LEAVEWORTHY

The Newsletter of the NYSBA Committee on Courts of Appellate Jurisdiction WINTER 2023

Chief Judge Rowan Wilson

Appellate Motions for Reargument

Order of Protection Issues Percolate on Appeal

NYSBA

LEAVEWORTHY

Winter 2023

Committee Chair:
Michael J. Miller, Esq.
PO Box 2057
Miller Place, NY 11764-8836
(934) 500-4944
mjmilleresq@gmail.com

Staff Liaison:
Kathryn Calista
New York State Bar Association
One Elk Street, Albany, NY 12207
(518) 487-5594
kcalista@nysba.org

Editor:
Mark Diamond
(917) 660-8758
markdiam@gmail.com

MESSAGE FROM THE CHAIR

Dear Colleagues,

It is early in December 2023, and we are at an inflection point: that point in time when a significant change may occur. I do not mean that time when we all reflect on our lives and resolve to improve ourselves in the New Year, albeit there is no harm in self-improvement. I do mean that we — as a committee, an organization, a profession — are at the start of the brave new world of artificial intelligence. This technology will, I believe, have a profound impact on our profession.

We have all read, viewed, or listened to presentations and news reports about the transformative impact that AI will have on all parts of our lives. At this time, you may be waiting to see what will happen, believe that AI is the best thing to come along since sliced bread, or fear that the world as we know it will end and we all will be beholden to the electronic superpowers. The truth is that no one knows where this technology will lead.

We do know, however, that it will change in some material way how we practice law and, of course, appellate representation. Many of us have already taken a CLE on the use of AI, or the ethical use of AI, or how to form prompts with AI. A few of us may have wandered into the more esoteric and technical realms of AI. But very few of us lawyers, if any, can understand at a production level how to make, code, develop or create this product. We, like everyone else, are watching a very smart, small group of people who understand and control this technology, to see where AI goes.

This becomes most interesting because some of the people behind the AI revolution do not see AI as an aid to lawyers, which is how we like to think about this technology. Rather, if you go back to ancient techno times — perhaps ten years ago — you will find discussions about AI replacing attorneys. The goal of artificial intelligence is to replace the human element in any given task, and that is the goal of AI used in the legal context.

So, we are at an inflection point in the practice of law. Before we are mere spectators we need to proactively address the use of AI in our profession. Ten years from now we may not recognize the practice of law.

Michael J. Miller

IN THIS ISSUE

Chief Judge Rowan Wilson

BY MARK DIAMOND, ESQ.

New York's new chief judge, Rowan D. Wilson, has an eclectic background. For more than 30 years at Cravath, Swaine & Moore, he did complex litigation, representing such mega-companies as IBM, American Express, and Time Warner. But as a young man, he grew up amidst free speech and anti-war demonstrations in Berkeley, where he was raised, and had his junior high school accidentally tear gassed. He started off wanting to be a college professor, partly because he doesn't care for theatrics, but wound up leading one of the most active, influential courts in the country.

Now 63 years old, born in Pomona, California, Chief Judge Wilson got his undergraduate education at Harvard College and in 1984, a J.D. from Harvard Law School. His father taught at a state school for deaf and blind children. His mother taught special education high school students and designed curriculum for a state hospital. Lest you think it was a family of eggheads, his brother was something of a pioneer in the e-commerce and fiber optics industries and his sister a costume designer at the California Academy of Dramatic Arts, though she later returned to a Ph.D. program at Berkeley.

"In 1984, my last year of law school, I sent out twenty applications to federal judges for a clerkship," recalls the judge. "I got back three invitations: from Anthony Kennedy, Dorothy Nelson, and Thelton Henderson. I managed to talk my way into an early Sunday morning interview with Judge James Browning, who was Chief Judge of the United States Court of Appeals for the Ninth Circuit. Although Judge Nelson made me an offer to clerk with her, knowing Judge Browning was my first choice, she called him and encouraged him to hire me. He interviewed me – actually, it was more that his wife interviewed me. She took, let's say, an active interest in the work of the Ninth Circuit. My one-year clerkship with him turned into two years, my second year as his administrative law clerk. Part of Judge Browning's job was administration of all the Federal courts within the Ninth Circuit, not just the district courts and bankruptcy courts, in the 13 western states plus Guam and the Northern Mariana Islands. So working for him was good experience for the administrative side of the job I now have."

In 1986, the judge began working at Cravath, Swaine & Moore in New York. He had worked there one summer as a summer intern in order to put together enough money to travel, which he wound up not doing because he was called by Judge Browning to start his clerkship earlier than expected.

