THE NUTS AND BOLTS OF

APPELLATE DIVISION MOTION PRACTICE

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I. Types of Motions

Appellate motions include:

a. Motions Pertaining to Appealability: CPLR §§5511, 5512(a), 5701
b. Motions pertaining to Reviewability: CPLR §5501
c. Motion for a Stay of Enforcement: CPLR 5519
d. Motion to Enlarge Time to Perfect Appeal
e. Motion for a Preference: CPLR 5521
f. Motion for Reconsideration: 22 NYCRR §670.6
g. Motion to Strike a Record on Appeal and/or a Brief
h. Motion for Leave to Appeal to the Court of Appeals

II. Necessary elements of all appellate motions

a. 22 NYCRR §§670.2(i), 670.5

b. Brevity is key: The Court reviews countless motions on a weekly basis, so keep your papers concise. This not the Brief you are writing! Reference only those facts necessary to resolution of the motion. If you are moving for a preference, explaining the tortured history of the case is unnecessary.

c. Ensure that you have clearly and specifically defined the relief you seek, including alternative relief.

d. The clerks typically review your papers for compliance with the Rules, so do not make them read each page of the motion to do so. Establish procedural compliance on page one.

e. Annex a copy of the notice(s) of appeal and underlying order(s) as an exhibit.

f. Include a statement that the motion is not frivolous (22 N.Y.C.R.R. §1301.1).

III. Motions pertaining to appealability (CPLR §§5511, 5512(a), 5701)

a. Is the paper a decision/order/judgment? The "label" is not dispositive, the content of the paper is. Paper that is labeled a decision but concludes with the statement that "This constitutes the Decision and Order of this Court" is an appealable Order. An oral mandate is not appealable paper. ***PRACTICE TIP***: If a lower court judge makes a ruling from the bench, get the transcript "so-ordered."

b. If you err and file a Notice of Appeal from a Decision or other non-appealable paper, the court will generally direct you to provide a copy of the Order or Judgment when it is entered and will not dismiss the premature appeal. CPLR §5520(c).

c. Denial of a motion for reargument (CPLR § 2221) (i.e., the lower court misapprehended the facts or the law) is not appealable. Denial of a motion to renew (CPLR § 2221) (i.e., there are new facts not presented to the court which, if they had been presented, would have changed the outcome) is appealable.

d. An order resolving only one prong of a multi-prong motion is not appealable as of right. You must move for leave.

e. Confirm that you may appeal as of right, otherwise the court will consider your Notice of Appeal a request for leave to appeal and may, *sua sponte*, dismiss the appeal. You will have therefore lost the opportunity to proffer arguments why leave is proper, so never assume that the Court will notify you of an appealability issue. ***PRACTICE TIP***: don't assume; look it up! When in doubt, call the Clerk of the Court!

f. The statutory list of the eight types of orders appealable as of right to the appellate division:

> Orders granting, refusing, continuing, or modifying a provisional remedy;
>
> Orders settling, granting, or refusing an application to resettle a transcript or statement on appeal;
>
> Orders granting or refusing 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;

Orders involving some part of the merits;*

Orders affecting a substantial right;*

Orders in effect determining the action and preventing a judgment from which an appeal might be taken;

Orders determining 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; and

Orders granting a motion for leave to reargue or determining a motion for leave to renew.

g. Examples of orders that are not appealable as of right:

In limine rulings;

Orders imposing sanctions; and

Discovery orders or rulings, but where a court directs the disclosure of information claimed to be privileged, an application for leave could be made by arguing that the order affects a substantial right.

h. Evidentiary rulings made during trial, or in advance of trial, are not appealable. *Cotsgreave v. Public Adm'r of Imperial County*, 91 A.D.2d 600, 456 N.Y.S.2d 432 (2d Dep't 1982). ***QUERY:*** what if the ruling affects a substantial right?

i. Motions pertaining to standing and "aggrieved party" status (CPLR §5511)

- Aggrieved party status and standing are intermingled in discussions. The Second Department has stated that "[i]t is well settled that only an 'aggrieved party' has standing to appeal." *Whiteman v. Temimah*, 255 A.D.2d 378 (2d Dep't 1998).

