

**New York's  
Appellate Terms  
A Manual for Practitioners**

**The Committee on Courts of Appellate Jurisdiction  
of the New York State Bar Association  
in Collaboration with  
The Appellate Division, First and Second Judicial Departments  
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## **INTRODUCTION**

This Manual provides an overview of appeals in the Appellate Terms in the Appellate Division, First and Second Judicial Departments. The New York State Bar Association Committee on Courts of Appellate Jurisdiction is devoted to improving the practice of appellate law and appellate court operations in the State of New York and has developed this Manual as part of that mission. We hope that this Manual will be a helpful resource for practitioners in the Appellate Terms. However, please note that the CPLR, Appellate Term Rules, and the Appellate Term Clerks should be consulted as the definitive authority regarding appeals to the Appellate Terms.

We would like to thank the Committee's Appellate Term Rules Subcommittee for their outstanding efforts in preparing this Manual: Hon. Martin Schoenfeld, a Justice of the Appellate Term, First Department; Robin M. Heaney, Esq. (Rockville Centre, NY); and Mark Diamond, Esq. (New York, NY). We would also like to thank Hon. Peter Diskint, Chief Clerk, First Department Appellate Term, and Hon. Paul Kenny, Chief Clerk, Second Department Appellate Term, for their generous and invaluable assistance in providing information regarding appeals to the Appellate Terms and in reviewing this Manual.

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# APPELLATE TERMS

## GENERAL

The New York State Appellate Division is divided into four judicial Departments. The State Constitution authorizes each Department to establish Appellate Terms to hear appeals in their Judicial Districts and/or counties other than appeals from the Supreme Court, Surrogate's Court, and Family Court and appeals in felony criminal cases.<sup>1</sup> Only the First and Second Departments have exercised their power to establish Appellate Terms. The Appellate Term of the First Department hears appeals from New York City's Civil and Criminal Courts located in Manhattan (First District) and the Bronx (Twelfth District).

The Second Department's Appellate Term comprises two separate courts, one for the Second, Eleventh, and Thirteenth Districts; and another for the Ninth and Tenth Districts. These courts have a single non-judicial staff. The Appellate Term of the Second, Eleventh, and Thirteenth Districts serves Brooklyn, Queens, and Staten Island (Richmond County). It considers appeals from New York City's Civil and Criminal Courts, similar to the First Department's Appellate Term. The Appellate Term of the Ninth and Tenth Districts hears appeals from City and Justice Courts in Long Island (Suffolk County), Rockland, Westchester, Orange, Putnam, and Dutchess Counties, as well as District Courts in Nassau and Suffolk Counties. In addition, it determines County Court civil appeals in its districts, except for SORA appeals.<sup>2</sup>

The Appellate Terms review questions of law or fact<sup>3</sup> and any exercise of discretion by the court below.<sup>4</sup> A large part of Appellate Term review consists of landlord-tenant appeals arising from Civil Court, the preferred forum for adjudication of these summary proceedings.<sup>5</sup> An even larger part of the appellate caseload in the Second Department involves first-party no-fault benefits litigation. The Rules for the Appellate Terms are codified in the NYCRR ("Rules"). The Appellate Term First Department Rules are set forth in Part 640. The Appellate Term Second Department Rules are found in Parts 730 and 731 (Second, Eleventh, and Thirteenth Districts) and in Part 732 (Ninth and Tenth Districts).<sup>6</sup> The rules of the various District, City, and County

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<sup>1</sup>NY Const art VI, §8.

<sup>2</sup>Rule 730.1(d)(2)(iii).

<sup>3</sup>CPLR 5501(d).

<sup>4</sup>Section 1702(d) of the New York City Civil Court Act (NYCCCA), Uniform District Court Act (UDCA), Uniform County Court Act (UCCA), and Uniform Justice Court Act (UJCA) (collectively, "Uniform Court Acts").

<sup>5</sup>*Post v. 120 East End Ave. Corp.*, 62 NY2d 19 (1984).

<sup>6</sup>Although Parts 731 and 732 of the Second Department Rules are distinguished by Judicial District, the Rules themselves are substantially the same.

Courts can be found in § 1702 of the applicable Uniform Court Act.<sup>7</sup> The State Constitution specifies that the Appellate Terms consist of Supreme Court justices appointed by the Chief Administrator of the Courts with the approval of the Presiding Justice of the appropriate Appellate Division.<sup>8</sup> Up to five justices sit on each Appellate Term court, but no more than three justices may sit on any matter pending before it. Two justices are a quorum, and the concurrence of two justices is necessary for a decision. The justices must be residents of the territorial jurisdictions of the court over which they preside. Appellate Term justices handle Supreme Court caseloads in addition to their appellate work.

## **JURISDICTION AND VENUE**

The Appellate Terms hear civil appeals from New York City's Civil Court, certain City Courts, District Courts (which are only in Nassau and part of Suffolk County), and certain County Courts. They may also hear appeals from Supreme Court cases that have been transferred to New York City's Civil Court pursuant to CPLR 325(d), even where they involve damages that exceed the Civil Court's \$25,000 cap. The Appellate Terms also consider criminal appeals from New York City's Criminal Court and local criminal courts from outside New York City. In addition, they hear and determine motions, orders to show cause, and ex parte applications, pursuant to CPLR 5704(b).

Appeals to the Appellate Terms are by submission or, where specifically requested, by oral argument. The venue for appeals varies by district. Until recently, all First Department appeals were held in Manhattan. Now, however, the First Department also holds one or two sessions each year in the Bronx. Venues for the Second Department depend on the particular District. The majority of Second, Eleventh, and Thirteenth District cases are heard in Brooklyn, with the court sitting in Queens twice a year and in Staten Island once a year. In the Ninth and Tenth Districts, cases are heard, on a rotating basis, at the Nassau Supreme Court in Mineola, the Westchester Supreme Court in White Plains, and the Suffolk Supreme Court in Central Islip. Once every other year, the court sits at the Dutchess County Courthouse in Poughkeepsie and the Orange Supreme Court in Goshen. It sits once a year at the Rockland County Courthouse in New City.

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<sup>7</sup>The Uniform Court Acts refer to the NYCCCA, the UDCA, the UCCA, and the UJCA. As discussed below, these Acts are substantively the same.

<sup>8</sup> NY Const art VI, §8.

## CIVIL APPEALS

### Appeal by Right or by Permission

The first determination a litigant must make before appealing to an Appellate Term court is whether the appeal may be taken as a right or only by permission. The governing authority is not found in the Appellate Term Rules but rather in the statutes that established the court from which the appeal is being taken. The relevant statutes, referred to collectively as the “Uniform Court Acts,” are:

New York Civil Court cases	NYCCCA 1702
District Court cases	UDCA 1702
Justice Court cases	UJCA 1702
City Court cases	UCCA 1702

These statutory provisions are substantially the same and are almost a complete replica of CPLR 5701,<sup>9</sup> which determines when matters may be appealed from Supreme Court and County Court to the Appellate Division.

Generally, appeals to the Appellate Term as of right are dispositive of all issues. Some orders are not appealable as of right. For example, orders requiring or declining to require a more definite statement in a pleading or declining to order a prejudicial matter stricken from a pleading are among those not appealable as of right.<sup>10</sup> A trial court’s decision is not appealable unless it is reduced to an order or judgment and entered by the clerk.<sup>11</sup> Only an aggrieved party may appeal from an appealable order or judgment.<sup>12</sup> Such party must have a direct interest in the controversy affected, and the adjudication must have binding force against the rights, person, or property of the party.<sup>13</sup>

Where the appeal is not as of right, the appellant has the discretion to seek permission from either the judge who made the order or the justices of the Appellate Term.<sup>14</sup> The time limit for the application for permission to appeal—whether to the Appellate Term justices or the lower

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<sup>9</sup>CPLR 5701 refers to Article 78 proceedings, and the Uniform Court Acts do not, since the lower courts do not have jurisdiction over such matters. The Uniform Court Acts empower the Appellate Term to review any exercise of discretion from the lower court; and in addition, CPLR 5501(d) provides that the Appellate Term shall review questions of law and questions of fact.

<sup>10</sup>CPLR 5701.

<sup>11</sup>CPLR 5016.

<sup>12</sup>See CPLR 5511.

<sup>13</sup>*DiMare v. O’Rourke*, 35 AD3d 346 (2<sup>nd</sup> Dept 2006).

<sup>14</sup>Uniform Court Acts 1702; see CPLR 5513 (b) – (c).

court judge—is 30 days from the service of a copy of the order or judgment with notice of entry. In a case where the lower court judge denies permission to appeal, the time to make a further application for leave to appeal to the Appellate Term is also 30 days, and it begins to run from the date of service of the order of the lower court denying permission. The application must be made on notice and must contain a copy of the opinion, if any; a concise statement of the alleged errors below; and, if applicable, a copy of any order denying permission to appeal.<sup>15</sup>

An order determining a motion may be appealed to the Appellate Term when the underlying motion was by order to show cause or notice of motion<sup>16</sup> and it was entered according to the requirements of CPLR 2219.<sup>17</sup> The Appellate Term is a court of coordinate jurisdiction with Supreme Court and cannot review an order or judgment from Supreme Court, which must instead be directed to the Appellate Division.<sup>18</sup>

### **The Notice of Appeal – Time Limits**

The first step in taking a civil appeal to the Appellate Term is serving a copy of the notice of appeal on the adverse party and filing it, along with a fee, with the office where the order or judgment being appealed was entered.<sup>19</sup> For good cause shown, the court may waive the filing fee.