At Cravath, attorney Wilson litigated antitrust, intellectual property, securities fraud, civil rights and employment cases. He was elected to partnership within five years and was the first partner of color in the white-shoe firm's then-172-year history. While at Cravath, he was in charge of hiring for several years, headed its pro bono practice, served as trustee at the Lawyers' Committee for Civil Rights Under Law, and as chair of Neighborhood Defender Services of Harlem.

"I remember Judge Browning telling me that being his law clerk was the best job I would ever have – unless one day I had his job," Wilson recounts. "In 2012, my friend Jennifer Raab, who was president of Hunter College, suggested that I apply to fill a vacancy on the New York State Court of Appeals.

"In 2012, the Judicial Commission passed my name to the governor for a judgeship. At that time, my wife and I had been matched to adopt a little girl from China. I had just finished a trial in Alabama and had a lengthy trial starting a few weeks later. We had two daughters in school, so my wife remained in the states while I got on a plane to China by myself, brought our daughter home, and then almost immediately began the trial in New York."

He did not get the judicial appointment but continued to apply each time a vacancy on the court occurred. Then, on his sixth try, "in 2016, the Judicial Commission recommended me, along with several other people, for a position as associate judge of the Court of Appeals. I was interviewed by Governor Andrew Cuomo's counsel and by the Governor, who showed me around the Capitol's executive floor in which he had rearranged the portraits and landscapes so that the portraits ran chronologically and the landscapes ran from east to west, from the tip of Long Island to Buffalo."

Attorney Wilson became Judge Wilson in February 2017, replacing Judge Eugene Pigott at his mandatory retirement age of seventy. As an associate judge with a humanist bent, he was a strong dissenter in a court often characterized as conservative.

In *People v. Tiger*, 32 N.Y.3d 91 (2018) he wrote an erudite, solo dissent against the majority's holding that unless a defendant has discovered new DNA evidence that proves his actual innocence, he should not be allowed to collaterally attack a judgment that arises from a guilty plea, even one based on non-DNA evidence of actual innocence, because doing so "contradicts the solemn admission of guilt entered during the course of a judicial proceeding free of constitutional error" and "would have enormous ramifications to the efficacy of our criminal justice system."

In *People v. Regan* 39 N.Y.3d 459 (2023) he authored the majority opinion that released a man from prison for failure to receive his constitutional right to prompt and just prosecution because the government failed to conduct any investigation, including DNA testing, for three years after the crime with which he was charged and waited until four years after the crime to indict him.

"Our constitution allows for modest unexcused delays; it allows for lengthy justifiable delays," states the opinion. "But it does not allow for lengthy unexplained or, as here, inexplicable delays caused by lethargy or ignorance of basic prosecutorial procedures. The constitutional prompt prosecution guarantee benefits defendants, victims and society at large, and it is the role of the courts to protect it. In this case, the police and prosecutors did not take defendant's constitutional rights or the complainant's sexual assault seriously; they did not act expeditiously with regard to either."

In the high-profile case of *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022) Judge Wilson wrote a forceful dissent where the majority threw out a Democratic legislature's proposed redrawing of political district lines, which led to a disruption in Democratic state political dominance and the Republicans flipping four congressional seats. "The Constitution does not prohibit the creation of districts highly partisan in one direction or the other unless the redistricting is unconstitutional. The evidence does not show the redistricting was unconstitutional," states the judge's dissenting opinion.

In 2023, Judge Wilson was nominated by Governor Kathy Hochul to replace her prior nominee, Presiding Justice Hector LaSalle, who had a hard time of it. In April 2023, Wilson was confirmed by the Senate in a vote of 40 to 19, to become Chief Judge of the Court of Appeals of New York State, the first chief judge of color in New York State history.

Plans for the Court

"We are overincarcerating hundreds of thousands of people at a rate unmatched by any other country, and no decent society would imprison people merely because they are destitute, mentally ill or addicted," said Judge Wilson before a National Academy of Criminal Defense Lawyers meeting in 2018.

"The Supreme Court sets a floor for legal standards to apply in a variety of situations," says the judge. "But New York can always set a higher standard, and that's an important part of our job, particularly in light of the tenor of the current (United States) Supreme Court. We can provide protections above the federal floor."

To address these and other important issues, the judge proffers an obvious fix: "Our docket of cases that we hear has fallen to an all-time low. Our court should hear more than 81 cases a year. I think double that is more appropriate. And we should not be interfering with the decisions of the Appellate Division justices about which of their decisions they need us to review. They know some of the important issues that need adjudicating by the Court of Appeals because they see the kinds of cases that are in the appellate pipeline before we do."

According to a recent article in "Leaveworthy," the Court of Appeals' docket under its most recent leadership shrank from 225 appeals heard in 2016 to 81 in 2021, due in part to the Court of Appeals discouraging the lower courts from sending appeals to the high court and because fewer leave applications were granted. "It's very difficult to be the nationally preeminent court of any kind if you're deciding fewer and fewer and fewer cases," Wilson noted.

