- a. Three alternative methods for getting the Record before the court
 - i) The full reproduced record — Rule 5526.
 - ii) The appendix — Rules 5528, 5529
 - iii) On a statement in lieu of a record on appeal — Rule 5527.
 - iv) Full reproduced record method — CPLR §5526 (method most frequently utilized)
 1. The original record remains in the custody of the clerk of the court whose order or judgment is to be appealed
 2. Appellant recreates the record on appeal
 3. Must be certified per CPLR §2105 or stipulated to per CPLR §5532
 - v) The appendix method
 1. Original record is transferred from the clerk of the court of original instance to the clerk of the Appellate Division via Subpoena *Duces Tecum*.
 2. Only those portions of the record necessary for the Court to consider the questions involved
 - vi) The Statement in Lieu of a Record CPLR 5527
 1. When the questions involved do not require a review of the pleadings and proceedings
- b. What about transcripts?
 - i) When a record of the proceedings is made a transcript must be:
 1. Ordered — CPLR §5525(a)

2. Settled — CPLR §5525(c)

Court to rule upon accuracy of transcript where parties cannot agree.

When parties cannot agree to the accuracy of a transcript or disagree as to amendment or correction of the transcript, the transcript must be settled before “the judge or referee before whom the proceedings were had...” CPLR 5525(c)(1). See also Rule 600.5(e)(1) of the Appellate Division, First Department.

3. Filed — Appendix Method

AD1 — 22 NYCRR §600.5(a)(3)

AD2 — 22 NYCRR §670.9(b)(3)

c. Exhibits

- i) The appellant must account for all exhibits entered into evidence when proceeding on the full record method.
 1. Bulky exhibits shall be held in readiness and be delivered to the court on telephone notice; AD1 — 22 NYCRR §600.10(b)(vii)(a); AD2 — 22 NYCRR §670.10.2(b)(6)(i)
 2. Irrelevant exhibits may be omitted by stipulation. The stipulation shall identify each exhibit and state that such exhibits will not be relied upon by parties to the appeal ; AD1 — 22 NYCRR §600.10(b)(vii)(b); AD2 — 22 NYCRR §670.10.2(b)(6)(ii)
 3. Relevant exhibits may be omitted from printing or reproduction—
 - a. Appellate Division, First Department — Exhibits omitted from printing must be done by a “So Ordered” stipulation and Exhibits must be filed no later than the Wednesday preceding the first day of the term. — 22 NYCRR §600.10(b)(vii)(a)
 - b. Appellate Division, Second Department — Exhibits omitted from printing must be done by a “So Ordered” stipulation or upon motion to the Court. Exhibits are filed concurrently with the appellant’s brief. — 22 NYCRR §670.10.2(b)(6)(i)

5. **Contents of a Record or Appendix — CPLR §5526**

a. Appeals from final judgments

- i) The notice of appeal
- ii) The judgment roll:
Summons, pleadings, admissions, each judgment and each order involving the merits or necessarily affecting the final judgment.
- iii) Any written opinions
- iv) Transcripts of testimony
- v) Relevant exhibits introduced into evidence in the court below.
- vi) An affirmation, stipulation or order settling the transcript pursuant to CPLR 5525(c)
- vii) A stipulation dispensing with the reproduction or filing of relevant and/or irrelevant exhibits.
- viii) A certification pursuant to CPLR 2105 or stipulation waiving certification pursuant to CPLR 5532

b. Appeals from interlocutory orders

- i) The notice of appeal
- ii) The order or judgment appealed from
- iii) Any memorandum decision or opinion rendered
- iv) The papers upon which the order or judgment was founded.
 - 1. Should not contain papers filed after the notice of appeal, or not considered by the lower court.
- v) A certification pursuant to CPLR 2105 or stipulation waiving certification pursuant to CPLR 5532

6. **What does “Perfect the appeal” mean?**

- a. An appeal is “perfected” when all components are served and filed with the clerk of the court to which the appeal was taken.
- b. Timing
 - i) In the Appellate Division — First Department:
 1. The “thirty-day” rule — 22 NYCRR §600.5
 - a. Appendix method
 - (i) If there is a transcript
 - A. the original record must be subpoenaed and “caused to be filed” within 30 days after settlement of the transcript
 - (ii) If there is no transcript
 - A. the original record must be subpoenaed and “caused to be filed” within 30 days after filing the notice of appeal — 22 NYCRR §600.5(d)
 - b. Full reproduced record method
 - (i) If there is a transcript
 - A. the record shall be filed within 30 days after settlement of the transcript — 22 NYCRR §600.5(c)
 - (ii) If there is no transcript
 - A. the record shall be filed within 30 days after filing the notice of appeal — 22 NYCRR §600.5(d)
 2. The “twenty-day” rule — 22 NYCRR §600.11
 - a. Appellant’s brief (with appendix, if applicable) and Note of Issue must be served and filed within 20 days after filing of the record.

