LEAVEWORTHY

The Newsletter of the NYSBA Committee on Courts of Appellate Jurisdiction SUMMER 2024

Conflicts between New York v. Federal IAC Standards

The Next Step In Modernizing New York Courts

Pre-Impact Terror Damages in Death Actions: A Lottery

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Summer 2024

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MESSAGE FROM THE CHAIR

For over 50 years, the Committee on Courts of Appellate Jurisdiction (CCAJ) has served as an influential voice in the New York State Bar Association. Through the hard work and creativity of past leadership, our committee has worked hard to fulfill its mission to engage in discussions about appellate practice, report on the need for reforms, educate the public, and act to promote access to appellate courts.

When I joined the committee twelve years ago, one of the first initiatives on which I worked was the project to harmonize the differing rules of the four Appellate Division departments. Although the project took years to become what is now the "Practice Rules of the Appellate Divisions," the process shows how a bar association can benefit the bench, the bar, and the public.

The committee's proposed reforms, like our proposal to change the process by which criminal leave applications are decided by the Court of Appeals, have not yet resulted in a policy change, but even where reform is not imminent, the committee has always prioritized taking a position on key issues that affect appellate practice. As chair, I look forward to collaborating with all of you to continue the committee's long history of advocating for reforms that improve appellate practice for everyone

Henry Mascia,
Chair, CCAJ

IN THIS ISSUE

Conflicts between New York v. Federal IAC Standards

BY SAM FELDMAN

When a defendant has been denied the effective assistance of counsel (IAC) courts generally apply the familiar two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). This test is so familiar that *Strickland* is the sixth most cited Supreme Court case of all time.

But in New York, the Court of Appeals has developed its own ineffective assistance of counsel case law. Several briefs and federal court opinions have raised unresolved questions between the New York and federal standards.

Under *Strickland*, an attorney's "deficient performance" constitutes ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *(Id*. at 687, 694). In New York, though, the Court of Appeals has held that, as a matter of state constitutional law, a showing of prejudice is not essential to an IAC claim. (*People v. Stultz*, 2 NY3d 277, 283-84 (2004)). New York courts cite the *Strickland* standard in their opinions but tend to rely on the state analysis in resolving IAC claims. For this reason, the common assumption among New York judges and lawyers is that the New York standard is more favorable to criminal defendants than the federal standard.

This assumption may not be warranted. Certain aspects of New York's standard may be less protective of a defendant's rights than the federal standard.

One area of controversy concerns the breadth of the ineffectiveness inquiry: Is it concerned with counsel's performance as a whole or with particular errors and omissions and their effect on the outcome of the proceeding? In other words, if an attorney's performance was deficient in one respect – a disastrous cross-examination, for example, or a failure to interview a potential key witness – does it matter that the attorney may have excelled at other aspects of representation, such as delivering a rousing summation or filing successful pretrial motions?

From the beginning, the Supreme Court has held that a single instance of ineffectiveness, if serious enough, can lead to reversal. In a companion case decided with *Strickland*, the Supreme Court noted that "the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole – specific errors and omissions may be the focus of a claim of ineffective assistance as well." (*United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984)). Two years later, the Court was even more specific, rejecting the prosecution's argument that when a lawyer committed a prejudicial error, competence elsewhere might "lift counsel's performance back into the realm of professional acceptability." (*Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986)).

In New York, however, the Court of Appeals had already begun defining its own ineffective assistance of counsel doctrine pre-*Strickland*, in which the key question is whether the defendant received "meaningful representation" as a whole. (e.g., *People v. Baldi*, 54 NY2d 137, 147 (1981)). Under New York law, "the effectiveness of a representational effort is ordinarily assessed on the basis of the representation as a whole." (*People v. Blake*, 24 NY3d 78, 81 (2014); see also, *People v. Harris*, 26 NY3d 321 (2015)).

The federal Court has yet to examine the seeming conflict between New York and federal law on this issue, an issue that has been highlighted by federal judges of the Second Circuit going back nearly two decades. (e.g., *Henry v. Poole,* 409 F.3d 48, 69-70 (2d Cir. 2005)) (doubting that New York's standard complies with *Strickland*).