"We will also move away from the ten-minutes-of-oral-argument-no-matter-what unofficial rule that exists," said the judge. "We will be evaluating cases more closely to determine which ones warrant more time for oral argument."

To make the Court more transparent and accessible, Judge Wilson says that at least one week of oral argument each year will be held on the road, in different places across the state, including Buffalo and downstate. "We will also vouch-in more judges from around the state to hear cases in this Court when a sitting judge has to recuse or is otherwise absent. Vouching-in builds collegiality with our colleagues in the Appellate Division, and judges appreciate the opportunity to sit on a case in the Court of Appeals and work with us toward just resolutions that set the law for the State."

As for perennial talk of creating a Fifth Department in New York to alleviate the caseload of the overworked Second Department, "That requires an amendment to the Constitution," notes Judge Wilson, "which may be necessary given the huge volume of appeals handled by the Second Department. Unlike the other three departments, the Second Department sits in panels of four instead of five judges, simply because it does not have enough judges to do otherwise. That's hardly desirable. But it has been necessary for decades because there are not enough judges in the Second Department.

Irrespective of whether a new department is created, we can increase the number of judges and we should. The current law says one judge per 50,000 people in the population. That could be changed to address not just the caseload in the Second Department, but allow more flexibility in created Supreme Court judgeships where they are needed. This will be an immediate administrative priority for me."

If nothing else, Judge Wilson has begun his tenure with more open communications and a policy of addressing the real-life procedural and substantive issues faced by New Yorkers.

Appellate Motions for Reargument

BY THOMAS R. NEWMAN, ESQ.

Over seventy years ago, Cohen & Karger, in their leading work "Powers of the New York Court of Appeals," cautioned counsel that "[a] motion for re-argument is generally an act of desperation: It is a psychological device for raising hopes which are invariably doomed to defeat. The percentage of cases in which a motion for reargument has been granted in the Court of Appeals is very low – unquestionably less than one out of one hundred."

Since hope springs eternal in the human breast, some defeated litigants refuse to accept Cohen & Karger's spot-on assessment that there is virtually no chance that their appellate motions for reargument will be granted. From 2014 to 2022, 224 motions for re-argument of an appeal were made and all were denied, while just one of 502 motions for reargument of a motion was granted.

Counsels and their clients appear to have gotten the message. So far in 2023, only two motions for reargument of an appeal to the Court of Appeals were timely made and both were denied, while two motions for reargument were dismissed as untimely. Fifteen motions for reargument of a motion for leave to appeal were made and all were denied.

Court of Appeals Rule 500.24(b), (c) sets forth the requirements for a motion for reargument: "Movant shall serve the notice of motion not later than 30 days after the appeal, certified question or motion sought to be reargued has been decided, unless otherwise permitted by the Court.

"The motion shall state briefly the ground upon which re-argument is sought and the points claimed to have been overlooked or misapprehended by the Court, with proper reference to the particular portions of the record and to the authorities relied upon."

Similarly, Practice Rule of the Appellate Division 1250.16(d) requires that motions for reargument or leave to appeal to the Court of Appeals must be made within 30 days after service of the underlying court order with notice of entry.

Although these rules governing reargument are clear and have been for over a century, disappointed litigants will often fail to comply by seeking to reargue their entire case. Where motion papers for reargument "are nothing more than a reiteration and amplification of those which were addressed to [the court] upon the original argument" the motion will be denied. *O'Brien v. Mayor, etc., of New York*, 142 N.Y. 671, 671-672 (1894).

Thus, it is not enough to urge only that a decision was wrong. The court does not conceive of a motion for reargument "as a means by which a defeated party can procure reconsideration of a decision fully considered and fully understood when made." (Cohen & Karger) Yet frequently, that is all disappointed litigants do rather than specify the basis(es) for reargument.

It is also "a mistake for counsel to assume that any particular portion of his argument, which has not been the subject of express reference in the opinion, has been overlooked. It is scarcely possible within the bounds of an ordinary opinion to meet and answer every argument which has been made by counsel orally or which may be in his brief." *Fosdick v. Hempstead*, 126 N.Y. 651, 653 (1891).

In New York's appellate courts, if you are the prevailing party and think it necessary, you may submit an affidavit and/or brief in opposition to a motion for reargument. But opposition papers should be extremely brief and not attempt to reargue the merits of the case. They have already been decided in your favor.

Oppositions should be directed squarely at the movant's claim that the court overlooked or misapprehended some vital point. You may do this by reference to the pertinent portions of the court's opinion or memorandum, or by reference to the record and briefs. Your task will be to show that the court had before it all of the relevant evidence and all of the applicable law to ground its decision. Very often, a short affidavit will suffice.