The time limit in which to file a notice of appeal in civil cases is 30 days from service by a party of a copy of the order or judgment and written notice of entry (plus five days if served by mail or, in the Second Department, one day if served by overnight delivery).<sup>20</sup> In small claims and commercial cases arising from New York Civil Court, or in the District, City or Justice Courts outside of New York City, the 30-day period to take the appeal begins to run upon service of the order upon the appellant.<sup>21</sup> Extensions of time to file the notice of appeal are not permitted under the statutes, except as set forth in CPLR 5514. However, once the notice of appeal has been filed, an extension of time to perform a further act may be sought.<sup>22</sup>

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<sup>15</sup>Rules 640.10(b), 731.10(b), 732.10(b).

<sup>16</sup>CPLR 2211.

<sup>17</sup>CPLR 2219 requires, among other things, that an order determining a motion be signed with the judge's signature; state the court, the place, and the date; and recite the papers used on the motion.

<sup>18</sup>*People v. Garcia*, 21 Misc 3d 732 (Bronx Co 2008).

<sup>19</sup>CPLR 5515(1).

<sup>20</sup>CPLR 5513; Rule 730.3(c).

<sup>21</sup>Uniform Court Acts 1703.

<sup>22</sup>CPLR 5520(a).



## **The Clerk's Return**

The use of the "Clerk's Return" is particular to the practice in the Appellate Term courts. It is necessary because in civil cases the Appellate Term does not have the notice of the appeal until it receives the Clerk's Return or a party makes a motion directly to the court.<sup>23</sup> The clerk of the lower court assembles and forwards the Return to the Appellate Term. Appended to the executed Clerk's Return are the notice of appeal; the order or judgment appealed from; and the opinion of the court, if any; all of the pleadings and relevant papers in the courts file; the transcripts, if any, duly settled; and exhibits, if any.<sup>24</sup> Unlike the Second Department, the First Department Appellate Term requires five copies of the record,<sup>25</sup> to be included with the Clerk's Return as well.<sup>26</sup>

Once the appellant files the notice of appeal, he should order a transcript, if the trial or hearing was held on the record.<sup>27</sup> Within ten days after the transcript fees are paid, the stenographer is to provide the transcript to the lower court clerk, who then notifies the appellant that the transcript may be "settled". A transcript is settled when both parties have had an opportunity to review the transcript and submit objections.<sup>28</sup> The trial judge will endorse the objections on the Clerk's Return or the parties can stipulate that the transcript is correct. When no testimony is taken, the Clerk's Return is prepared upon the filing of the notice of appeal.

The Clerk's Return was designed to speed up the appellate process from the lower courts, but often the practice falls short. The difficulty in obtaining transcripts leads to delay. Moreover, the time constraints for the perfection of the appeal are not compelling until after the Clerk's Return is filed. The First Department technically requires the appellant to arrange for filing of the Clerk's Return within 30 days of filing the notice of appeal. Nevertheless, this rule is usually not enforced, given the unavoidable delay inherent in obtaining the transcript from court reporters.

The Second Department sets no time limit for the filing of the Clerk's Return. Under these circumstances, it is possible for the appeals to languish. The respondent may move to dismiss an

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<sup>23</sup>In criminal appeals, the notice of appeal is forwarded by the lower court clerk to the Appellate Term clerk immediately upon filing. In civil appeals, the clerk prepares the record on appeal, which includes the notice of appeal, and then forwards the entire record to the Appellate Term Clerk.

<sup>24</sup>Uniform Court Acts 1702.

<sup>25</sup>Rule 640.2(a). Under Rule 640.2(c), the "parties may elect to proceed upon a statement in lieu of a record" pursuant to CPLR 5527.

<sup>26</sup>Rule 640.2.

<sup>27</sup>Uniform Court Acts 1704.

<sup>28</sup>Uniform Court Acts 1704.

untimely appeal at this stage. Courts usually deny these motions, with the condition that the appellant procure the Return and perfect the appeal by a date certain. In the event that there is a subsequent failure to comply, the respondent must renew the motion and obtain a final order of dismissal.<sup>29</sup>

### **The Record on Appeal**

Although the rules of the Appellate Terms have many similarities, they also differ in important ways. One of these differences is that the First Department requires the submission of the reproduced record<sup>30</sup> on appeal in most circumstances,<sup>31</sup> while the Second Department hears its cases on the original record.<sup>32</sup>

The reproduced record in the First Department must include, in the following order, as applicable: an index or table of contents; a statement pursuant to CPLR 5531;<sup>33</sup> the notice of appeal; the judgment upon which the appeal is based; a signed copy of the order or decision and a copy of any opinion; the verdict; the summons and complaint (in landlord/tenant matters, the notice of petition and petition); the answer; the bill of particulars, if any; the trial transcript; exhibits; the stipulation of settlement or notice of settlement of transcript with proof of service; a Statement of No Opinion (no other judicial opinion relating to the appeal); an attorney's certification pursuant to CPLR 2105 or a stipulation waiving certification (a self-represented appellant will have the "certification" signed before a notary); and the Clerk's Return.

The exhibits list in the reproduced record for the First Department should indicate whether the exhibit was marked for identification or in evidence and the page of the transcript where the evidence appears.<sup>34</sup> If the exhibits are not available, the record must contain a stipulation that any exhibits will be filed along with the briefs, or else they will not be considered for the appeal. Those exhibits marked for identification only and not the subject of the appeal will have a blank page so stating. Each document should have a heading at the top of the page. The form and style of the record should conform to the requirements for submitted briefs, discussed below, but in general are the same as those which would be submitted to the Appellate Division.

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<sup>29</sup>Rules 640.8, 731.7, 732.7.

<sup>30</sup>Per Rule 640.2(b), there is no requirement for a reproduced record from small claims part of the Civil Court.

<sup>31</sup>Rule 640.2(a). Civil Court appellants must either prepare a record, a statement in lieu of a record pursuant to CPLR 5529 or an appendix. Appeals from the Small Claims part are heard upon the Clerk's Return and five copies of the briefs.

<sup>32</sup>Rules 731.1, 732.1.

<sup>33</sup>While the CPLR 5531 statement is not specifically required under Rule 640 et seq., the CPLR generally applies pursuant to Uniform Courts Acts 1704, and it is common practice to include the statement.

<sup>34</sup>Rule 640.4.

The First Department also provides that the parties may elect to submit a statement in lieu of a record, in accordance with CPLR 5529, although in the event of such an election, the appeal must still be heard upon five copies of such statement and the briefs.<sup>35</sup>

### **Perfecting the Appeal**

An appeal is perfected in the Appellate Term courts after the matter appears on the general calendar and the appellant's brief has been filed. In the First Department, the general calendar of cases is published in the *New York Law Journal*, which lists the new appeals in each term for which the Clerk's Return has been filed. However, the Appellate Terms require that the appeal be brought on for argument within a specific term of each court. The two Departments differ in the manner in which the appeal is assigned to a specific term calendar and in the timing for the filing of the briefs.

In the First Department, both the appellant and the respondent may notice the appeal for argument for a particular term in the First Department<sup>36</sup> In contrast, in the Second Department, *no* party may notice the appeal for a particular term of the court. An appeal is placed on the general calendar in a civil case when the complete record of the trial court is filed with the Appellate Term. When the appeal is perfected—by the filing of an appellate brief plus five copies—the court assigns the appeal to a particular term of the court. In both Departments, an appeal that is not brought on for argument within the required time is subject to dismissal.<sup>37</sup>

In the First Department, the appeal must be noticed for argument within 60 days after the filing of the Return.<sup>38</sup> About two weeks before the start of each term, the *New York Law Journal* publishes a listing of the filed appeals. This listing serves as notice to litigants that the Clerk's Return has been filed and activates the time to file the notice of appeal for argument. If neither party notices the appeal for argument within 60 days, the appeal will eventually be dismissed.

In the Second Department, a civil appeal may be placed on the appeals calendar of an appointed term by filing an original and five copies of the appellant's brief, with proof of service of one copy, within 90 days after the Clerk's Return is received.<sup>39</sup> Appellant receives a written notice

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<sup>35</sup>Rule 640.2(c).

<sup>36</sup>Allowing the respondent to notice the appeal for argument gives him or her the opportunity to move the appeal forward in cases where the appellant is not actively pursuing the matter after the notice of appeal has been filed.

<sup>37</sup>Rules 640.6 (a)(3)(iii), 731.8, 732.8 (providing that enlargements of time are granted for good cause shown).

<sup>38</sup>Rule 640.6. The "notice of appeal for argument" is a term arising from use and statute. Rule 640.5 directs that in the absence of a specification that the appeal is to be argued, it will be marked submitted without argument.