3. The “nine-month” rule — 22 NYCRR §600.11(a)(3)
 - a. An appeal will be considered to be abandoned and dismissed for lack of prosecution if it is not perfected within nine months from the date of the notice of appeal.

Caveat: An appellant may obtain an enlargement of time/extension of time to perfect an appeal. An appellant must make a motion to the Appellate Division for an enlargement of time. Generally, such motions are liberally granted by the Appellate Division and successive motions for enlargement of time may be made. At a certain point, the Appellate Division’s order granting the motion will state that no further enlargements may be obtained by the appellant.

4. On a Cross-Appeal — NYCRR §600.11(d)
 - a. Must prepare and file a joint record on appeal or joint appendix
 - (i) Must include both the notice of appeal and notice of cross-appeal
 - b. The parties are required to consult as to the document contents and share equally in the cost of its preparation and printing, including the cost of preparing the transcript of testimony, if any.
 - (i) The nine months is calculated from the “earliest” of the dated notices of appeal.

ii) In the Appellate Division — Second Department:

1. The “six month” rule — 22 NYCRR §670.8
 - a. An appeal is “deemed to be abandoned” unless it is perfected within six months of the date of the notice of appeal or order granting leave to appeal.

Caveat: An appellant may obtain an enlargement of time/extension of time to perfect an appeal. As

opposed to the requisite motion practice in the First Department, the Second Department entertains requests for an enlargement of appellant's time by letter or stipulation of the parties. Generally, the Second Department permits 30-60 day extensions of time for perfection of an appeal.

2. Cross-Appeals and Concurrent Appeals —
22 NYCRR §670.2

- a. A cross-appeal is taken from an order or judgment where the parties' interests are adverse.
 - (i) Must prepare and file a joint record on appeal or joint appendix.
 - (ii) All notices of appeal and notices of cross-appeal must be included in the titled document
 - (iii) The parties are required to consult as to the document contents and share equally in the cost of its preparation and printing.
 - (iv) The six months is calculated from "earliest" of the dated notices of appeal.
- b. A concurrent appeal is taken from the same order or judgment by a party (or parties) whose interests are not adverse.
 - (i) The joint record on appeal or joint appendix and briefs of concurrent appellants to be filed simultaneously — §670.8(c)(2)
 - A. The six months is calculated from the concurrent notice of appeal bearing the "latest" date.
- iii) Dismissal for lack of prosecution and preclusive effect upon successive appeal. The Appellate Division will generally not consider an issue on appeal "which was raised or could have been raised in an earlier appeal which was dismissed for lack

of prosecution, although the Court has the inherent jurisdiction to do so.” Maksuta v. Galiastsatos, ___A.D.3d ___, 878 N.Y.S.2d 902 (2d Dept. 2009); See also Rubeo v. National Grange Mutual Ins. Co., 93 N.Y.2d 750, 720 N.E.2d 86, 697 N.Y.S.2d 866 (1999).

c. Service and Filing

i) The Appellate Division, First Department.

1. File 10, Serve 2 copies of the record and brief on each adverse party.

a) Methods of Service:

(i) Service must be completed prior to filing.

A. When service is by other than personal service must comply with CPLR 2103(b)(2)

2. 2 copies of the Note of Issue

3. A firm check or money order in the amount of \$315.00 made to the order of the Clerk of the Appellate Division, First Department.

ii) The Appellate Division, Second Department

1. File 9, Serve 2 copies of the record and brief on each adverse party.

2. Methods of Service:

a) Service may be performed on the filing date.

(i) CPLR 2103 have been adopted.

3. 1 copy of CPLR 5531 Statement 22 NYCRR §670.8(a)

4. A firm check or money order in the amount of \$315.00 made to the order of the Clerk of the Appellate Division, Second Department.