Every so often when an appeal is decided by a sharply divided court, 3–2 in the Appellate Division or 4–3 in the Court of Appeals, and a forceful dissenting opinion has been written, the losing party will seek just one more chance to persuade another judge of the righteousness of its cause. The fact that a case was decided by a narrow margin, however, is not a ground for granting reargument. Indeed, it usually shows that all the arguments for both sides have been considered and thoroughly thrashed out by the judges.

It is also well to bear in mind that just because the court has granted your motion for reargument is no assurance that it will alter the outcome. Very often, reargument is granted to limit the effect of the court's decision, certain undesirable consequences not previously considered having been brought to its attention, or to shift the emphasis of the earlier opinion.

The court may find that in arriving at its decision, it neglected to make certain findings of fact necessary to support the validity of the result reached. In such a case, reargument will serve as the means by which the court can correct any ambiguities and cure any oversights in its main opinion while adhering to its conclusion.

Thomas R. Newman is original author of Buzard & Newman, New York Appellate Practice (LexisNexis, publ.) and the New York Law Journal's expert columnist on appellate practice. He is a past chair of the NYSBA Committee on Courts of Appellate Jurisdiction and a Fellow of the American Academy of Appellate Lawyers.

Order of Protection Issues Percolate on Appeal

BY SAM FELDMAN, ESQ.

Orders of protection that restrict defendants' contacts with protected parties are a regular feature of criminal cases in New York. Although frequently litigated in trial courts and often highly significant to the parties involved, these orders have often been almost invisible on appeal. In the past few years, however, a leading case from the Appellate Division, First Department, has focused attention on these orders, and several departmental splits on commonly occurring issues suggest that orders of protection may feature in one or multiple Court of Appeals cases in the near future.

Prosecutors often seek orders of protection in criminal cases that feature civilians as complainants or key witnesses. These orders come in multiple varieties. They may require the defendant to stay away from and avoid all contact with the protected party (a "full order") or they may permit contact but prohibit the defendant from assaulting, harassing or otherwise harming the protected party (a "limited order"). Temporary orders ("TOPs") are generally issued at arraignment and renewed periodically while the case is pending. Final orders ("FOPs") lasting years into the future are issued at sentencing. In many cases where the parties are strangers, these orders are uncontroversial, but they can raise difficult questions when the parties know each other – particularly if they cohabitate, are related, have a child in common, or live in the same building.

These difficult cases were the focus of a landmark First Department decision, *Crawford v. Ally*, 197 A.D.3d 27 (1st Dep't 2021) which attracted amicus briefs from public defense and civil rights organizations as well as press attention from "The New York Times." The petitioner in that case, Shamika Crawford, had been charged with misdemeanors based on her partner's allegations of domestic violence. The New York City Criminal Court issued a full TOP at arraignment that required her to stay away from her partner and his residence – which, in this case, was Crawford's own apartment, which she leased and where she lived with her young children. After the Criminal Court refused to modify the full order to a limited order that would allow her to return home, Crawford sought a writ of mandamus requiring the Criminal Court to hold an evidentiary hearing.

The First Department held Crawford was entitled to the writ, although it declined to articulate "the precise form of the evidentiary hearing required." *Id.* at 34. Instead, the court held only that, "when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP, the Criminal Court should conduct a prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued." *Id.*

Crawford constituted the first but not the last word on the topic of what process a court must follow before issuing a TOP that deprives a defendant of an important interest. According to statewide non-profit news outlet "New York Focus," defense attorneys across New York City reported that "judges have been applying the ruling in a highly limited fashion, if at all." Part of the reason may lie in a controversial memo produced by the Office of Court Administration three days after the First Department decision, which instructed trial courts that *Crawford*

"SHOULD NOT BE READ as to require live witnesses and/or non-hearsay testimony" and discouraged them from holding "anything approaching a full testimonial hearing."

Some attorneys told "New York Focus" that judges were holding a "hearing" at arraignment that consisted merely of reviewing the defendant's rap sheet and the complaint. The proper scope and procedure for a *Crawford* hearing will likely be decided by the Appellate Division and perhaps the Court of Appeals.

TOPs expire before the entry of any final judgment, so it's unusual for an appellate court to rule on issues involving them; *Crawford* was decided on an appeal from a mandamus decision, and only because the First Department held that a mootness exception applied. FOPs, on the other hand, have been appealable as part of the judgment in criminal cases since the Court of Appeals so held in *People v. Nieves*, 2 N.Y.3d 310 (2004).