<sup>39</sup>Rule 731.4 (c), 732.4 (c).

that the 90-day period has commenced and is given the date by which the appeal is to be perfected and when it will be placed on a dismissal calendar if not perfected. A written notice is sent by the court to the appellant regarding this deadline. The failure to comply will cause the appeal to be dismissed for lack of prosecution.<sup>40</sup>

There are also differences in the two Departments regarding the time calculations for delivery of the respondent's and the reply briefs. In the First Department, the time to serve and file such briefs is measured against the beginning of the term for which the appeal is noticed. In the Second Department, the time for serving and filing responding briefs is measured from the date of service of the appellant's brief.<sup>41</sup>

Specifically, in the First Department, if the appeal is noticed by the appellant, the following documents must be filed at least 53 days before the first day of the term for which the appeal is noticed: notice of argument with proof of service, five copies of the brief with proof of service of one copy, and five copies of the record or appendix with proof of service. The respondent has 31 days before the beginning of the noticed term to file five copies of the answering brief with proof of service of one copy, along with any exhibits.

The appellant's five copies of the reply brief, with proof of service of one copy, must be served and filed at least 24 days before the beginning of the term.<sup>42</sup> If records or briefs are served by mail, they must be mailed at least five days before the last day to file. If served by overnight delivery service, they must be served at least one day before the last day to file. If the appeal is noticed by the respondent, the notice of argument must be served and filed at least 68 days before the first day of the noticed term. The other requirements are the same as when the appellant noticed the argument as discussed above.

If the respondent notices the appeal for argument, and the appellant fails to serve and file a brief and does not appear at the calendar call, the court may affirm the order or judgment, or, in its discretion, dismiss the appeal with costs.<sup>43</sup> If neither party notices the appeal for argument within the prescribed time, the appeal will be dismissed, unless an enlargement of time has been granted for good cause shown. An appeal that has not been noticed for argument will generally be dismissed on the first argument day of the third term following the filing of the Clerk's Return. As set forth above, in the Second Department, the Appellate Term assigns the appeal to a particular term of the court.

Once the appeal has been perfected through the filing of appellant's brief, the respondent has 21 days after service in which to file his brief. The appellant then has seven days after service of the respondent's brief to reply. In each case, the filing consists of one original and five copies, along

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<sup>40</sup>Rules 731.8 (a) and (c), 732.8 (a) and (c).

<sup>41</sup>Rules 640.6 (a)(3)(i) and (ii), 731.4(c), 732.4(c).

<sup>42</sup>Rule 640.6(a)(3).

<sup>43</sup>Rules 640.6(a)(3)(iii), 731.8(c), 732.8(c).

with proof of service of one copy. An additional five days are added for service by mail and one day for overnight delivery.<sup>44</sup> The appeal will be placed on a dismissal calendar published in the *New York Law Journal* when it has not been perfected within the 90-day statutory limit. If an appeal is dismissed, a motion may be made to restore it to the calendar upon a showing of an adequate excuse for the default and a meritorious appeal.

### **Enlargement of Time**

In First and Second Departments, the vast majority of enlargements of time are sought by letter application, with stipulations a distant second. Motions are largely confined to situations where the court ordered that the appeal be perfected by a date certain or where letter requests and stipulations have been exhausted.

Where a stipulation is used, it must be signed by all parties and submitted to the court to be “So Ordered” before the date the papers would otherwise be due. Where the parties stipulate to enlarge the time to file the respondent’s brief, provision should also be made to enlarge the time to file the reply brief. The Second Department requires that any stipulation to enlarge the time to perfect an appeal be limited to 60 days, to file an answering brief to 30 days, and to file a reply brief to 10 days. The Second Department does not permit more than one stipulation.<sup>45</sup> The First Department does not have specific rules covering this issue, but is liberal in providing extensions where the stipulations are reasonable. Appellants may also direct a request for additional time in writing to the clerk of the court, with a copy to the other parties. This option is not available where the court has already directed the appeal be perfected by a date certain.

### **Briefs**

The form and style of Appellate Term briefs are generally the same as those in the Appellate Division.<sup>46</sup> The name of the attorney and whether oral argument is sought should be indicated in the upper right-hand corner of the cover, and the calendar number should appear on the upper left corner. The appeal will be taken on submission, unless oral argument is requested.<sup>47</sup> The First and Second Department Appellate Terms allow no more than 15 minutes for argument on each side, except by express permission of the court.<sup>48</sup> If only one side appears for oral argument, that party is given the option of relying solely on his or her brief, unless the judges have questions. If neither party shows up for the calendar call, the appeal is taken on submission.

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<sup>44</sup>Rule 730.3(c).

<sup>45</sup>Rule 731.8(d) or 732.8(d).

<sup>46</sup>Unless a specific rule appears in the Appellate Term Rules or in the Uniform Court Acts, it is important to consider CPLR 5528 and 5529 as a guide for form, substance, and style.

<sup>47</sup>Rules 640.5, 731.2(a)(2) or 732.2 (a)(2), 731.6(b) or 732.6(b).

<sup>48</sup>Rules 640.7(d), 731.6, 732.6.

The First Department requests that records and briefs be bound on the left. Spiral binders are impermissible. Where staples are used, they must be covered with vinyl or cloth tape. Clear plastic covers are permitted on the first page, and back covers may be any color. The cover should state the court of original jurisdiction, the index number, the name of the action, and the address of the appellant and the respondent. Exhibits are not attached to the briefs. Exhibits or testimony referred to in a brief should reference the appropriate page in the reproduced record. Briefs are limited to no more than 50 pages, and reply briefs to 20 pages. Both should be no less than 14-point type and should be double-spaced.<sup>49</sup> The Second Department requires that all briefs adhere to CPLR 5528 and 5529 and include a CPLR 5531 statement.<sup>50</sup> While the First Department rules omit the official inclusion of such statement in the brief, it is a matter of custom and practice to include it.

### **Motions to Reargue**

The unsuccessful appellant may make a motion to reargue or seek permission to appeal to the Appellate Division. Motions to reargue in both the Appellate Terms of the First and Second Department must be made within 30 days of the date of the order determining the appeal.<sup>51</sup> In addition, in the Second Department, where good cause is shown, the court may consider such motions at a later date.<sup>52</sup> In all cases, supporting papers should be concise and contain particular references to the record or brief. These motions are rarely granted.

### **Stays**

Filing the appeal in the Appellate Term does not in and of itself stay compliance with the lower court order or judgment, although CPLR 5519(a) does provide exceptions to this rule in limited situations.<sup>53</sup> The Appellate Term or the court of original instance may stay all proceedings to enforce the order or judgment pending an appeal or determination on a motion, upon a showing of a potentially meritorious appeal. The stay does not prevent the lower court from proceeding in any matter not affected by the order or judgment appealed.<sup>54</sup>

The notice of appeal must be served and filed before a stay can be sought in the Appellate Term. The motion should include a copy of the order or judgment being appealed; the notice of appeal;

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<sup>49</sup>Rule 640.5(d).

<sup>50</sup>Rules 731.2, 732.2.

<sup>51</sup>Rules 640.9 (a)(1), 731.11, 732.11

<sup>52</sup>Rules 731.11 (a), 732.11(a).

<sup>53</sup>For example, an exception occurs where the appellant is a municipality or where an undertaking has been made in the amount of the underlying judgment from lower court. CPLR 5519(a).

<sup>54</sup>CPLR 5519(f).

any related orders or decisions; any relevant exhibits; a brief procedural history; and a statement of the merits of the appeal, as part of the affirmation or affidavit or a concise memorandum of law. If the appeal has not been perfected, the motion should state when the appeal will be perfected and why a stay of enforcement will not irreparably harm the respondent.

When an appellant is granted a stay pending an appeal to the Appellate Term and the subsequent decision denies relief in whole or in part, the stay remains in effect for five days after service upon the appellant of a copy of the Appellate Term order with notice of entry. If an appeal is taken or a motion is made for permission to appeal within that five-day period, the stay remains in effect until five days after the further appeal is determined. Where the motion for permission to appeal is denied, the stay remains in effect until five days after the movant is served with the order of denial with notice of its entry.<sup>55</sup>

### **Appeal of the Appellate Term Decision**

There is no automatic right of appeal from the Appellate Terms to the Appellate Division. A motion for permission to appeal is required.<sup>56</sup> This motion should be made within 30 days from the date the moving party received service of a copy of the order to be appealed or within 30 days of the service of the order on the opposing side.<sup>57</sup> Where the Appellate Term denies the motion for leave, the movant may then make a motion directly to the Appellate Division within 30 days of the order denying leave.

Both the First and Second Department Appellate Terms require that the moving papers concisely set forth the grounds for the appeal, with reference to record, brief, and citations in support of the motion. A stay may be granted pending a determination of a motion for reargument or leave to appeal, provided that application is made. In a civil case, the motion for leave to appeal from an order affirming or granting a new trial or hearing must contain a stipulation consenting to the entry of judgment against the moving party, in the event the order is affirmed on appeal.<sup>58</sup>

### **Motions**

The Appellate Terms determine motions, orders to show cause, and ex parte applications, pursuant to CPLR 5704(b). Motion practice is primarily derived from Article 22 of the CPLR, although there are some guidelines in the courts' rules.<sup>59</sup> Motions may be brought by order to show cause or by notice of motion.