7. **Appeal to Court of Appeals**

- a. By motion for leave to appeal made directly to the Court of Appeals. CPLR 5602(a).
 - i) Prerequisites: a final order or judgment of the Appellate Division and a timely motion for leave to appeal as determined by service of the order/judgment with notice of entry. See, CPLR 5602(a)(1) and 5611 as to finality; CPLR 5513 as to timeliness.
 - ii) The return date of a motion for leave to appeal must be in compliance with scheduling requirements of CPLR 5516.
 - iii) Leave to appeal is granted upon approval of two judges of the Court of Appeals. CPLR 5602.
 - iv) Exception to finality rule: CPLR 5602(a)(2) regarding an appeal from an order of the Appellate Division “in a proceeding instituted by or against one or more public officers or a board, commissioner or other body of public officers or a court or tribunal....”
- b. By motion for leave to appeal made to the Appellate Division.
 - i) Pursuant to CPLR 5602(a), a party may move in the Appellate Division, in the first instance, for leave to appeal to the Court of Appeals. Upon “refusal” of the motion, a party can then move for leave directly in the Court of Appeals.
 - ii) Unlike the Court of Appeals, the Appellate Division is statutorily authorized to permit an appeal without the necessity for a “final order” determinative of the action. See, CPLR 5602(b)(1).
 - iii) Rare instances where an action originated “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.” CPLR 5602(b)(2).

- c. As of right upon the dissent of two Justices of the Appellate Division concerning a question of law. CPLR 5601(a). Finality of an order/ judgment is still required.
- d. As of right under CPLR 5601(b) concerning constitutional issues where:
 - i) A final order of the Appellate Division which “determines an action where there is directly involved the construction of the constitution of the state or of the United States.”; or
 - ii) 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.”
- e. As of right under CPLR 5601(c) upon stipulation of judgment absolute.
- f. As of right under CPLR 5601(d) upon a final order, judgment, arbitral award or determination of an administrative agency which is “necessarily affect[ed]” by an order of the appellate division on a prior appeal in the same action or proceeding. However, the appealable paper at issue must also satisfy the requirements of either a two Justice dissent in the Appellate Division (CPLR 5601(a)) or the constitutional requirements of CPLR 5601(b).
 - i) Under CPLR 5602(a)(1)(ii), a party can also move for leave to appeal in such instance in the absence of a two Justice dissent or the constitutional requirements of CPLR 5601.

Basic Format Requirements of the Appellate Brief

1. Font: Times New Roman 14 point.
2. Page/Word Limit:
 - a. First Department: 14,000 words or 70 pages in First Department for principal appellate brief; 7,000 words or 35 pages for reply brief. Rule 600.10.
 - b. Second Department: 14,000 words for principal appellate brief and 7,000 words for reply brief. Rule 670.10.3. Certificate of Compliance required. Rule 670.10.3(f).
3. Request for Oral Argument.
 - a. First Department: must file a request oral argument or oral argument is waived. See, Rule 600.11(f). Only one attorney from each side (plaintiff/defendant) is permitted to argue; impacts co-defendants represented by separate counsel. Rule 600.11(f)(2).
 - b. Second Department: request on cover of appellate brief suffices, with notation of allotted time requested and name of attorney arguing the appeal. Rule 670.10.3 (g). Oral argument is waived if not so requested. Rule 670.20. Argument is permitted from each party that filed a brief. Rule 670.20.

Example of Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

----- x

Index No.

(Caption)

NOTICE OF
APPEAL

----- x

PLEASE TAKE NOTICE that the above named (specify Plaintiff(s) or Defendant(s)) hereby appeal(s) to the Appellate Division, (First or Second) Department from an (Order or Judgment) which (describe nature of the order or judgment including amount of damages, if any), entered in the office of the Clerk of the (name court) on (enter date). The appeal is from (each and every part thereof *or* describe the portion(s) of the order or judgment sought to be reviewed).

Dated:

Yours, etc.