The specific issue raised in *Nieves* concerned the expiration date of an FOP, which has become a frequent topic of criminal appeals. Criminal Procedure Law §§ 530.12 and 530.13 set limits on the duration of FOPs: depending on the offense, these orders must expire no later than two to eight years after the date of sentencing or the end of the sentence, whichever comes later. But sentencing courts frequently set expiration dates without taking jail credit into account. For example, if a defendant is convicted of a felony and sentenced to one to three years in prison, the FOP must expire no later than eight years after the end of that sentence. But a court that sets an expiration date 11 years after sentencing may be making a mistake: if the defendant spent a year in jail prior to sentencing, he or she has effectively served a year of the sentence already, and the maximum permissible expiration date is only ten years after sentencing.

The defendant in Nieves challenged the expiration date of his FOP, which failed to take his jail credit into account, but the Court held the issue unpreserved because there was no objection at sentencing. The Court suggested that defendants in this situation should move to modify the FOP in the trial court, where they can "expeditiously obtain correction of the orders and, even if not successful, will have created a record that will facilitate appellate review." *Id.* at 317.

This advice, often quoted by the Appellate Division in declining to exercise its interest of justice jurisdiction, reflected an unfortunate mistake by the Court. While an FOP issued at sentencing may be appealed as part of the judgment of conviction, no statute permits an appeal from a decision denying modification of an FOP, as the Second Department held in *Utter v. Usher*, 150 A.D.3d 863, 864 (2d Dep't 2017). Although the Court clearly contemplated appellate review of these decisions, it may take a legislative amendment of the Criminal Procedure Law's provisions governing appeals in order to permit such review.

There is currently a departmental split on the preservation requirement for claims of error in FOP expiration dates. Because the FOP is often treated as an afterthought, sentencing courts frequently fail to specify an expiration date on the record. In this circumstance, when "the record does not reflect that the duration of the order was disclosed to defendant or to defense counsel at any point prior to or during sentencing," the Third Department has held that the "defendant had no practical ability to register a timely objection to the duration of the order and, accordingly, preservation was not required." *People v. Clark*, 155 A.D.3d 1184, 1185 (3d Dep't 2017). The Third Department adhered to that holding in *People v. Surdis*, 160 A.D.3d 1305, 1306 (3d Dep't 2018) which presented a slightly different fact pattern: when issuing the order of protection, the sentencing court stated that its expiration date would be in 2030, but in fact the written order displayed an expiration date of 2036.

In the Second Department, on the other hand, while panels have occasionally cited and followed *Clark, see People v. Gonzalez*, 207 A.D.3d 656 (2d Dep't 2022); *People v. O'Sullivan*, 198 A.D.3d 986, 987 (2d Dep't 2021) more often panels have held that a defendant failed to preserve an expiration date issue even if the court never specified the date on the record. *E.g., People v. Lloyd-Douglas*, 208 A.D.3d 520 (2d Dep't 2022); *People v. Gabor*, 192 A.D.3d 824, 824 (2d Dep't 2021). Although few decisions from other appellate courts have addressed this preservation issue, the First Department and the Appellate Term for the 9th and 10th Judicial Districts have each adopted the Second Department majority rule in a single decision. *People v. Williams*, 40 A.D.3d 402, 403 (1st Dep't 2007); *People v. Delvecchio*, 34 Misc. 3d 142(A) (App. Term, 9th & 10th Jud Dists. 2012). As expiration date issues arise with some frequency, the Court of Appeals may be called upon to resolve this departmental split regarding preservation of these issues.

Finally, the Appellate Division is also split on the question of who can be a beneficiary of an order of protection in a criminal case. The Criminal Procedure Law permits courts to issue TOPs or FOPs in favor of someone who is a "victim" or a "witness" in the case, which the Third Department has interpreted narrowly: "The witnesses referred to in the statute must be those who actually witnessed the offense for which defendant was convicted, rather than simply all witnesses who testified at trial." *People v. Somerville*, 72 A.D.3d 1285, 1288 (3d Dep't 2010); see also *People v. Myers*, 163 A.D.3d 1152, 1156 (3d Dep't 2018) (vacating order of protection in favor of person who "saw people screaming and arguing outside his apartment and the victim taking pictures" but who "did not witness the shooting"). The Second Department, however, has interpreted "witness" more broadly, explicitly disagreeing with cases like Somerville and Myers and "declin[ing] to adopt" the Third Department's construction. *People v. Daniel A.*, 183 A.D.3d 909, 909 (2d Dep't 2020).

While the law in the Third Department is that witnesses "must be those who actually witnessed the offense," *Somerville*, 72 A.D.3d at 1288, in the Second Department a court may issue an order of protection for any "individual who had information that was relevant to the offense." This explicitly recognized split between Second Department and Third Department case law makes Court of Appeals review likely in the near future.