In *Rosario v. Ercole*, 617 F.3d 683 (2d Cir. 2010) Chief Judge Dennis Jacobs, in a dissent from denial of rehearing en banc that was endorsed by four other judges, opined that New York's ineffectiveness standard was "contrary" to the standard set forth in *Strickland*: "(T)he New York test averages out the lawyer's performance while *Strickland* focuses on any serious error and its consequences." (*Id.* at 685-86). Judge Jacobs' argued that "this shift – from the specific mistake to the broader performance … concerns me and should concern the entire Court." (*Id.* at 687).

The late Judge Rosemary Pooler agreed: "The state standard can act to deny relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation. This is contrary to *Strickland*." (*Id.* at 688, dissenting from denial of rehearing en banc).

More recently, several filings have drawn attention to a related aspect of New York's ineffectiveness standard known as the single-error rule. Under this rule, a single error by an attorney cannot amount to ineffective assistance of counsel when it does not "involve an issue that was so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it." (*People v. Espinosa*, 40 NY3d 1065, 1066 (2023) quoting *People v. Rodriguez*, 31 NY3d 1067, 1068 (2018)). This standard asks not whether the lawyer's deficiency was clear-cut and dispositive, but whether the issue involved was.

As the assigned attorney at Appellate Advocates for the defendant in *Espinosa*, I filed an unsuccessful cert petition in the Supreme Court arguing that New York's standard effectively added a third prong to the *Strickland* test based solely on the number of asserted errors: one as opposed to several. An amicus brief filed by the Center for Appellate Litigation in *People v. Dunton*, 2024 NY Slip Op 02130 (2024) made a similar argument, objecting to "quantity-based formalism" as inconsistent with *Strickland* and cases like *Hinton v. Alabama*, 571 U.S. 263 (2014).

The *Hinton* Court found ineffective assistance of counsel based on a lawyer's single error (counsel mistakenly believed that a state statute restricted funding for defense

expert witnesses to no more than $1,000) without any consideration of whether the error was "clear-cut" or "dispositive." Indeed, no reasonable lawyer abandons a potentially meritorious claim simply because it is not clear-cut or a dispositive winner. The right to counsel must consist of more than an entitlement to a lawyer who will invoke fully settled and plainly applicable precedent if it disposes of a case. A lawyer must do more. The Court of Appeals itself recognized as much in cases like *People v. Turner*, 5 NY3d 476, 482-83 (2005) which upheld an IAC claim based on a lawyer's failure to raise a claim that was not "definitively settled," although the Court changed course years later in cases like *People v. McGee*, 20 NY3d 513 (2013) which adopted the heightened "clear-cut and dispositive" standard.

Applying a special test based on whether counsel's deficiency amounted to one or multiple errors invites confusion and uncertainty. Often an attorney's mistake or omission can be described with equal accuracy as one or several errors. For example, a failure to call a helpful alibi witness may sound like one error but might include multiple failures to find and interview any of several potential witnesses in addition to the failure to present their testimony at trial. Conversely, could various blunders in attempting to impeach several prosecution witnesses be aggregated into the single error of inept cross-examination? It seems illogical to rest the validity of a conviction on these semantic questions and there is little to gain from encouraging appellate and post-conviction counsel and judges to quibble over how finely to slice an error.

As with the "meaningful representation" standard, the conflict between the single-error rule and the *Strickland* standard has yet to be fully examined by a court of last resort. *Dunton* ended in an affirmance based on the merits of the underlying claim, with neither the majority nor the dissent engaging the Center for Appellate Litigation's arguments about the ineffectiveness standard. Until the Court of Appeals or the Supreme Court resolves these conflicts, New York courts and attorneys should not assume the state ineffectiveness standard is necessarily more favorable to defendants than the federal standard.

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

The Next Step In Modernizing New York Courts

BY HON. CRAIG J. DORAN AND CHRISTINE SISARIO

Many New York courthouses, maybe even the judicial system as a whole, need technology upgrades. Recognition of this need led the New York Unified Court System (UCS) to propose a bold budgetary proposal for 2025. As part of its $2.7 billion budget request, the UCS sought $93.4 million to modernize court technology including supporting and upgrading our systems and courtrooms. The budget request represents an increase of more than $22 million in core operations and capital funds.

The New York State Legislature and Governor Hochul answered the call. The 2025 budget signed by Governor Hochul includes the funds needed to create a more efficient, accessible, modern court system that includes the following:

* Revamping the website to make it more user friendly.

* More effective virtual court appearances, which is critical considering that more and more court proceedings are being handled virtually rather than in-person.