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<sup>55</sup>CPLR 5519(e).

<sup>56</sup>See CPLR 5513, 5516, 5703; Rules 640.9, 731.11, 732.11.

<sup>57</sup>See CPLR 5513(c), 5516.

<sup>58</sup>Rules 640.9(b)(2), 731.11(d), 732.11(d) .

<sup>59</sup>Rules 640.8, 731.7, 732.7; see CPLR 2103, 2214, 2215, 5516.

Motions may be noticed for any day of the term and must be submitted without oral argument. All papers in support or in opposition to the motion should be filed in the clerk's office by 10 a.m. on the return day, along with proof of service. Moving papers should be filed along with proof of service, in accordance with the time constraints set forth by CPLR 2214(b), 2215, 2103 and 5516, or as directed by the court. For example, unless otherwise directed, notices of motion should be served at least eight days before the return date via personal service, or with an additional five days for service by mail and an additional one day if service is by overnight delivery.

Answering affidavits should be served at least two days before the return date.<sup>60</sup> Such affidavits and any cross motions, with supporting papers, if any, should be made returnable the same day as the original motion and served and filed not less than three days before the return date.<sup>61</sup> Seven days' additional time to serve a cross motion are available only if the original motion is served at least 16 days before the return date and the notice of motion expressly demands service of cross motions at least seven days before the return date. In this case, reply or responding affidavits should be served at least one day before the return date. All affidavits must be sworn before a notary, and the affidavit of service must be completed by a person who is not a party to the action. To adjourn a motion, a signed stipulation must be submitted to the clerk's office for approval prior to the return date.

The First Department requires that all motions papers contain the appropriate County Clerk's index number.<sup>62</sup> Where an appeal is affected by the motion, the papers must also contain the calendar number of the appeal. The Second Department does not have this provision, but it is advisable to include all relevant court information on motion papers. The motion papers should contain a copy of the notice of appeal with proof of its filing in the lower court, which essentially provides the Appellate Term with jurisdiction over the motion or application. The papers should include, where applicable: a copy of the determination; the order or judgment appealed from; an affidavit setting forth the background of the case; the relief requested and arguments in support; any other exhibits or affidavits deemed necessary;<sup>63</sup> and an affidavit stating that the papers were served upon all adversaries.

### **Orders to Show Cause**

An order to show cause is most appropriate where time is of the essence and/or a stay is needed. As discussed above, the granting of the stay is generally a matter of discretion for the justice before whom the matter is pending. It is not granted as a matter of course.<sup>64</sup>

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<sup>60</sup>CPLR 2214(b).

<sup>61</sup>CPLR 2214, 2215.

<sup>62</sup>Rule 640.8(a).

<sup>63</sup>An example would be a copy of a stipulation of agreement.

<sup>64</sup>See CPLR 5519.



An ex parte order is not appealable as of right.<sup>65</sup> However, CPLR 5704(b) permits the review of ex parte orders by an Appellate Term justice, provided that the order is from a court over which the Appellate Term has jurisdiction. The Appellate Term may vacate or modify an ex parte order granted below or may grant an ex parte order denied below. The Appellate Term has original,<sup>66</sup> rather than appellate, jurisdiction, to hear these ex parte motions. Because such orders are not appealable, often the only method to obtain relief is by motion to the Appellate Term. Much of the Appellate Term motion practice arises from pro se as well as represented litigants in Housing Court seeking to review ex parte applications, orders or stays<sup>67</sup> of evictions.

Orders to show cause should have a complete history of the proceeding in the trial court; a copy of any order to show cause denied or refused by the trial court; a copy of the notice of appeal and order or judgment appealed from; and an affidavit, sworn before a notary public, setting forth the background of the case and why the requested relief should be granted.<sup>68</sup> When available, a computer-generated history of proceedings should be included. Litigants should also include additional relevant information that was presented to the trial court with the order to show cause, such as receipts, rent statements, and a notice of eviction or termination. If a stay is requested, the movant should submit a statement of why the relief requested should be granted and any other exhibits or affidavits deemed necessary.

A party need not serve the order to show cause and supporting papers upon his or her adversary before seeking to have it signed by a justice of the Appellate Term. The court will set the time and method of service. The failure to comply with all service instructions will bring a risk of dismissal. The court will insert the return date on the application, which generally is sooner than if the application were made by notice of motion. If the application is denied, the movant can proceed by notice of motion.

### **Appellate Term Coordinator – Second Department**

The Second Department has developed a streamlined procedure for processing emergency applications. Litigants seeking to file an order to show cause or ex parte application should submit the application to an Appellate Term coordinator in the Supreme Court of the county in which the action or proceeding arose, except for Kings County, where applications are brought directly to the Appellate Term Clerk's Office. The coordinator will conduct a preliminary review and transmit it to an Appellate Term clerk. The application is then presented to a justice. His or her decision is returned to the submitting coordinator who disseminates it to the moving party.

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<sup>65</sup>CPLR 5701(a)(2).

<sup>66</sup>CPLR 5704(b).

<sup>67</sup>Note that, in the Second Department, an application under CPLR 2221 to vacate a signed stay must be declined by that judge before Appellate Term review. Where that relief is denied, the application may be presented to the Appellate Term under CPLR 5704(b).

<sup>68</sup>Where relevant, the affidavit should also note any possible defenses and excuses for non-compliance or default.

### **Duty to Notify Appellate Term of Settlement**

Rule 730.3(f) provides that, if an appeal of an underlying action is wholly or partially settled, the failure to immediately notify the court of that fact may result in sanctions. The courts have repeatedly sanctioned counsel for violating this rule.

## **CRIMINAL APPEALS**

The Criminal Procedure Law governs when and what types of appeals are permissible in criminal cases and to which courts appeal are taken. When the appeal is appropriately directed to the Appellate Term courts, the specific rules of the First and Second Department Appellate Terms must also be followed.<sup>69</sup>

### **Appellate Term Jurisdiction**

First Department appeals from judgments, sentences or orders from New York City's Criminal Court in Manhattan and the Bronx are directed to that Appellate Term. The Appellate Term Second Department hears appeals from judgments, sentences or orders from local criminal courts outside New York City and New York City's Criminal Courts in Brooklyn, Queens, and Staten Island.<sup>70</sup>

### **What is Appealable**

Under the Criminal Procedure Law, a defendant may appeal a sentence, order or judgment either by right or by permission, provided that he or she makes timely application for a certificate permitting the appeal. In general, the defendant must await the judgment of conviction before the appeal is appropriate. The People can appeal by right from certain intermediate orders issued during the course of the criminal proceedings.<sup>71</sup> The People cannot appeal a verdict of acquittal or an acquittal of some, but not all, pending charges.<sup>72</sup>

### **What is Appealable as of Right – Defendant**

The defendant may appeal as of right a judgment of conviction and/or sentence,<sup>73</sup> a sentence of criminal forfeiture, an order setting aside a sentence upon motion of the People, and an order denying a motion for forensic DNA testing of evidence.<sup>74</sup> Moreover, a defendant may appeal by

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<sup>69</sup>Parts 640, 731 and 732 of the Appellate Division Rules.

<sup>70</sup>CPL 450.60(3); NY Const art VI, §8.

<sup>71</sup>See CPL 450.20, 450.50.

<sup>72</sup>CPL 450.20.

<sup>73</sup>CPL 450.10.

<sup>74</sup>*Id.*

right from a sentence imposed from a plea bargain, unless the sentence is not in excess of the agreed-upon bargain.<sup>75</sup>

### **What is Appealable as of Right – People**

The Criminal Procedure Law sets forth instances in which the People may appeal as of right a sentence or order.<sup>76</sup> These include an order dismissing an accusatory instrument or count thereof or an order terminating a prosecution; an order reducing the counts of an indictment or dismissing the indictment and directing the filing of a prosecutor's information; an order setting aside a verdict and dismissing an accusatory instrument or count thereof; an order setting aside a verdict; an order vacating a judgment; and an order setting aside a sentence.<sup>77</sup> When seeking to appeal a suppression order, the People must file a statement pursuant to CPL 450.50, in addition to the notice of appeal or affidavit of errors.<sup>78</sup> In other respects, the procedures for taking and perfecting an appeal on behalf of the People is the same as that for an appeal by the defendant.

### **What is Appealable by Permission – Defendant**

A defendant may appeal an order from criminal court denying a motion to vacate a judgment or to set aside a sentence if he receives permission of the court.<sup>79</sup> An order denying a motion for leave to appeal under CPL 450.15 and 460.15 is not appealable. Where permission to appeal is required, defendant must apply for a certificate from an Appellate Term justice.<sup>80</sup> The certificate is an order granting leave to appeal and certifying that the issues are meritorious. The applicant should follow rules derived from both the Criminal Procedure Law and Appellate Term Rules.<sup>81</sup> Only one application may be made, and there is no appeal if the certification is denied.

The application for leave to appeal must be made within 30 days after service upon defendant of a copy of order sought to be appealed and on notice to the People.<sup>82</sup> It must be in writing and addressed to the Appellate Term for assignment to a particular judge. The application should briefly set forth the questions of law and/or fact to be reviewed and must contain a statement as to whether any such application has been made previously. It should also include a copy of the

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<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>CPL 450.20.