Sam Feldman is a senior staff attorney at Appellate Advocates, where he represents indigent criminal defendants before the Appellate Division, Second Department, and the New York Court of Appeals.

When Is Final Final?

BY ANDREW M. DEBBINS, ESQ.

The civil justice system serves many purposes, but its core function is dispute resolution that provides finality.

Finality is a central concept to appellate practice. Indeed, the civil jurisdiction of the Court of Appeals hinges on finality, and civil appeals to the Court of Appeals generally can be taken only from an order or judgment that finally determines an action or special proceeding. N.Y. Const. art. VI, § 3(b).

The question of whether an order is final, however, can be surprisingly vexatious. Each year, the Court of Appeals decides scores of matters to be non-final and thus unreviewable while offering little guidance why. The admonishment that the order sought to be appealed "does not finally determine the action within the meaning of the Constitution" appears frequently in the Court's decisions. That familiar phrase can easily leave attorneys wondering.

Indeed, the rule of finality may often be an afterthought for attorneys, since automatic review by the Appellate Division is available. But when a practitioner anticipates appealing an order of the Appellate Division, failing to consider whether the trial court's order finally determined the action may spoil their chances for a trip to the Court of Appeals.

Twice in recent years I have seen the Court of Appeals surprise litigants by denying a motion for leave to appeal an assumedly final order because it did not finally determine the underlying action. In each case, the Appellate Division's order seemed to dispose of all the issues in the action, which would make the order final within the meaning of CPLR 5611.

The first case, *Matter of Maziarz v. W. Reg'l Off-track Betting Corp.*, 207 A.D.3d 1065 (4th Dep't 2022), involved an Article 78 action to compel compliance with a Freedom of Information Law request. The petitioner appealed from a trial court order denying his request for attorney's fees and litigation costs. This was the only issue on direct appeal.

The Appellate Division affirmed, holding that although the respondent had failed to properly respond to the FOIL request, delays caused by the pandemic excused the delay. What was unsaid in the Appellate Division order is that in its order on appeal, the trial court said it was going to conduct an *in camera* review of the documents sought by the plaintiff. But the trial court order did not address the outcome of its *in camera* review.

The Court of Appeals, familiar with the record and understanding that the underlying case was still open, dismissed the petitioner's motion for leave to appeal because the Appellate Division order "does not finally determine the proceeding within the meaning of the Constitution." *Maziarz v. Western Reg'l Off-Track Betting Corp.*, 39 N.Y.3d 980 (2023). So, although the order denying costs was final, the underlying case continued and so the order on appeal was not a final order from the underlying action.

The second case is more difficult to understand. The plaintiff sued its two lawyers for failing to advise them of the availability of a D&O policy concerning a third-party action against the plaintiff for breach of contract. The trial court dismissed the cases against both law firms. But for one defendant, the trial court dismissed the case "with prejudice." For the other defendant it did not, allowing that defendant to have sought

leave to replead and proceed with his case if the motion were granted.

In *Nat'l Air Cargo, Inc. v. Jenner & Block, LLP*, 203 A.D.3d 1655 (4th Dep't 2022), the plaintiff appealed the trial court's dismissal against both defendants. The Appellate Division affirmed. The plaintiff then sought leave to appeal that order with respect to the defendant whose trial order did not dismiss the action "with prejudice." The Court of Appeals dismissed the petitioner's subsequent motion for leave to appeal "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." *Nat'l Air Cargo, Inc. v. Jenner & Block, LLP*, 39 N.Y.3d 1068 (2023). At first, this is difficult to understand. How could an order dismissing the action against the defendant not dispose of all underlying issues in the action?

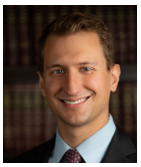
The second sentence of CPLR 5611 provides that "[i]f the aggrieved party is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his having performed it." Section 5611 applies only if leave to replead or perform some other act is "granted," and then only if a specific time limit is fixed. In this case, neither the trial court order nor the Appellate Division "granted" the plaintiffs leave to replead, let alone within a specific time. They were silent on both dismissal with prejudice and leave to replead.

The Court of Appeals deemed the Appellate Division's order non-final since it was silent on the issue of the plaintiff's repleading from what was a non-final order of dismissal. If the action against the lawyer had been dismissed "with prejudice," the dismissal order would be deemed final. In other words, without the "with prejudice" language, repleading was possible and the order was not final. If there is no time limit in the original order, the motion for leave to replead could come at any time, possibly reviving an action long treated as resolved by the litigants.