* Expanded support for those accessing the court system virtually especially by the increasing number of self-represented. The innovative Virtual Court Access Network (VCAN) provides access hubs in community-based locations to help litigants lacking appropriate technology access.

* Expedited use of e-filing in all New York courts. In this regard, the state legislature recently passed a bill long championed by the Unified Court System and the Court Modernization Action Committee, S7524/A10350, which, if signed by the Governor, will enable New York's chief administrative judge to create e-filing programs across the state in courts where e-filing is not underway.

* Courtroom modernization to bring our courts into the 21st century. With the support and expertise of the UCS' recently established Division of Court Modernization and the leadership of Division Director Sheng Guo, courtrooms across the State will be updated with improved audio and acoustics, accessibility, evidence presentation capabilities, videoconferencing, streaming, and digital signage.

The FY 2025 UCS budget reflects leadership's commitment to improving the experience of the increasing number of court users and staff. This budget confirms the appreciation that technology is a significant factor in access to justice. This laudable investment in the future of New York's courts is an important step in a journey towards a more modern and effective court system.

Craig Doran is a Justice of the New York Supreme Court Justice and chair of the Court Modernization Action Committee, which is formed to support and advise the court system in implementing technology initiatives.

Christine Sisario is director of technology for the New York State Unified Court System and a member of the committee.

Pre-Impact Terror Damages in Death Actions: A Lottery

BY THOMAS R. NEWMAN AND JAMES E. PELZER

Forty years ago, it was not clear that New York law allowed decedents in wrongful death actions to recover damages for pain and suffering from "pre-impact terror," a sub-category of conscious pain and suffering. In 1984, the Second Circuit stated, "Assuming that pre-impact pain and suffering is compensable, it must first be shown by a preponderance of the evidence that the decedent had some knowledge or other basis for anticipating the impending disaster; otherwise no basis would exist for a finding of fright or mental anguish." (*Shatkin v. McDonnell Douglas Corp.*, 727 F2d 202, 206 (2d Cir. 1984)).

Today, the right to recovery for such damages is well established. An actor whose negligent conduct causes serious emotional harm to another is subject to liability if the conduct places the other in danger of immediate bodily harm and the emotional harm results from the danger. (*Restatement (Third) of Torts: Liability for Physical & Emotional Harm* § 47 (2012); see also, *Donofrio v. Montalbano*, 240 AD2d 617 (2d Dept 1997)).

"Damages for pre-impact terror are designed to compensate the decedent's estate for the fear the decedent experienced during the interval between the moment the decedent appreciated the danger resulting in the decedent's death and the moment the decedent sustained a physical injury as a result of the danger." (*In re 91st St. Crane Collapse Litigation*, 154 AD3d 139, 153 (1st Dept. 2017)).

Successful claims

In *91st Street Crane Collapse*, "(T)he evidence supported the jury's findings that Leo (*crane operator*) and Kurtaj (*on the ground*) both endured inconceivable pre-impact terror…. It is undisputed that the crane did not fall straight to the ground. With Leo in the glass cab, it first teetered, and then fell backward from a height of 200 feet (*approximately 14 stories*), struck the Electra building, and bounced off a number of terraces before reaching the ground, where it crashed down onto Kurtaj. Leo, trapped in the glass cab, was aware of his impending death, as detailed by witnesses in the adjacent apartment buildings…. Kurtaj saw what was happening and yelled to his coworkers, 'Run, run, the crane is coming down.' A medical expert testified, based on defensive injuries to Kurtaj's forearm, that Kurtaj was aware of the crane collapsing on him and tried to protect himself from the falling crane and debris." (154 AD3d at 153-154).

The Appellate Division ordered a new trial on damages unless it was stipulated that the pre-impact terror awards of $7,500,000 for each man were reduced to $2,500,000 for Leo and $2,000,000 for Kurtaj. The decision contains not a hint of how these amounts were arrived at or why Kurtaj received $500,000 less for his fright of impending death than Leo Neither does the court explain why Kurtaj's verdict was reduced to $7,500,000 for four hours of "inconceivable pain and suffering" while Leo's verdict was reduced to $5,500,000 for 16 minutes of great pain. The choice of the adjective "inconceivable" instead of "great" does not warrant giving Kurtaj $2,000,000 more than Leo

At almost the other extreme, in *Vatalaro v County of Suffolk*, 163 AD3d 893 (2d Dept. 2018) the evidence at trial established that decedent made eye contact with the defendant bus operator for approximately one second before the bus collided with decedent's vehicle. The Second Department found the $250,000 award for pre-impact terror deviated materially from what would be reasonable compensation and ordered a new trial on damages unless plaintiff accepted a reduced award of $50,000.