- Is the appellant the party who filed a Notice of Appeal? If counsel did not appeal an order that affects him, he cannot piggyback onto his client's Notice of Appeal. Has the proposed appellant waived the right to appeal by settlement with another?

- In the personal injury context, a plaintiff may accept a sum paid pursuant to a judgment, and appeal the amount of the award as inadequate.

- Mootness is sometimes addressed in the context of standing issues. One is no longer aggrieved when a matter is rendered moot. A co-defendant may not appeal the entry of a money judgment if the co-defendant has paid the judgment and the appellant lacks any exposure by contribution or indemnity. An appeal from a conditional order of preclusion is rendered moot by the entry of a final order. For practical purposes, one should withdraw the moot appeal by letter to the court after the appeal from the final order is taken.

- Ripeness or issues relating to a premature appeal: The court will not hear an appeal from an order entered on default. The appeal is premature or unripe until the defaulting party has first asked that the trial court vacate the default. An appeal from the denial of the motion to vacate is ripe to review. Also, appeals from a judgment entered on a stipulation which pertain to the stipulation's terms are premature. Relief must first be sought in the trial court or is subject to dismissal.
  Cornell v. T. V. Development Corp., 17 N.Y.2d 69 (1966); James v. Powell, 19 N.Y.2d 249 (1967)

IV. Motions pertaining to reviewability (CPLR §5501)

a. CPLR § 5501(a) (1) defines the scope of review from a final judgment to include:

> any non-final judgment or order which "necessarily affects" the final judgment. According to a test suggested by Professor David Siegel, the order "necessarily affects" the final judgment if reversing it would require a reversal or modification of the final judgment. The phrase "necessarily affects" has been the subject of multiple Court of Appeals decisions:
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> > *Oakes v. Patel*, 20 N.Y.3d 633, 988 N.E.2d 488, 965 N.Y.S.2d 752 (2013): A medical malpractice case in which a defendant's motion to amend, if granted, would have added a new defense of release to the case. The other defendants argued that the new defense would have significantly changed the case's result. The Court of Appeals held that "when an order granting or denying a motion to amend relates to a proposed new pleading that contains a new

cause of action or defense, the order necessarily affects the final judgment," meaning that the denial of the motion to amend was reviewable. The Court specifically refused to craft a generally applicable definition of "necessarily affects."

Sigmund Strauss, Inc. v. East 149th Realty Corp., 20 N.Y.3d 37, 980 N.E.2d 483, 956 N.Y.S.2d 435 (2012): The case involved the right to a commercial leasehold. Defendant appealed a judgment declaring plaintiff the lawful tenant of the subject property. The question was whether that appeal brought up for review two non-final orders, one dismissing defendants' counterclaims and third-party complaint, and the other denying defendants' motion to amend their answer. The Court of Appeals addressed only the first order, holding that "because Supreme Court's dismissal of the counterclaims and third-party claim necessarily removed that legal issue from the case (i.e., there was o further opportunity during the litigation to raise the question decided by the prior non-final order), that order necessarily affected the final judgment."

Matter of Aho, 39 N.Y.2d 241, 347 N.E.2d 647, 383 N.Y.S.2d 285 (1976): Attorneys representing Olga Aho, an alleged incompetent person, moved for a change of venue from Westchester County to Schenectady County. The motion was denied and a competency trial was scheduled to begin five days later. Aho's attorneys immediately filed an appeal and sought a stay. The stay was denied, and the appeal itself was ultimately dismissed. While the appeal was pending, the competency trial was held, in which a jury found Aho to be incompetent. Aho's attorneys timely filed a notice of appeal of the incompetency adjudication, but excluded any appeal of the adjudication of incompetency. They sought to bring up for review the denial of the motion for a change of venue. Thus, the denial of the venue motion was appealed twice, once directly and once on the ground that it "necessarily affected" the final judgment.