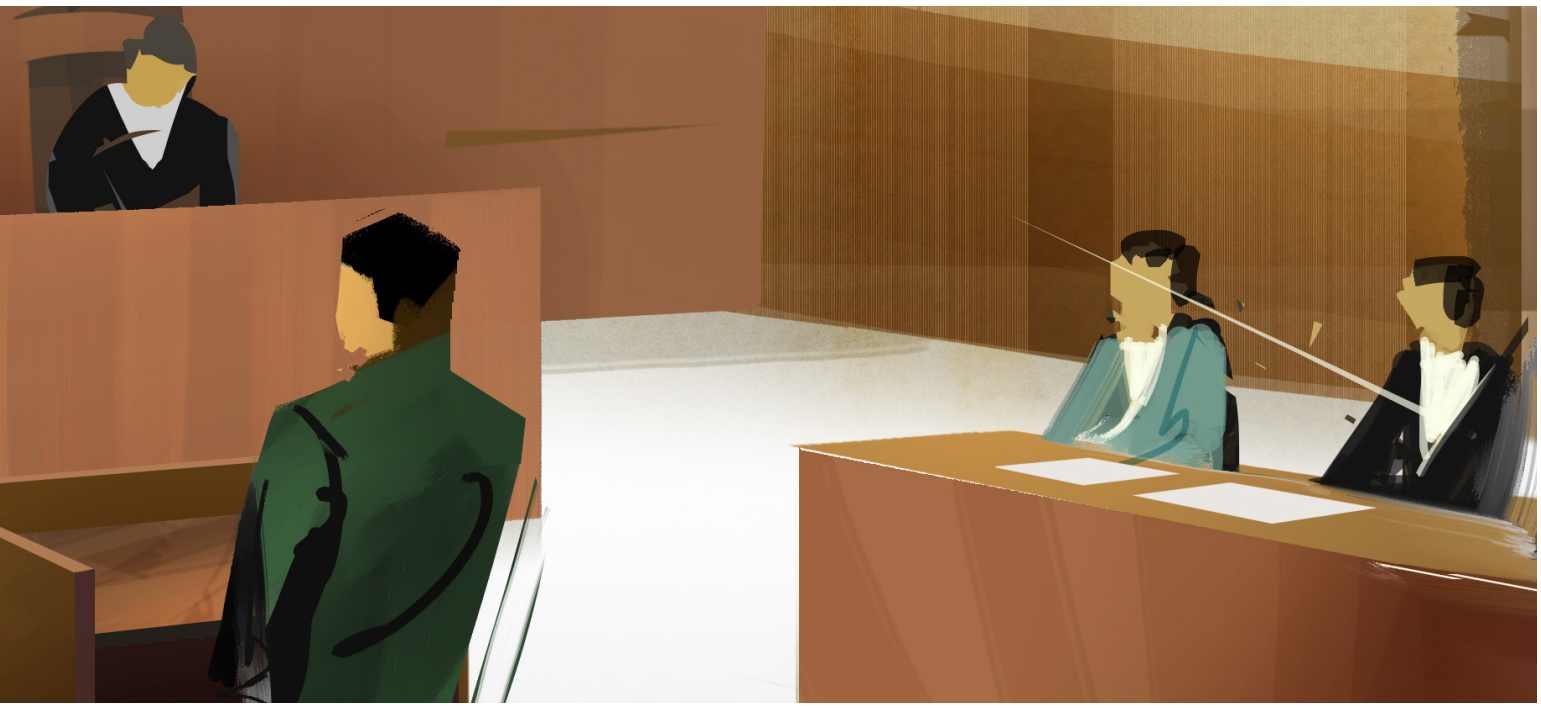
When an action appears final but is not, should it really be marked as "disposed" in NYSCEF? In the examples above, both actions were marked "disposed." Perhaps more importantly, should the mere prospect that a plaintiff-appellant might move for leave to replead automatically constitute a non-final order simply because the order was not "with prejudice"? That is particularly curious because the possibility that a plaintiff will be granted leave to replead is narrow.

What the plaintiffs-appellants in the second example should have done was move for leave to replead in the trial court and then, presuming the motion is denied, pursue another appeal to the Appellate Division of that final order. This would likely come only at significant additional cost to the parties.

The lesson is that litigants that anticipate seeking review by the Court of Appeals would do well to ensure the underlying trial court order is really final; that it disposes of all issues in the action and is entered "with prejudice." Too often, this issue is far from the minds of practitioners who draft or review a proposed order. But failing to consider the rule of finality when drafting the trial court order may cause a practitioner to get an unpleasant surprise when reviewing the Court of Appeals decision list.



Andrew Debbins is a trial attorney and appellate practitioner at Connors LLP in Buffalo. He is a member of the Committee on Courts of Appellate Jurisdiction and the Western District of New York Local Rules Committee.



Commentary

BY JAMES EDWARD PELZER, ESQ.