"Eyewitness testimony to the decedent's pain and suffering (*in such cases, pre-impact terror*) is not essential to recovery; indeed, in most cases of the present type it would be difficult if not impossible to obtain. But at least some circumstantial evidence must be adduced from which it can reasonably be inferred that the passenger underwent some suffering before the impact." (*Shatkin*, 727 F2d at 206).

In *Lang v Bouju,* 245 AD2d 1000 (3d Dept 1997) decedent, riding a motorcycle, collided with a pickup truck several seconds after seeing the truck and trying to stop before the fatal collision. "In view of his speed and proximity to the truck when this occurred, and his inability to control the motorcycle as it proceeded toward the truck, it was not unreasonable for the jury to find that, at some point prior to impact, Lang perceived the inevitable, that he was going to endure grave injury or death, so as to justify making an award for this "preimpact terror." (245 AD2d at 1001).

On appeal, the Third Department found no evidence of any physical injury to Lang before the collision and "given the extremely short period of time during which Lang could have experienced this emotional injury … and the absence of proof that he sustained any bodily injury or significant physical pain prior to his death … a recovery of $100,000 would constitute ample compensation for Lang's brief emotional pain and suffering' [pre-impact terror]…. Accordingly, this aspect of the verdict is reversed, and a new trial ordered, unless plaintiff stipulates to a reduced verdict in this amount." (245 AD2d 1001-1002).

Occasionally, courts will lump together an award for pre-impact fear and terror with an award for conscious pain and suffering. In *Torelli v City of New York,* 176 AD2d 119 (1st Dept. 1991) the First Department stated that taking "into account the pre-impact fear and terror which necessarily attended plaintiff's decedent's observation of LaFauci's automobile bearing down upon him, the horrendous nature of the injuries, which included severance of the thoracic artery, and the evidence of consciousness for at least 15 minutes and possibly as long as an hour, we find that the amount to which the trial court reduced the verdict was inadequate and that the sum of $250,000 is a more appropriate award for such damages."

In *Donofrio v Montalbano*, *supra*, "defendant's son lost control of the car he was driving at a speed of 70 to 75 miles per hour, while attempting to negotiate a curve on the Cross Island Parkway, and crashed into a tree." The only eyewitness to testify "estimated that seven to ten seconds elapsed between the time that the car first sped past him and its collision with the tree. While the driver apparently lost consciousness upon impact, the passenger, the decedent herein, was heard moaning and groaning shortly after the impact, and was declared dead within 20 to 30 minutes." The Appellate Division found that the "trial court properly exercised its discretion in conditionally reducing the jury award for conscious pain and suffering, which included preimpact terror (*from $1,500,000 to $100,000*). As the (trial) court found, the duration within which the decedent could have experienced any preimpact terror was limited to only several seconds, which warrants, at best, a minimal award." (240 AD2d at 618).

In *Boston v Dunham*, 274 AD2d 708 (3d Dept. 2000) decedent, operating a motorcycle, collided with a car at an intersection. The Third Department found that "the record supports plaintiff's claim for damages for preimpact terror embodied in the observations of a witness who saw a surprised look on decedent's face just prior to impact." It reversed the dismissal of "the portion of plaintiff's damages claim related to preimpact terror." (274 AD2d at 712).

Unsuccessful claims

Mere speculation will not suffice. (*Phiri v Joseph*, 32 AD3d 922, 923 (2d Dept. 2006)). In *Anderson v Rowe*, 73 AD2d 1030, 1031 (4th Dept. 1980) the Fourth Department held that a motion for summary judgment dismissing the claims for conscious pain and suffering brought by the administrator of the estate of two girls was properly granted. "All of the evidence shows that these girls were killed instantly upon impact. The plaintiff was not able to present any evidence that they suffered any conscious pain. Nor was the plaintiff able to show evidence from which one might imply that the decedents were aware of the danger and suffered from pre-impact terror."

In *Keenan v Molloy*, 137 AD3d 868, 871 (2d Dept. 2016) decedent was struck and killed by a bus. The evidence failed to establish that decedent "perceived grave injury or death" prior to impact with the bus necessary to support a claim of pre-impact terror. No damages were awarded for pre-impact terror. "Although Molloy (*the bus driver*) testified that he heard 'a scream' 'a few seconds' before he 'felt the bus hit something,' there was no evidence to establish that the scream … came from the decedent."