Attorneys for

To: Attorney(s) for *each* party to the appeal
The Clerk of the Court of Original Instance

Attach a copy of the subject order or judgment

**Example of Statement Pursuant to CPLR
§5531**

STATEMENT PURSUANT TO CPLR 5531

**New York Supreme Court
Appellate Division - Second Department**



– against –

-
1. The index number of the case in the court below is .
 2. The full names of the original parties are as above. There have been no changes.
 3. The action was commenced in Court, County.
 4. The action was commenced on or about , by the filing of a . The Answer was served thereafter.
 5. The nature and object of the action is as follows:
 6. The appeal is from an (order/judgment) of the Honorable , entered on .
 7. This appeal is being perfected on a full reproduced record. *Or* This appeal is being perfected on the appendix method. *Or* This appeal is being perfected on the original record. Leave to prosecute the appeal on the original record was granted by permission of the Court or by statute.

Example of Pre-Argument Statement

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

,

,

- against -

,

Index No.

PRE-ARGUMENT STATEMENT

1. The full names of the _____ are as set forth above (or specify).
The full names of the _____ are as set forth above (or specify).
There has been no change in the parties (if applicable).
2. The attorneys for _____ are (names, addresses, telephone #).
The attorneys for _____ are (names, addresses, telephone #).
3. This appeal is taken from a(n) _____ order/judgment/etc. of the Honorable _____, Supreme Court of the State of New York, County of _____. The order/judgment/etc. is/are dated _____.
4. There are no additional appeals pending in this action (or describe).
5. There are no related actions or proceedings pending in this or any other court (or describe).
6. (Object and nature of action)
7. (Describe order/judgment/etc. of court below)
8. (Nature of appeal)

Dated: _____, 200__
_____, New York

Attorney(s) for
(addresses, telephone #)

**Example of Note of
Issue**

NOTE OF ISSUE

**New York Supreme Court
Appellate Division - First Department**



,

,

– against –

,

.

-
-
1. The Notice of Appeal was served on or about .
 2. The Record on Appeal was filed on .
 3. The nature of the appeal is for .
 4. The action was commenced in Supreme Court, County.
 5. The index number of the action is .
 6. The (judgment, order, etc.) of the Honorable was entered on .
 7. This appeal is noticed for the 2014 term.
 8. (ATTORNEYS)

Example of Notice of Settlement

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

,)	
)	
)	
	,	
)	
– against –)	NOTICE OF SETTLEMENT
)	OF TRANSCRIPT
)	
)	County Clerk’s
)	Index No.
)	
)	
)	
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)	
)	
)	

PLEASE TAKE NOTICE that, pursuant to CPLR 5525(c), within 15 days of receipt of the transcript from the court reporter, a copy of the transcript and proposed amendments of Appellant are hereby served upon you.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 5525(c)(2) [and 22 NYCRR 600.5(e)], you are required to serve upon the undersigned attorney for Appellant any proposed amendments and any objections to the proposed amendments of Appellant, or the transcript, with the proposed amendments of Appellant, shall be deemed correct without the necessity of a stipulation by the parties or settlement of the transcript by the judge or referee before whom the proceedings were had.

Dated:

(Attorney for Appellant)

TO:

(Attorney for Respondent)

Example of Affirmation of Compliance

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – SECOND DEPARTMENT

<p style="text-align: center;">,</p>)	
)	
)	
),	
)	
– against –)	AFFIRMATION OF
)	COMPLIANCE
)	
)	County Clerk’s
,)	Index No.
)	
)	
)	
)	
)	

I, _____, attorney of record for the appellant in the above entitled action, do hereby certify and affirm under the penalties of perjury that I have complied with the time limitation and other provisions of CPLR 5525(c)(1) and 22 NYCRR §670.10.2(e) in the service of a copy of the transcript, that I have served upon the respondent herein the notice of settlement required by CPLR 5525(c)(3) and 22 NYCRR §670.10.2(e), and that respondent has failed to propose amendments or objections within the time prescribed by CPLR 5525(c)(1) and 22 NYCRR §670.10.2(e).

Dated:

(Attorneys for Appellant)

Example of Stipulation Settling Transcript

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

,)	
)	
)	
	,	
)	
– against –)	STIPULATION SETTLING
)	TRANSCRIPT
)	
)	County Clerk’s
)	Index No.
)	
)	
)	
)	

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the transcript in this matter has been corrected in accordance with proposed amendments and objections, if any, of the Appellant and Respondent, and that certification of the stenographic transcript of the proceedings is hereby made pursuant to CPLR 5525(c).