The Court of Appeals ruled that the Appellate Division property dismissed the direct appeal because any right of direct appeal from the non-final order terminated with the entry of the final order.

However, the Court of Appeals held that the appeal of the denial of the venue motion was reviewable on appeal of the final order because "reversal of an order denying the motion

> for change of venue in any proceeding to determine competency would strike at the foundation on which the final judgment was predicated. In this case any such reversal would inescapably have led to a vacatur of the judgment declaring Mrs. Aho incompetent…"
>
> Because it is sometimes difficult to determine if a non-final order "necessarily affects" the final judgment, many practitioners err on the side of caution and appeal every adverse non-final order they get.
>
> In 2012, the OCA Advisory Committee on Civil Practice proposed an amendment to CPLR 5501 to remove the "necessarily affects" language and permit appellate review of a non-final judgment or order that does not "necessarily affect" a final judgment. The proposal also seeks to legislatively overrule *Matter of Aho* to the extent it held that an appeal from a non-final order terminates with entry of the final judgment. The NYSBA Committee on Courts of Appellate Jurisdiction voted in March 2013 to oppose the proposed amendment.

any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;

any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any change to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;

any remark made by the judge to which the appellant objected; and

a verdict after a trial by jury as of right, when the final judgment was entered into a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

These orders/judgments are not reviewable if they were the subject of an earlier appeal.

- *Burke v. Crosson*, 85 N.Y.2d 10 (1995); *Matter of Gross v. City of New York*, 266 A.D.2d 214 (2d Dep't 1999)

V. Motion for a Stay of Enforcement (CPLR §5519)

A. Basics

1. The fact that you have to proceed to trial because the lower court denied your motion is not a basis for seeking a stay, although your chances are better if all parties agree to the stay and this is your first request.

2. 22 NYCRR § 670.5 (e) requires you to notify opposing counsel of the day, time and place your motion will be brought. Annex proof of notice and any responses as exhibits. Verbal notice is permitted by the Rules, but not recommended.

3. Alternatively, explain why opposing counsel had not been contacted. The circumstances for declining to notify opposing counsel are few and far between and you may risk denial of interim relief if your grounds for declining to provide notice are not acceptable to the Court. This will be addressed to the Judge, not the clerk, who may instruct you to notify opposing counsel. ***PRACTICE TIP:*** Make sure you have your adversary's office and cell phone numbers … the clerk may ask you to call when you present your motion.

B. Automatic stays in accordance with CPLR 5519(a):

1. **CPLR §5519 (a) (1):** Government entities simply file a Notice of Appeal or Affidavit of Intention to appeal to stay enforcement of the Order/Judgment that is the subject of the appeal. No undertaking is necessary.

2. **CPLR §5519 (a) (2):** service of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from where the judgment or order "directs the payment of a sum of money" and the appellant gives an undertaking in that sum.

> Although offering to post an undertaking would go a long way towards the grant of a stay, it has become very difficult and expensive to do so.
>
> The amount of the undertaking is set after a motion on notice in the court of original instance. The movant should always suggest a realistic amount for the undertaking in the motion papers, with appropriate support for the request. Courts that wish to effectively deny the motion can do so by fixing the undertaking in the same amount as the total equitable award – many appellants will not be able to post such a large undertaking.

3. **CPLR §5519 (a) (3)**: service of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from where the judgment or order "directs the payment of a sum of money, to be paid in fixed installments," and an undertaking is paid in an amount to be determined by the court. This provision is important to consider in equitable distribution cases, since large equitable awards are usually payable in fixed installments over time, e.g., a payout on the value of a license or professional practice.

4. **CPLR §5519 (a) (4)**: service of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from where the judgment or order "directs the assignment of delivery of personal property," and the property is placed in the custody of the court's designee, or if an undertaking is given in a sum fixed by the court. "Personal property" in a matrimonial action can include bank accounts, brokerage accounts, antiques, furs, art, jewelry, cars, boats…the list is endless, and potentially valuable!