In 1896, when the New York Constitution went into effect, civil actions terminated in a judgment and special proceedings terminated in something called a "final order." With the adoption of the CPLR in 1965, the use of the term "final order" was abandoned, and now special proceedings also terminate in a judgment. So, there is no such thing as a "final order," as that term was once used, in current New York practice.

Originally, the concept of "finality" was irrelevant to issues relating to the jurisdiction of the Court of Appeals. Appeals to that court lay as of right from judgments or final orders. The way the system worked was that an appeal from either of those papers was taken to the Appellate Division and after it determined the appeal, an appeal from the judgment or final order of the trial court – not the Appellate Division order – lay to the Court of Appeals.

In the mid-1920s, practice changed, and statutes authorized appeal directly from the order of the Appellate Division. But the jurisdiction of the Court of Appeals was not changed. This required the Court of Appeals to determine whether the Appellate Division order was the "equivalent" of a judgment or final order of the trial court. From this change in practice, but not jurisdiction, the so-called "finality" jurisprudence of the Court of Appeals arose.

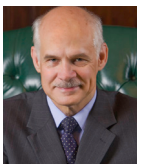
In *Burke v. Crosson*, 85 N.Y.2d 10, 15, 623 (1995) the Court of Appeals held that "the concept of finality as used in CPLR 5501(a)(1) is identical to the concept of finality that is routinely used to analyze appealability under article VI, § 3 (b) (1), (2) and (6) of the State Constitution and the related statutory provisions (*see*, CPLR 5601, 5602)" and it provided a working definition of the concept, stating "a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters."

Even though there no longer is a document called a final order in New York practice, the Court of Appeals has routinely continued to speak of final orders – meaning not the paper that concludes a special proceeding but, rather, an order of the Appellate Division that has the attribute of finality under Burke for purposes of its jurisdiction. That would be fine if use of the now-confusing term "final order" were applied only to orders of the Appellate Division from which an appeal might lie to the Court of Appeals, but it also has been applied, erroneously, to trial court orders, resulting in holdings that such orders must be separately appealed and are not reviewable by the Appellate Division on an appeal from a final judgment.

This creates a trap for the unwary under CPLR 5501, which is intended to permit litigants to await the entry of a final judgment and, on appeal therefrom, seek review of any order or interlocutory judgment that necessarily affected the outcome of the case.

The NYSBA CPLR Committee and the Committee on Courts of Appellate Jurisdiction have approved an affirmative legislative proposal to amend CPLR 5501 to make it clear that any outcome-affecting trial court order may be brought up for review on appeal to the Appellate Division from a final judgment. It has been stalled since 2013 or so, but we are still trying to get the proposal before the Legislature and passed into law.

The problem is that the whole subject is arcane and confusing and requires a lengthy memo to explain it. We have made several attempts at an executive summary, but the matter is still stalled with the leadership of the NYSBA CPLR Committee.



James Pelzer was Clerk of the Appellate Division, Second Department, for eleven years and supervisor of the Court's Decision Department before that. He is the co-author with Martin Brownstein and Alan Chevat of "Justice Delayed: A Status Report on the Condition of the Court" and an active member of the NYSBA Committee on Courts of Appellate Jurisdiction.

ARE YOU ARGUING AN APPEAL BEFORE THE APPELLATE DIVISION OR COURT OF APPEALS?

If you answered "yes," consider participating in the Committee on Courts of Appellate Jurisdiction's Moot Court Program. This program offers NYSBA members who are scheduled to argue a case before the Appellate Division or the Court of Appeals the opportunity to moot their argument before a panel of experienced appellate attorneys and former judges. Following the moot, the panel will provide the attorney with helpful feedback and suggestions.

For more information on the CCAJ Moot Court Program, and to obtain and complete a form to request a moot argument, go to nysba.org/committee-on-courts-of-appellate-jurisdiction-moot-court-program/.

NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON COURTS OF APPELLATE JURISDICTION
One Elk Street, Albany, NY 12207

Non-Profit Org.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

New York State Bar Association
Committee on Courts of Appellate Jurisdiction
Mission Statement

Adopted September 15, 2020

- **Engage** attorneys, members of the judiciary, judicial staff, academics, and other interested parties in discussion of current issues in appellate practice;
- **Report** on the need for statutory and procedural rule changes to improve the administration of justice in state and federal appellate courts located in New York;
- **Educate** attorneys and pro se litigants about the subject of appellate practice by producing educational materials and sponsoring programs to enhance their skills in perfecting, briefing, and arguing appeals, and engaging in appellate motion practice; and,
- **Act** to promote access to appellate courts and assist the administration of justice by, for example, supporting programs to aid indigent litigants with pending appeals.