<sup>78</sup>*Id.*

<sup>79</sup>CPL 450.15(1) – (2).

<sup>80</sup>CPL 460.15.

<sup>81</sup>*See* Rules 640.10, 731.10, 732.10.

<sup>82</sup>CPL 460.10(4).

order sought for review and any memo or opinion from the court below or a statement that there was none, as well as the name and address of the applicant and the prosecutor's office and the index or docket number.<sup>83</sup> The Second Department mandates that answering papers be filed by the prosecutor's office within 15 days after service of a copy of the application and papers.<sup>84</sup> The First Department does not have a similar rule. Generally, and unless specifically requested by the court, a determination is made on submission. If the certificate is issued, the appellant has 15 days to file the notice of appeal in duplicate, along with the certificate and proof of service on the prosecutor concerned. If the underlying criminal case occurred in a district within the Second Department for which no stenographic record was generated, the defendant may proceed by either the notice of appeal or affidavit of errors thereafter, following the procedure and rules for appeals set forth below.

### **Filing the Notice of Appeal**

The appeal is taken when the notice of appeal is properly filed and served upon the adverse party and the appeal is timely placed on the appeal calendar to be assigned to an appointed term.<sup>85</sup>

Criminal appeals to the Appellate Terms, except those from local criminal courts outside of New York City,<sup>86</sup> are taken by filing a notice of appeal within 30 days after sentence or, if the order appealed from is not included in the judgment, within 30 days from service.<sup>87</sup> The defendant may seek relief from the 30-day rule by making a motion to the Appellate Term, as set forth more fully below. A defendant seeking to appeal a guilty verdict must file the notice of appeal after the imposition of sentence, not when found guilty.<sup>88</sup> The notice of appeal is not usually filed with the Appellate Term. Rather, it is filed in duplicate with the clerk of the criminal court in which the sentence was imposed or the order was entered. The lower court clerk forwards the duplicate notice of appeal to the Appellate Term clerk immediately upon filing.<sup>89</sup> If the court in which the defendant was convicted does not employ a clerk, one copy of the notice of appeal must be filed by the appellant with the judge of that court, and a duplicate copy must be filed with the Appellate Term.<sup>90</sup> If the People are appealing, they should serve the notice of appeal on

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<sup>83</sup>Rules 640.10, 731.10(c), 732.10(c).

<sup>84</sup> Rules 731.10(c)(4), 732.10(c)(4).

<sup>85</sup>Rules 640.6(b), 731.8(b), 732.8(b).

<sup>86</sup>CPL 10.10(3) – (6).

<sup>87</sup>CPL 460.10.

<sup>88</sup>CPL 460.10(a).

<sup>89</sup>The duplicate notice is designed to improve case tracking in criminal matters. Contrast this with civil appeals, where the clerk prepares the record on appeal, which includes the notice of appeal, and then forwards the entire record to the Appellate Term.

<sup>90</sup>CPL 460.10(2). This method is used in Second Department where a few local Justice Courts

the defendant pro se or the attorney for the defendant. If the defendant is the appellant, the notice of appeal should be served on the District Attorney or prosecutor.<sup>91</sup> There is no fee for the filing of a notice of appeal in a criminal case. If the notice of appeal is filed and service completed within 30 days, the jurisdiction of the appellate court is invoked. Without the timely filing of the notice of appeal, the Appellate Term lacks jurisdiction, and the appeal will be dismissed.<sup>92</sup>

### **Filing the Settled Transcript**

Where official minutes were taken of the proceedings in which a order or judgment was made following a trial or hearing, the appellant must purchase the transcript of all proceedings, including the trial or guilty plea and sentence and provide a copy to the court and his or her adversary, unless poor person relief is granted.<sup>93</sup> In the First Department, the appellant must procure the record within 30 days after service of the notice of appeal.<sup>94</sup> The official transcript must be settled by the judge by a hearing, a stipulation settling the transcript, or asking the parties to submit any proposed changes via mail responses. When a determination is made that the transcript is complete and accurate, the judge signs the Clerk's Return form and indicates that the official minutes are settled. Upon motion to the Appellate Term, the appellant may be authorized to use an abbreviated record.<sup>95</sup> The clerk will sign the Clerk's Return on the appeal form, and the entire record will be sent to the appropriate Appellate Term court.<sup>96</sup>

### **Poor Person Relief**

Where an appellant successfully moves for poor person relief, he or she will obtain an order from the Appellate Term directing that the minutes be produced. In most cases, the transcriber is

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outside of New York City do not have a county clerk or the ability to generate a stenographic record. Where there is a stenographic record, but no criminal court clerk, the procedure for filing the appeal is the same (i.e. file the notice of appeal within 30 days after sentence or from service). But the filing is with the criminal court judge and directly with the Appellate Term to which the appeal is being taken. This filing would ordinarily be the responsibility of the court clerk. Since there is none, the appellant will have this responsibility. Where there are no official minutes, the affidavit of errors should be filed within 30 days of filing the notice of appeal. CPL 460.10(3).

<sup>91</sup>CPL 460.10(1).

<sup>92</sup>CPL 460.10(1)(d).

<sup>93</sup> See Rule 108.2.

<sup>94</sup>Rule 640.6(b).

<sup>95</sup>Rules 640.3(a), 731.1(b)(2), 732.1(b)(2).

<sup>96</sup>CPL 460.10 (1)(e), 460.10(2), 460.10( 3)(d).

directed to provide two written transcripts of all the proceedings to the clerk of the trial court. One copy is for the attorney assigned by that order to represent the defendant. The other copy is to be filed along with the record, which in turn will be filed with the Appellate Term. The transcript must be settled by a judge and becomes part of the Clerk's Return.

### **Filing the Affidavit of Errors**

Appeals from local criminal courts that do not have stenographic records utilize an affidavit of errors, which is an affidavit setting forth the errors of the lower court. However, note that since § 30.1 of the Rules of the Chief Judge and Admin. Order 245/08 require that *all* Town and Village Court proceedings before those courts be recorded, resort to affidavits of errors has been significantly curtailed.

Where an affidavit of errors is used, the appellant has 30 days after entry of judgment, sentence or order to either timely file an affidavit of errors (substituting for the notice of appeal) or file a notice of appeal, followed by the affidavit of errors 30 days thereafter.<sup>97</sup> If proceeding by notice of appeal, within the 30-day period, the appellant must file the notice in the local criminal court and serve a copy upon respondent. Subsequently and within 30 days of the filing of notice of appeal, the appellant must file the affidavit of errors with the local criminal court. Within three days of filing, the appellant must serve a copy of the affidavit of errors upon the respondent or counsel. Where the appellant is the criminal defendant, the filing must be upon the District Attorney of the county where the local criminal court is situated. The appeal is deemed to be taken upon the filing and service of the affidavit of errors within the 30-day period. If proceeding by affidavit of errors alone, the affidavit will substitute as the notice of appeal.<sup>98</sup>

Within ten days of the filing of the affidavit of errors, the trial judge should prepare a "Court's Return" summarizing facts and evidence relevant to the appellate issues and limited to the contentions in the affidavit of errors. This Return must be sent to both parties. If the court fails to file the Return within the 10-day period or it is defective, the appellant may make an application to the Appellate Term for an order to file an appropriate Return within a specified time.<sup>99</sup> Once the Return is filed, the Clerk will sign it and send the entire record to the Appellate Term.<sup>100</sup> The Appellate Term may treat the instrument as valid, in the interest of justice, where an application for leave to appeal, the notice of appeal or the affidavit of errors is premature or the judgment, order or sentence for which review is sought is inaccurately described.<sup>101</sup>

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<sup>97</sup>CPL 460.10(3).

<sup>98</sup>CPL 460.10(3)(c).

<sup>99</sup>CPL 460.10(3)(d) – (e).

<sup>100</sup>CPL 460.10(3)(d); Rule 640.3(a).

<sup>101</sup>CPL 460.10(6).

### **Bringing the Appeal on for Argument**

Once the Appellate Term has received the notice of appeal or the affidavit of errors and the Return, the appellant has the responsibility to bring the matter on for argument or submission. In the Appellate Term First Department, the appellant must notice the appeal for argument or submission within 120 days from the date of service of the notice of appeal. This is done by filing the notice of argument, one original plus four copies of the briefs and one copy of the transcript, along with proof of service of one copy of each. This must be done at least 53 days before the first day of the term for which the appeal is noticed. The respondent has 31 days before the beginning of the noticed term to file five copies of the answering brief, with proof of service of one copy. The appellant's five copies of the reply brief, with proof of service of one copy, must be served and filed at least 24 days before the beginning of the term.<sup>102</sup>

In the Second Department, a criminal appeal must be perfected within 90 days of the date the notice of appeal or the affidavit of errors and the Return have been transmitted to the clerk.<sup>103</sup> The appeal is placed on the calendar to be assigned to an appointed term by filing the original appellant's brief plus five copies, with proof of service of one copy upon the respondent. The respondent's brief and proof of service of one copy should be filed not more than 21 days after service of the appellant's brief. The reply brief, with proof of service, must be filed not more than seven days after service of the respondent's brief.<sup>104</sup>

### **Enlargement of Time**

An appeal that has not been timely perfected will be subject to dismissal. As in civil appeals, to enlarge the time to perfect, the parties may proceed by letter-application, stipulation or motion. The stipulation must be signed by all parties to the appeal and forwarded to the court to be "So Ordered" by the clerk before the date upon which the brief would otherwise be due for filing.<sup>105</sup> If stipulating to enlarge the time to file a respondent's brief, that stipulation must contain a provision for the filing of the reply brief as well.