5. **CPLR §5519 (a) (5)**: service of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from where the judgment or order "directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered …"

6. **CPLR §5519 (a) (6)**: service of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from where "the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered…" The court must fix the amount of an undertaking.

7. **CPLR §5519 (a) (7)**: Multiple Grounds: If the papers appealed from direct the appellant to perform two or more acts covered by Section 5519(a) (2) through 5519(a) (6), then compliance with all grounds is mandatory to effect a stay.

C. **CPLR §5519 (b):** Insurers can only secure a stay to the limit of the policy by posting an undertaking.

D. **Discretionary motions pursuant to CPLR § 5519(c):** If your matter does not fall within one of the automatic categories of CPLR§5519 (a), you will

have to seek a stay by motion. Discretionary stay applications occur with more frequency due to the difficulty in securing an undertaking.

1. In the Second, Third and Fourth Departments, motions for a stay are brought by order to show cause.

2. The factors that must be proven include the following:

    a. Likelihood of success on the merits: requires review of the claims to be raised on appeal, with supporting case law;

    b. Irreparable harm: the payment of money is not irreparable harm; and

    c. Lack of prejudice to the adversary.

3. You may make your showing by proffering affidavits or proofs that were not presented to the lower court, but it does not become part of the Record on Appeal.

4. The motion can be made either in the court of original jurisdiction or in the Appellate Division. In my experience, it is more efficient to bring the motion for a stay directly in the Appellate Division. In certain cases (e.g., child custody cases), one should always try to get a temporary stay from the court of original instance before moving in the Appellate Division.

5. The motion for a stay is a two-step process:

    a. When making your motion, request an interim stay, i.e., a stay pending a determination of the motion. This is generally done simultaneously with, or shortly thereafter, the Notice of Appeal is filed. ***PRACTICE TIP:*** No matter how much your client is rushing you because he lost a lower court decision, you cannot move for a stay in the Appellate Division without filing a Notice of Appeal – the Notice gives the Appellate Division jurisdiction!

    b. In preparing the order to show cause for an Appellate Division justice's signature, include a paragraph providing for an interim stay and for expedited service (leave the dates blank).

    c. No *ex parte* stays are granted in the Appellate Division. You must notify your adversary of the place, date and time for oral argument to afford the other party the opportunity to appear and orally argue

in opposition. As a courtesy, you should give your adversary a copy of your papers before the date for the appearance on the request for an interim stay, but it is not strictly necessary.

d. In the Second Department, the order to show cause must be accompanied by an affirmation stating the time, place, by whom given, the manner of notification, and, to the extent known, the opposing party's position on the stay request. If notice has not been given, the affirmation must state whether the applicant made an attempt to give notice and the reason or reasons for lack of success, or why notification need not or should not be given.

e. Oral argument occurs before a single judge. Presenting the motion for a stay requires a rock-solid knowledge of the facts and an appeal to the judge's emotions and instincts.

f. If granted, the interim stay continues only until a full panel has the opportunity to determine the motion for a stay pending the hearing and determination of the appeal.

g. There is no codified procedure for seeking a stay in the Court of Appeals. The Clerk of the Court will be happy to assist you!

E. **CPLR §5519 (e):** Duration of the stay: if the judgment or order appealed from is affirmed or modified, the stay shall continue for five days after service upon the appellant of the order of affirmance or modification with notice of its entry in the court to which the appeal was taken." If an appeal is taken, or a motion is made for permission to appeal, before the expiration of the five days, the stay continues until five days after the appeal is determined. Where a motion is made within the five days for permission to appeal, and permission is granted, the stay continues until five days after the appeal is determined. If permission is denied, the stay continues until five days after the order of denial is served with notice of entry.

F. **CPLR §5519(g)** Medical, dental or podiatric malpractice: One can post an undertaking in the sum of $1 million or the limit of coverage, whichever is higher. Additionally, the appellant and the insurer must provide an undertaking that no fraudulent conveyance, as defined by Debtor Creditor Law §273-a, shall be made during the appeal's pendency.