Dated:

(Attorneys)

(Attorneys)

(Attorneys)

(Attorneys)

**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	G CPLR Article 78 Proceeding G Special Proceeding Other G Habeas Corpus Proceeding	Filing Type	G Appeal G Transferred Proceeding G Original Proceeding G CPLR 5704 Review
Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.			
A. Administrative Review	D. Domestic Relations	F. Prisoners	I. Torts
G 1 Freedom of Information Law G 2 Human Rights G 3 Licenses G 4 Public Employment G 5 Social Services G 6 Other	G 1 Adoption G 2 Attorney's Fees G 3 Children – Support G 4 Children – Custody/Visitation G 5 Children – Terminate Parental Rights G 6 Children – Abuse/Neglect G 7 Children – JD/PINS	G 1 Discipline G 2 Jail Time Calculation G 3 Parole G 4 Other	G 1 Assault, Battery, False Imprisonment G 2 Conversion G 3 Defamation G 4 Fraud G 5 Intentional Infliction of Emotional Distress G 6 Interference with Contract G 7 Malicious Prosecution/ Abuse of Process G 8 Malpractice G 9 Negligence G 10 Nuisance G 11 Products Liability G 12 Strict Liability G 13 Trespass and/or Waste G 14 Other
B. Business & Other Relationships	G 8 Equitable Distribution G 9 Exclusive Occupancy of Residence G 10 Expert's Fees G 11 Maintenance/Alimony G 12 Marital Status G 13 Paternity G 14 Spousal Support G 15 Other	G. Real Property	
G 1 Partnership/Joint Venture G 2 Business G 3 Religious G 4 Not-for-Profit G 5 Other		G 1 Condemnation G 2 Determine Title G 3 Easements G 4 Environmental G 5 Liens G 6 Mortgages G 7 Partition G 8 Rent G 9 Taxation G 10 Zoning G 11 Other	
C. Contracts	E. Miscellaneous	H. Statutory	J. Wills & Estates
G 1 Brokerage G 2 Commercial Paper G 3 Construction G 4 Employment G 5 Insurance G 6 Real Property G 7 Sales G 8 Secured G 9 Other	G 1 Constructive Trust G 2 Debtor and Creditor G 3 Declaratory Judgment G 4 Election Law G 5 Notice of Claim G 6 Other	G 1 City of Mount Vernon Charter §§120, 127-f, or 129 G 2 Eminent Domain Procedure Law §207 G 3 General Municipal Law §712 G 4 Labor Law §220 G 5 Public Service Law §§128 or 170 G 6 Other	G 1 Accounting G 2 Discovery G 3 Probate/Administration G 4 Trusts G 5 Other

Appeal

Paper Appealed From (check one only):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order and Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court:	County:
Dated:	Entered:
Judge (name in full):	Index No.:
Stage: <input type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> 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 Numbers(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> 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			
2			
3			
4			
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7			
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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):

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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):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order and Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court:	County:
Dated:	Entered:
Judge (name in full):	Index No.:
Stage: <input type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> 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 an appeal is from a money judgment, specify the amount awarded.
Issues: Specify the issues proposed to be raised on the appeal.

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

Form C — Additional Party and Attorney Information

Additional Party Information			
No.	Party Name	Original Status	Appellate Division Status
21			
22			
23			
24			
25			
26			
27			
28			
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 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):



**STRATEGIC CONSIDERATIONS
IN NEW YORK
APPELLATE PRACTICE**

Submitted By:

**VINCENT CHIRICO, ESQ.
Chirico Law Firm
Brooklyn, NY**

STRATEGIC CONSIDERATIONS IN NEW YORK APPELLATE PRACTICE

Vincent Chirico, Esq.*

Two parts to every appeal: The “written word” and the “spoken word”

PART I – THE WRITTEN WORD (Brief Writing)

First and best impression of the merits of your argument

- Persuade court that relief you request is the **only** logical conclusion, and is mandated by
 - The facts
 - The law
 - Public policy

Appellate Briefs inform the court of:

- The relief sought;
- The facts and procedural history;
- The controlling law;
- The application of the law to your facts

Be mindful of ethical obligations: Ethics is:

- 70% common sense - devised from everyday life
 - What your mother taught you
 - The Golden Rule
- 30% motive
 - If you want to be bad, you will be regardless of what the rules are
- Credibility is the life blood of appellate lawyers
 - It's good to
 - Know the facts
 - Know the law
 - Know the judge
 - **Get the judge to know you**
 - Via multiple court appearances
 - Networking
- Ethical obligations applicable to appellate lawyers;
 - Frivolous appeals (arguments that are barred by recent, controlling authority)
 - False/misleading
 - Arguments
 - Evidence
 - Misquotes or inaccuracies (of law or fact)
 - Even unintentional misstatements may lead to sanctions
 - Failure to reveal directly adverse controlling legal authority
 - (different from good-faith efforts to distinguish)
 - Failure to update research

Deconstructing Brief Writing: Suggest writing in this order:

- Argument
 - “The Guts”
- Point headings
 - “The Roadmap”
- Questions Presented
 - “The Issue”
- Conclusion
 - “The End”
- Statement of facts
 - “Necessary” facts
 - “Supporting” facts
- Preliminary Statement
 - “The Summary”

Properly constructed, each section presents a stand-alone “mini argument” (so that “*if court reads nothing else...*”)

Intentional/structural reiteration is good

A. The Argument (“The Guts”):

(1) Accuracy produces credibility;

- Concede when you must
 - But explain why not relevant

(2) Pitch argument at least vulnerable level:

- Arrange in order which maximizes chances of success
 - Threshold issues first (may win without even addressing merits!)
 - Then best substantive argument
 - If court is swayed by point 1, may not even consider point 2;
 - If court is not swayed by point 1, chances are court will be less willing/open to be swayed by point 2
- When the law is against you, argue the facts;
- When the facts are against you, argue the law;
- When the law and the facts are against you...withdraw the appeal?
 - Very different than a trial

(3) “Tell ‘em what your gonna say, say it, and tell ‘em what you said”

- Stand-alone statement of issue, law, application, reasoning, conclusion
 - *“If the court reads nothing else...”*
- Structure:
 - Lead
 - Identifies issue
 - Persuasively asserts conclusion
 - Concise
 - Strong
 - Avoid making concessions here
 - Avoid policy statements here
 - State why it is the “only logical conclusion”
 - State why your position is fair, reasonable and meritorious
 - Rule
 - Explains the law, including the appropriate standard of review, using supporting binding and persuasive authority
 - Be accurate!
 - Be persuasive!
 - Try to “synthesize” a rule from relevant precedent
 - Be mindful of hierarchy of precedent:
 - Treaties
 - US Constitution
 - Statutes
 - Precedential case law
 - New York Court of Appeals
 - Direct Appellate Division
 - Other Appellate Divisions
 - Other “persuasive” authority
 - New York
 - Other jurisdictions (including Federal)
 - Secondary sources
 - Use supporting law that is (in order of importance)
 - Binding
 - Relevant
 - Factually similar
 - Otherwise favorable
 - Similar procedural context
 - Similar result
 - Strive for all, ensure presence of at least some
 - At the very least, use favorable persuasive authority, and distinguish adverse binding authority
 - If none available, considering withdrawing appeal
 - Avoid string cites (3 case citations are better than 10)

- Application
 - Apply Rule to facts
 - Persuade court that facts of your case justify relief requested
 - analogize favorable law
 - Distinguish unfavorable law
 - Relate favorable facts (in detail)
 - Minimize unfavorable facts (in general)
 - Pre-empt and rebut adversary’s “anticipated” arguments
 - Take wind out of adversary’s sails
 - Policy statements
- Conclusion
 - Reiteration of lead

(4) Constructing a Sound Argument – Logical Devices:

- Cause and effect: A particular condition or event will cause a particular result;
 - i.e. – Res Ipsa Loquitur (“The thing speaks for itself”)
- Circumstance: Sometimes, the law excuses acts (or failures to act) because of particular circumstances
 - i.e. – contractual impossibility/impracticability (“The house you contracted to paint was destroyed in a fire”)
- Definition: One event belongs to a class of prohibited/permitted/required (depending on your circumstances)
- Similarity: One thing is like another (that is permitted or prohibited);
- Comparison: Your requested relief is warranted even more so than in a prior decision in your side’s favor
- Contraries: Your requested relief is warranted because deciding against your side will lead to adverse consequences
- Authority: “Don’t take it from me – take it from the experts”

3) Attacking Adversary’s Argument – Logical Fallacies:

- Begging the Question: Circular reasoning (“The dog could not possibly have bitten the plaintiff because the dog is a friendly dog”)
- Non Sequitur: The conclusion does not follow from the premise
 - Faulty syllogisms
 - “All lemons are yellow; this car is a lemon; therefore this car is yellow”

- Ad Hominem Arguments: Directed against an adversary's person/character instead of the argument itself;
 - "The plaintiff did not fall because the sidewalk was defective, but because he's a klutz"
- Post hoc, ergo propter hoc ("After this, therefore because of this"): Simply because one thing follows another doesn't mean the latter was caused by the former (temporality)

B. Point Headings ("The Roadmap")

- One brief phrase persuasively summarizing the argument for each point;
 - The Short answer to Questions Presented (*see below*)
- Your brief's "first impression"
 - Where? In Table of Contents!
 - "*If court reads nothing else...*"
 - If court is interested, can quickly paginate to argument
- Structure:
 - Issue
 - Law
 - Specific necessary facts/reasons
 - Identify parties (otherwise, at this juncture, court won't know who players are until it reads the statement of facts)
 - Incorporate standards of review
 - All in one sentence!
- Short, complete, persuasive
- Introduce theme(s)
- Where favorable, emphasize:
 - Standards of review
 - Burdens of proof
 - Elements of claims/defenses
 - If statutory, identify specific statute(s), section(s), term(s) of art
- If complex, consider dividing into sub-headings

C. Questions Presented

- The “question” that point heading answers
 - Can only draft once you know the answer (point heading)
- Structure:
 - Issue
 - Law
 - Specific necessary facts
- Can be
 - Interrogative
 - Declarative
- Must be
 - Concise
 - Thorough
 - Persuasive
 - *“If the Court reads nothing else...”*
- Avoid statements that are
 - Conclusory (“Did the evidence support the verdict where defendant breached duty?”)
 - Vague
 - Broad
- As with point headings, where favorable, emphasize
 - Standards of review
 - Burdens of proof
 - Elements of claims/defenses
 - If statutory, identify specific statute(s), section(s), term(s) of art
- As with point headings, good place to “re-introduce” theme

D. Conclusion

- Concise summary of point headings;
- Be sure to include specific relief requested

E. The Statement of Facts

- Use the facts to tell a compelling story;
 - Capture the court's attention
- Introduce the theme(s) you will repeat throughout the brief
 - Is your case about
 - Fairness?
 - Justice?
 - Accountability?
 - Responsibility?
- Practical tools:
 - Be accurate
 - Active voice;
 - Be descriptive;
 - Maintain credibility;
 - Emphasize favorable facts
 - Beginning and end of a paragraph
 - Address directly
 - De-emphasize unfavorable facts
 - Must be accurate, but
 - Bury in middle of paragraph
 - Hedge

F. Preliminary Statement

- Not really “preliminary” (Point Headings in Table of Contents are the real “Preliminary Statement”)
- “If the court reads nothing else...”
- The “thesis” of your argument – must assertively contain
 - Legal issues on appeal
 - Contentions
 - Outline of argument (point by point)
 - Conclusion(s)
- Introduces “theme” in a manner which is
 - Persuasive (maximize favorable, minimize unfavorable)
 - Realistic
 - Concise

G. Responsive (and Reply) Briefs

- Respondent's only opportunity to persuade the appellate court
 - o Focus:
 - Defend logic and wisdom of lower court decision
 - Identify deficiencies in appellant's
 - Argument
 - Legal support
 - Logic
 - Policy considerations
- Appellants, on the other hand, must persuade appellate judges that their brethren erred
 - o Thus, appellants get both “first” and “last” word
 - The Reply Brief:
 - Cannot present new arguments
 - Can
 - o refute adversary's
 - version of the facts
 - legal support
 - logic
 - policy considerations
 - **Reiterate merits of arguments first presented in initial brief**
 - o Re-consider ethical obligations – avoid:
 - ad hominem attacks
 - inaccuracies
 - mischaracterizations

PART II – THE SPOKEN WORD (Oral Argument)

As an appellant, **always** strive to present an oral argument

- Must take every opportunity to explain why the lower Court erred
 - “A picture paints a thousand words”
 - Leave the court with a last(ing) impression of your argument
 - Clarify a position in your brief(s)
 - Discredit adversary’s position
 - Leave court with a positive message of your position and not a negative message of your adversary’s