The Second Department requires that enlargements of time from a judgment of conviction in a criminal case, whether on motion or by stipulation, include: a statement setting forth the sentence imposed, whether defendant is free on bail or on his or her own recognizance;<sup>106</sup> the date and issuing judge of that order; and if there had previously been an extension of time.<sup>107</sup> The First

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<sup>102</sup>Rule 640.6(b).

<sup>103</sup>CPL 460.10(1)(e), 460.10(2), 460.10(3)(d); Rules 731.4(a)(2), 732.4(a)(2).

<sup>104</sup>Rules 731.4(c), 732.4(c).

<sup>105</sup>Rules 640.6(b)(2), 731.8(a) and (d), 732.8(a) and (d); CPL 460.70(2)(a).

<sup>106</sup>CPL 460.50.

<sup>107</sup>Rules 731.9, 732.9.

Department does not address this situation. The appeal is placed on the Appellate Term's Ready Day Calendar for argument or submission within several months of perfection, and the parties are notified of the date by publication in the *New York Law Journal* and by written notice. An appeal that is not timely perfected is placed on a dismissal calendar also published in the *Journal*.<sup>108</sup>

### **The Record on Appeal**

The Record on Appeal consists of:

1 – A certified copy of the Criminal Court information or Appearance Ticket with attachments and endorsements, as well as all original papers, including motion and opposition papers and court orders.

2 – The notice of appeal.

3 – Where official minutes were taken, the settled transcripts of the arraignment, hearing, trial or plea and sentence; and any other proceeding pertinent to the appeal. Where no official minutes were taken, the affidavit of errors and the Return.

4 – A certificate of disposition, stating the date of the plea or verdict, charge of conviction, sentence date, and sentence on each count.

5 – Proof of service of a copy on the adversary.

For good cause shown, the court may hear the appeal on an abridged record.<sup>109</sup> In the Second Department, unless otherwise ordered by the court, the appellant may, but need not, print copies of the record on appeal.<sup>110</sup> As noted previously, the First Department rules require five copies of the record or appendix.

### **Briefs**

The form, style, and content of briefs for civil appeals discussed above are applicable for criminal appeals, with some additional rules. The First Department requires a statement setting forth whether the defendant is incarcerated. If bail was permitted, the appellant should indicate the date of the order and the court. Likewise, where a fine was paid, the statement should set forth the amount, the date of payment, where payment was made, and the receipt number.<sup>111</sup> The Second Department requires that the brief set forth the entire order or judgment appealed

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<sup>108</sup>Rules 640.6 (b)(2) – (4), 731.4, 732.4.

<sup>109</sup>Rules 640.3(b)(2) ,731.1(b)(2), 732.1(b)(2).

<sup>110</sup>Rules 731.1, 732.1.

<sup>111</sup>Rule 640(c).



from or its material provisions and include the date and sentence imposed, if any. The appellant must state whether a stay of judgment pending appeal under CPL 460.50 has been obtained, the date issued, the name of the judge, and whether the appellant is free on bail or on his or her own recognizance.<sup>112</sup> Both Departments require a CPLR 5531 statement.<sup>113</sup>

An appellant in the First Department who is incarcerated may bring the appeal on for argument or submission on ten days' notice, after the record is filed, by filing a notice of argument and five copies of the appellant's brief, with proof of service of one copy. The respondent has seven days after service of the appellant's brief to file five copies of his or her answering brief, with proof of service of one copy. Five copies of the reply brief must be filed, with proof of service of one copy, no later than two days after service of respondent's brief. The respondent can move to dismiss the appeal where the appellant does not notice the appeal within the time specified by the First Department Rules, unless an enlargement of time is granted from the Appellate Term for good cause shown.<sup>114</sup>

### **Late notice of appeal**

If the notice of appeal or the affidavit of errors is not timely filed, the defendant may make a motion for an extension of time to file the appeal with the Appellate Term. The motion must be in writing and on notice and must be made within one year and 30 days from the imposition of sentence<sup>115</sup> (or within one year of the time required to file the original notice of appeal). The motion must demonstrate defendant's due diligence in pursuing the appeal; that the delay was due to the improper conduct of his or her attorney or public servant; the death or disability of counsel; or the defendant's inability to communicate with counsel due to incarceration.<sup>116</sup> The essential facts of the motion must be substantiated by unquestionable documentary proof.<sup>117</sup> Where there is a question of fact necessary for the disposition of the motion, the matter can be remanded to the lower court for a hearing and determination.<sup>118</sup>

### **Stays**

The filing of the notice of appeal does not stay a defendant's obligation to pay his or her fine. Nor does it stay the obligation to serve any imposed sentence. Rather, the defendant must move

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<sup>112</sup>Rules 731.2(c)(3), 731.1(c)(3).

<sup>113</sup>Rules 640(c), 731.2(b), 732.2(b).

<sup>114</sup>Rule 640.6(b)(2).

<sup>115</sup>*But see People v. Thomas*, 47 NY2d 37 (1979).

<sup>116</sup>CPL 460.30(1).

<sup>117</sup>CPL 460.30(3).

<sup>118</sup>*Id.*

for a stay or a suspension of the judgment or sentence pending appeal.<sup>119</sup> The defendant may make the application after filing the notice of appeal or, where the appeal is not as of right, after the certificate is granted. Where the appeal is from a judgment or sentence in New York City's Criminal Court, the motion should be made to Supreme Court justice of the Judicial District where the judgment was entered.<sup>120</sup>

Where the appeal is from a judgment or sentence from a criminal court outside New York City, the Criminal Procedure Law vests the Appellate Term with the authority to determine which judge may issue the stay order. Under the Rules, either an Appellate Term justice or justice of the Supreme Court from the county in which the judgment was entered may issue the order.<sup>121</sup> However, as a practical matter, motions for stays are decided by Supreme Court justices. In all cases, the application for the stay must be made upon reasonable notice to the People.

While the appeal is pending, the judge may stay or suspend the execution of the judgment or sentence, with or without conditions. Likewise, the defendant may be released on his own recognizance or bail may be fixed during the appeal. If a justice orders the release of an incarcerated defendant, the custodian must be provided with a certified copy of the order staying the execution of the sentence. No more than one application may be made.<sup>122</sup> Once the stay has been granted by the Supreme Court justice, the Appellate Term may extend the stay by application.

Where the motion for the stay is granted, the defendant must bring the appeal on for argument or submission within 120 days. The failure to do so, or to request an extension, will allow the stay to expire and require the surrender of the defendant. In the event that the judgment is affirmed on appeal, the Appellate Term will remit the case to the criminal court of original jurisdiction, which will, upon two days' notice to the defendant, direct that he or she appear to commence or resume execution of judgment.<sup>123</sup>

### **Appeal of the Appellate Term Decision**

An appeal from a judgment of the Appellate Term in a criminal case is directed to the Court of Appeals and is granted only by permission from a judge of that Court.<sup>124</sup>

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<sup>119</sup>CPL 460.50.

<sup>120</sup>CPL 460.30(2).

<sup>121</sup>Rule 732.12.

<sup>122</sup>CPL 460.50(3).