VI. Motion/Application to enlarge the time to perfect (22 N.Y.C.R.R. §670.8[d])

a. The first two applications may be made by letter, the third by formal motion.

b. The formal motion should state that this is the final request for an enlargement of time.

c. Acceptable reasons for an enlargement include difficulty in locating exhibits, securing transcripts, or ongoing settlement discussions.

d. Parties may write a letter setting forth a stipulation to enlarge time or a briefing schedule.

VII. Motion to consolidate/preference (CPLR §5521; 22 NYCRR §670.7)

a. Consolidate

The court will automatically consolidate appeals perfected under the same index number and one Brief and Record may be filed. However, be mindful that the time to perfect runs from the first-filed Notice of Appeal unless you request an enlargement from the court.

A motion to consolidate could be directed at appeals under different index numbers but which implicate the same facts or legal issues. In that instance, the case is consolidated for oral argument not for the purpose of perfecting the appeals. Separate Records and Briefs must be filed.

b. Preference

Preferences are only granted with respect to calendaring the appeal for argument. An appellant's time to perfect cannot be advanced by virtue of filing a demand for a preference nor can a respondent's time be accelerated in that fashion. If you anticipate a dispute over whether a preference is proper, move by motion for an order granting a preference instead of filing a demand for one.

Examples of instances in which a preference would be appropriate include reasons of age, illness, or the occurrence of an event that will render the appeal moot. The decisional authority underlying CPLR §3403, which pertains to trial preferences, is a guide. If illness is the reasons, an affidavit from a medical professional is recommended.

Consider as alternative relief a request for a stay to avoid mooting the appeal.

VIII. Motion for reconsideration (22 N.Y.C.R.R. §670.6)

- Best reserved for when the Court has made an error in fact or when the Court awards relief that does not address all claims.

- Consider that this is not an opportunity to reargue issues of law that you simply disagree with.

- If you intend to seek leave to appeal to the Court of Appeals, this motion does not toll the time for making such a motion. One should consider seeking leave to appeal as an alternative form of relief to a motion for reconsideration.

IX. Motion to Strike the Record/Appendix/Brief (CPLR §§5526, 5528, 5529; 22 N.Y.C.R.R. §§670.9, 670.10, 670.10-a, 670.10-b, 670.10-c)

Possible reasons for a motion to strike:

a. Including matters *dehors* the Record – those documents that could have been presented at time of original motion or at trial but were omitted. Proceedings that occur or evidence that comes into your hands after the appealable paper is rendered. If the trial court did not consider it, the Appellate Division cannot, with some exceptions, such as the parties' statements of net worth in a matrimonial action, which are always before the court.

b. Excluding relevant matters – The Record/Appendix must include all relevant matter to *all* parties.

c. Matters that could be judicially noticed – Orders of the Supreme Court; real property records, etc., especially if a party draws inferences from the Record to make a claim that has been proven untenable by subsequent events. For example, a party cannot argue on an appeal that he has been unable to locate another purchaser for a parcel of property if, before the lower court, the prospective purchaser has appeared in the Supreme Court proceedings as co-counsel to the appellant.

Patel v. Patel, 270 A.D.2d 241 (2d Dep't 2000)

X. Motion for Leave to the Court of Appeals

a. You cannot simply convert your Appellate Division brief into a motion for leave to appeal to the Court of Appeals. You must present issue(s) that fall within the scope of the Court of Appeals's limited review powers and/or raise an issue of public import, such as the following:

> Questions affecting the public interest;
> Questions of constitutional law, preemption by federal law, or the construction of a statute.
> Questions upon which there is a conflict between different Departments of the Appellate Division; and
> Questions relating to a principle of law or a question of evidence, that will create confusion and will recur regularly in litigation.

b. In short, many try; few are chosen! The Court is more likely to grant leave in instances that do not merely resolve a dispute between litigants, but which affect others statewide.