New York appellate courts are “hot benches”

- Judges/law clerk pool attorneys read all briefs
 - The “cheat sheet” (bench memos)
- Importance of “knowing the judge”
 - Prepare by attending other arguments – get a “feel”

“Success is 90% preparation and 10% perspiration”

- Preparation ought to be time-consuming

(1) Know your case:

- Intimate familiarity of every nuance
 - Prepare to answer every question thrown your way
 - If fully prepared, it’s a fun conversation
 - You’ll never lose your place

(2) Know the law:

- Know every relevant case, including those in
 - your brief(s)
 - adversary’s brief(s)
 - other relevant cases not cited
 - fate will lead you to need to answer questions on cases not cited
 - including facts, reasoning, factors/considerations in each

(3) Organize argument:

- “Tell ‘em what you’re gonna say, say it, tell ‘em what you said”
 - Greeting:
 - “May it please the Court” – name, client
 - Issue and conclusion
 - Introduction:
 - “Tell ‘em what you’re gonna say”
 - Be creative – focus the court’s attention
 - Present:
 - Outline main points of your argument
 - Effective to “number them”
 - Main applicable facts
 - No need to recite all the facts (“hot bench”)
 - Introduce your theme
 - Spend little/no time on adversary’s argument
- “Say it”:
 - Bulk of presentation;
 - Revert to your theme often (healthy repetition is good)
 - Recite relevant legal rule
 - Apply it to your case
 - Analogize supporting precedent
 - Distinguish adverse precedent
 - Rebut adversary’s position
 - State public policy
- “Tell ‘em what you said”:
 - Reiterate
 - outline (numbered points)
 - theme

(4) Practice, PRACTICE, PRACTICE!

- On your own
 - Use a mirror
- With a colleague
 - Role play
- Budget time and don't go over;
 - prepare a 10-minute argument
 - How to say it all in 5 minutes? 2? 30 seconds? 10 seconds?
- If unfamiliar with panel, attend other arguments (“get a feel”)
- You're ready when you don't need your outline

(5) The Day Before

- Appellate Division, First Department announces panel at 3:00 p.m. the day before
 - Potentially most important preparation period:
 - Research judge
 - Update research to fine-tune cases decided by each judge relevant to your issue(s)
 - Adjust argument accordingly
 - Personal and professional background
 - What makes them “tick”?
 - “personalize” your argument
 - Update all law!
 - Much time passes between briefing and argument
 - Change in the law? Bring copies to argument

(6) What to bring with you:

- The Record on Appeal/Appendix
 - Tab specific evidence you'll recite in argument
 - “The faintest ink is more powerful than the most retentive memory”
- All briefs
 - Leave record and brief at your side (on desk)

- At podium, a simple manila folder (no “paper shuffling”):
 - On the left side, 1-page “security blanket” – to help organize thoughts
 - Important facts (dates, other details not committed to memory);
 - Outline of presentation
 - Relief you’re requesting
 - Don’t forget to tell court what you want
 - Judgment?
 - Affirmance?
 - Reversal?
 - New trial?
 - Equitable relief?
 - On the right side, your authority
 - Names, citations of cases that may be discussed
 - 1 sentence of facts
 - Holding and reasoning
 - How each supports argument (or how it is distinguishable)
 - Do NOT bring script (though ok to practice with)
 - You will get lost – if you need script, you’re really unprepared
 - You will not find information when you need it
- Project confidence:
 - Posture
 - No “shuffling”
 - Clear and confident voice
 - Slower is better than faster
 - Use simple, everyday language
 - Impress judges with logic, not legalisms
 - Eye contact is crucial!
- Show deference to court:
 - Be respectful
 - They can interrupt you; don’t interrupt them
 - Answer questions immediately and directly
 - Be aware of why the question is being asked – does it seek
 - Clarification?
 - Limitation?
 - Agreement?
 - Disagreement?
 - Possible disagreement among the panel?
 - If you don’t know the answer – admit it (don’t guess)

Are You Finished When The Argument Is Done?

- NO!

- A zealous advocate is a conquering advocate
 - The importance of constantly updating
 - Continued ethical obligations?
 - Continued strategic importance
 - Some courts frown on post-argument submissions
 - Do it anyway, but be sure it's necessary