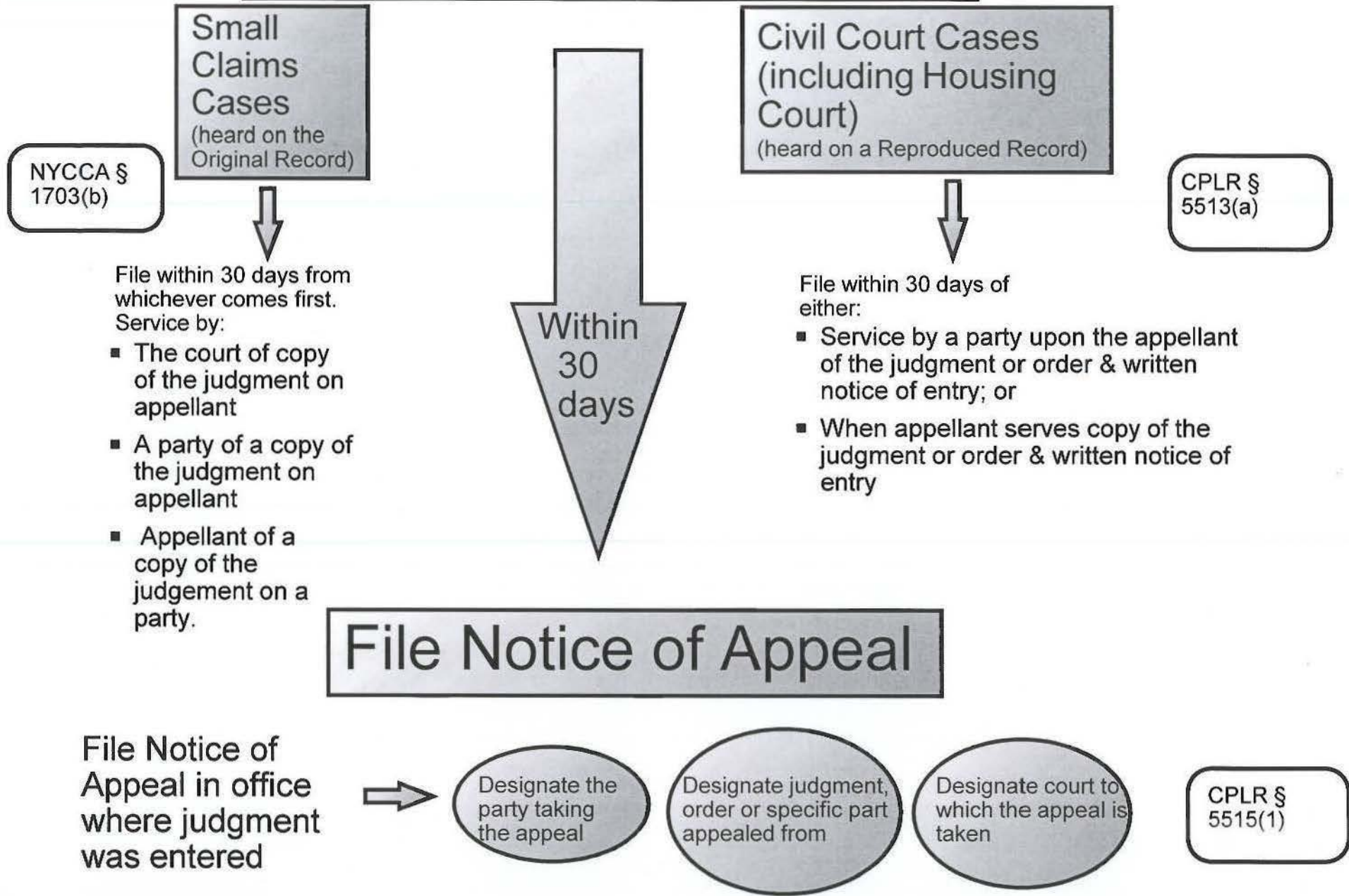
<sup>123</sup>CPL 460.50(5).

<sup>124</sup>CPL 460.20(2)(b).



# Appellate Term 1st Department Civil Cases

## Appeal of Judgment or Order



# Appellate Term 1st Department Civil Cases

## FILE NOTICE OF APPEAL

NY Court Rules § 640.6(a)(1) (1st Department Appellate Term Rules)

Within 30 days

- Clerk obtains transcript and gives to Appellant
- Appellant settles transcript and returns to Clerk
- Clerk Prepares return

NYCCA § 1704

## Plaintiff procures CLERK'S RETURN

NY Court Rules § 640.6(a)(3)

Within 60 days after filing of Clerk's Return

Appellate Term publishes calendar in NY Law Journal 15 days before first day of each term. Lists date return was filed and received and serves as notice to parties of filing of Return.

NY Court Rules § 640.6(a)(3)(ii)

## Either Party may NOTICE THE APPEAL FOR ARGUMENT

Terms are first Monday of January to June and September to December

Obtain form from Appellate Term

Scheduling argument for specific Term:

If Appellant notices argument:

Must file Notice of Argument at least 53 days before 1st day of term which has been noticed

NY Court Rules § 640.6 (3)(i) & (ii)

Must file Notice of Argument at least 68 days before 1st day of term which has been noticed

If Respondent notices argument;

Appellate Term office will provide a calendar with specific dates and deadlines for each term

# Appellate Term 1st Department Civil Cases

## **BRIEFING FOR APPEAL**

### Appellant shall file:

- Notice of Argument
- 5 copies of Reproduced Record or Appendix (except small claims cases & Appellants granted poor person's status which are heard on the Original Record)
- 5 copies of Appellant's Brief & Exhibits
- Proof of service of the above
- Brief may not exceed 50 pages

NY Court Rules §§ 640.1-640.6.  
Check rules for specific filing and briefing requirements.

### Respondent shall file:

- 5 copies of Answering Brief
- Proof of service
- Brief may not exceed 50 pages

### Appellant may file:

- 5 copies of Reply Brief
- Proof of Service
- Brief may not exceed 20 pages

NY Court Rules § 640.6(a)(3)(l)

At least  
**53**  
days  
before  
1st day  
of term

Not  
later  
than  
**31**  
days  
before  
1st day  
of term

Not  
later  
than  
**24**  
days  
before  
1st day  
of term

**1ST DAY OF TERM FOR WHICH CASE WAS NOTICED**

# Appellate Term 1st Department Criminal Cases

## CRIMINAL JUDGMENT, SENTENCE OR ORDER & SENTENCE

Crim. Pro. Law §  
460.10(1)(a) - (e)

Within  
**30**  
Days

Within 30 days of:

- Imposition of sentence; or
- After service on appellant of copy of an order not included in a judgment

### File Notice of Appeal

File with Clerk of Criminal Court in which sentence was imposed or in which order was entered

2 copies stating what is being appealed and that it's being appealed to the Appellate Term

Clerk endorses the filing date and transmits one copy of the Notice of Appeal to the Clerk of the Appellate Term

If Appellant is the Defendant

Serve copy of notice upon District Attorney

If Appellant is the People

Serve copy of notice on Defendant or last known attorney

# Appellate Term 1st Department Criminal Cases

## SERVICE OF NOTICE OF APPEAL



NY Court Rules §  
640.6(b)(1)-(4)



Appellant shall file  
**original papers** or  
abbreviated record

## APPELLANT FILES NOTICE OF ARGUMENT

Appellate Term publishes calendar in NY Law Journal 15 days before first day of each term. Lists date in which Notice of Appeal was filed in criminal cases.

Must be noticed for argument at least 53 days before 1st day of term of appointment (see next page for briefing schedule)

- Appellant must file with Notice of Argument:
- Transcript of minutes of proceeding (certified by trial judge)
  - 5 copies of Appellant's brief
  - Proof of Service
  - Criminal cases are heard on the Original Record



# Appellate Term 1st Department Criminal Cases

## BRIEFING FOR APPEAL

### Appellant shall file:

- Notice of Argument
- Transcript of Minutes of Proceeding
- 5 copies of Appellant's Brief
- Proof of service of the above
- Brief may not exceed 50 pages & must include statement pursuant to NY Court Rules § 640.3(c)

NY Court Rules §§ 640.3 -640.6. Check rule for specific filing requirements. Appellants incarcerated under the judgment being appealed have expedited process.

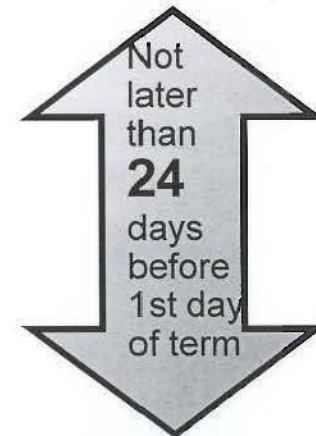
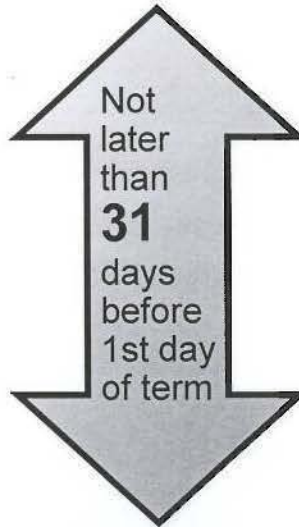
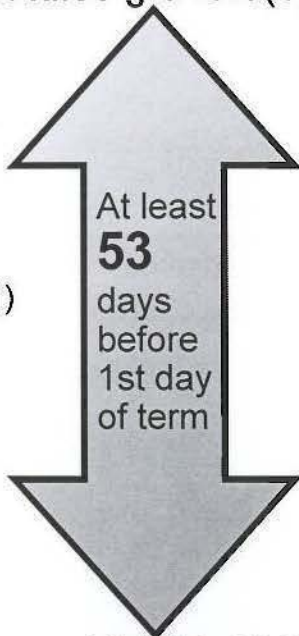
### Respondent shall file:

- 5 copies of Answering Brief
- Proof of service
- Brief may not exceed 50 pages

### Appellant may file:

- 5 copies of Reply Brief
- Proof of Service
- Brief may not exceed 20 pages

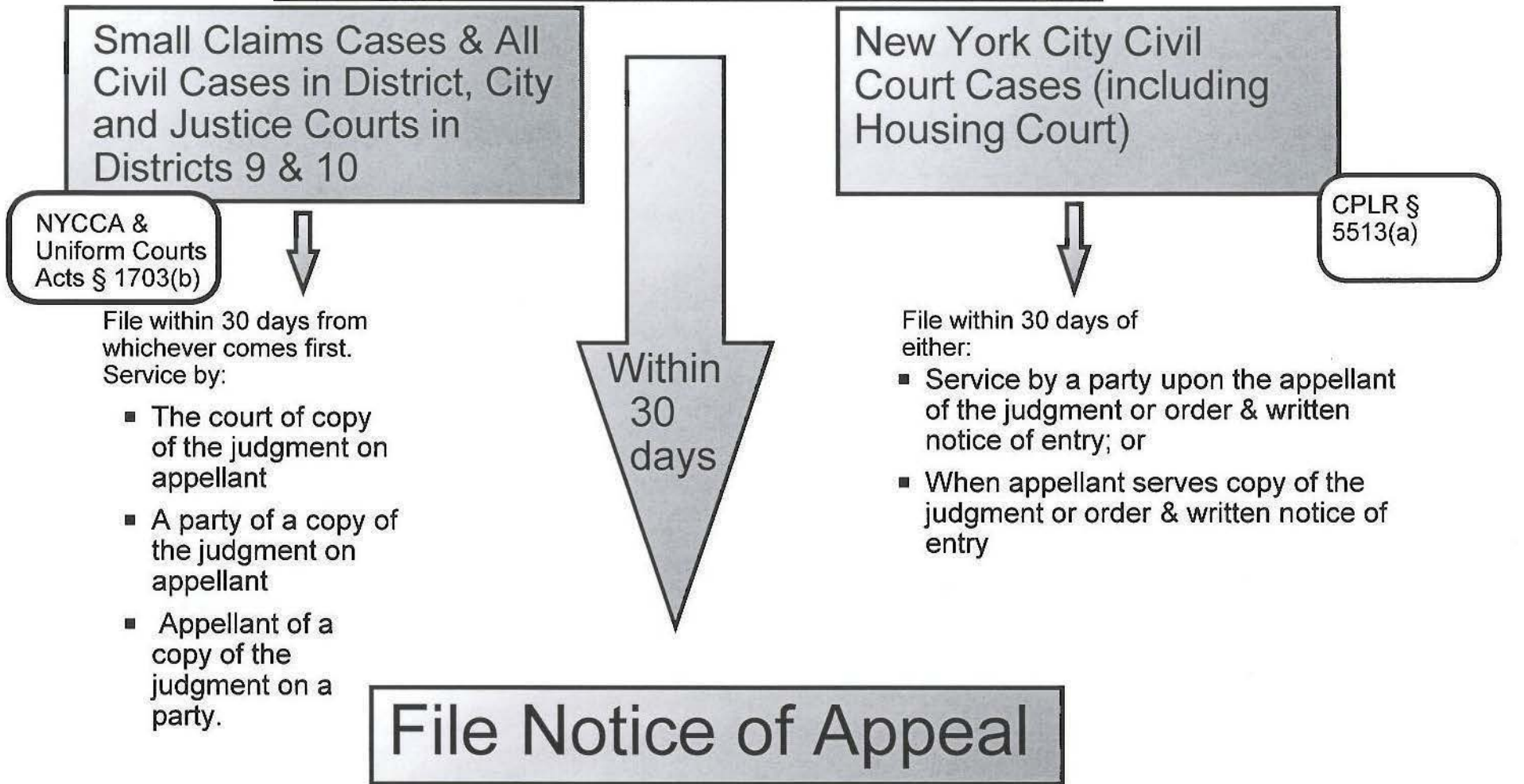
NY Court Rules § 640.6(b)(1)



**1ST DAY OF TERM FOR WHICH CASE WAS NOTICED**

# Appellate Term 2nd Department Civil Cases

## Appeal of Judgment or Order



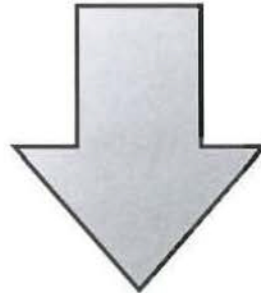
File Notice of Appeal in office where judgment was entered



CPLR § 5515(1)

# Appellate Term 2nd Department Civil Cases

## FILE NOTICE OF APPEAL



- Clerk obtains transcript and gives to Appellant
- Appellant settles transcript and returns to Clerk
- Clerk Prepares return

NYCCA &  
Uniform  
Court Acts §  
1704

## Appellate Term Receives CLERK'S RETURN and Places Case on the Calendar

Written notice is sent by the court to the appellant notifying him of this deadline. This is a courtesy and will not by itself excuse default.

NY Court Rules §  
731.4(c) or  
732.4(c)

Within  
**90 days**  
after  
case is  
placed  
on  
court's  
calendar

Obtain  
form from  
Appellate  
Term

## Appellant Must File:

Terms are first Monday of  
January to June and  
September to December



- Original and 5 Copies of Appellant's Brief
- Proof of service of one copy on the parties to the appeal

# Appellate Term 2nd Department Civil Cases

## **BRIEFING FOR APPEAL**

### **Appellant shall file:**

- Notice of Issue
- Original & 5 copies of Appellant's Brief & Exhibits
- Proof of service of the above

NY Court Rules §§ 731.4 & 732.4. Check rules for specific filing and briefing requirements.

### **Respondent shall file:**

- Original & 5 copies of Answering Brief
- Proof of service

### **Appellant may file:**

- Original & 5 copies of Reply Brief
- Proof of Service


NY Court Rules §§ 731.8(a) & 732.8(a)



Within 90 days of case being placed on court's calendar



Within 21 days after service of Appellant's brief



Within 7 days after service of Respondent's brief

# Appellate Term 2nd Department Criminal Cases

## CRIMINAL JUDGMENT, SENTENCE OR ORDER & SENTENCE which was STENOGRAPHICALLY RECORDED

Crim. Pro. Law §  
460.10(1)(a) - (e)

Within  
**30**  
Days

Within 30 days of:

- Imposition of sentence; or
- After service on appellant of copy of an order not included in a judgment

### File Notice of Appeal

File with Clerk of Criminal Court in which sentence was imposed or in which order was entered

2 copies stating what is being appealed and that it's being appealed to the Appellate Term

Clerk endorses the filing date and transmits one copy of Notice of Appeal to the Clerk of the Appellate Term

If Appellant is the Defendant

Serve copy of notice upon District Attorney

If Appellant is the People

Serve copy of notice on Defendant or last known attorney

# Appellate Term 2nd Department Criminal Cases

## CRIMINAL JUDGMENT, SENTENCE OR ORDER & SENTENCE **NOT RECORDED**

Crim. Pro. Law §  
460.10(1)(a) - (e)



Within 30 days of:

- Imposition of sentence; or
- After service on appellant of copy of an order not included in a judgment



File Notice of Appeal

OR

File Affidavit of Errors



File Affidavit of Errors

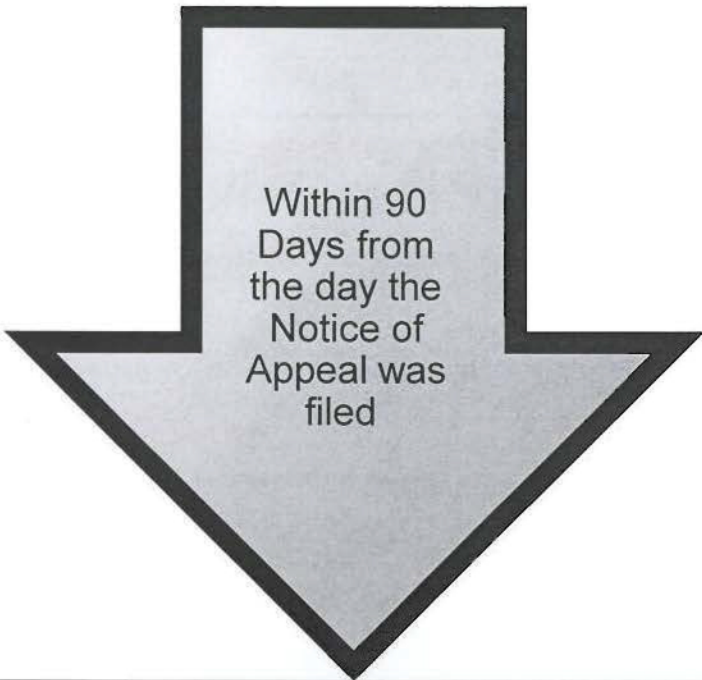
Court's Return



Court's Return

# Appellate Term 2nd Department Criminal Cases

## **SERVICE OF NOTICE OF APPEAL**



NY Court Rules § 731.8

### **APPELLANT MUST PERFECT APPEAL BY FILING BRIEF**

Appellate Term publishes calendar in NY Law Journal 15 days before first day of each term. Lists date in which Notice of Appeal was filed in criminal cases.

- Appellant must file:
- Original & 5 copies of Appellant's brief
  - Proof of Service

**Criminal cases are heard on the Original Record, or with leave, on an abridged record**

# Appellate Term 2nd Department Criminal Cases

## **BRIEFING FOR APPEAL**

### **Appellant shall file:**

- Original & 5 copies of Appellant's Brief
- Proof of service of the above
- Proof of service on Respondent of one copy of a transcript of the minutes of all the proceedings

NY Court Rules §§ 731.4(c) & 731.4(c)

### **Respondent shall file:**

- Original & 5 copies of Answering Brief
- Proof of service

### **Appellant may file:**

- Original & 5 copies of Reply Brief
- Proof of Service