In *Kevra v Vladagin,* 96 AD3d 805, 806 (2d Dept. 2012) decedent died as a result of a one-car accident when the vehicle in which he was seated in the rear passenger compartment flipped onto its side and its roof then struck a tree. The driver and the front seat passenger survived. Defendants were granted summary judgment, submitting evidence that "decedent did not make any sound or movement, and that he appeared not to be breathing, during the approximately one hour in between the occurrence of the accident and the official time of death." The court stated that "(a)ny finding that the decedent perceived grave injury or death, so as to justify making an award for 'preimpact terror,' would be based on impermissible speculation."

Conflicting results in two claims from the same crash

Shu-Tao Lin v McDonnell Douglas Corp., 742 F2d 45, 53 (2d Cir. 1984) and *Shatkin v McDonnell Douglas Corp.,* 727 F2d 202 (2d Cir. 1984) are death actions arising from the same plane crash in which the Second Circuit reached opposite results depending on where the passenger sat.

In *Shu-Tao Lin, supra*, decedent, Dr. Lin, had been assigned a seat over the left wing and the Second Circuit concluded that "a jury might find that he saw the left engine and a portion of the wing break away at the beginning of the flight, which lasted some thirty seconds between takeoff and crash." The court saw "no intrinsic or logical barrier to recovery for the fear experienced during a period in which the decedent is uninjured but aware of an impending death." (742 F2d at 53.) It affirmed the jury's award of $10,000 damages for Dr. Lin's pre-impact pain and suffering for "approximately three seconds before the crash," relying on *Juiditta v Bethlehem Steel Corp.,* 75 AD2d 126, 138 (4th Dept 1980) ($70,000 for pain and "apprehension of impending death" experienced during a one-hour period).

In *Shatkin, supra,* the Second Circuit concluded there was insufficient evidence to support a finding that a passenger seated on the right side of the wide-body plane suffered any pre-impact conscious pain and suffering or that he was even aware of the impending disaster until approximately three seconds before the crash. The court found no evidence permitting an inference Shatkin was aware the left engine had been lost on take-off and that it would be sheer speculation to infer he knew of the incident. (727 F.2d at 206-207). This is a questionable finding. The court seems to have acknowledged the existence of some evidence from which a jury could have concluded that Shatkin was aware of the impending crash.

Conclusion

It is impossible to objectively evaluate pre-impact terror claims for settlement purposes before a jury verdict because the decisions in such cases give no practical guidance as to whether an offer or demand would be fair and reasonable. There is wide disparity in awards, with no explanation for why the presumed (and that is all it can ever be) pre-impact terror of one person deserves compensation many times greater than that of another.

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

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.

Reflections: A Career On And Off The Bench

BY HON. ERIN M. PERADOTTO

I had the privilege of serving on the New York State Supreme Court for almost twenty years, the last seventeen of which I served on the Appellate Division, Fourth Department. During that time, I served with 24 appellate division justices, many of whom became like family to me.

Working at the Appellate Division is like working in lawyer heaven, a phrase I stole from late Chief Judge Judith Kaye. From my first day on the bench, I was keenly aware that the work I did impacted people's lives and, on occasion, influenced New York jurisprudence. I worked hard as a judge and was committed to rendering decisions that were intellectually honest and did justice.

Of course, I did not do that work alone. I was surrounded by a cast of the most talented lawyers I have known including my longest serving clerk, Joseph Sroka, who started with me as an intern when he was at the University at Buffalo Law School; Elizabeth Fox-Solomon, who now works at the Equal Employment Opportunity Commission in Washington; and Katie Baumgarten, who is an immigration judge in Buffalo. My smart, dedicated, and fiercely loyal secretary, Lisa Weatherby, started with me in private practice in 1991.

The great majority of the decisions at the Appellate Division, Fourth Department, are not authored opinions. An authored opinion will be issued, however, when a case involves, for example, an issue of first impression or an application of the law to a unique set of facts. The first opinion I authored was in *Meegan v. Progressive Insurance* was in 2007. It involved a supplemental underinsurance motorist coverage case. My last opinion was in *Batavia Townhouses, Ltd. v. Council of Churches* and it involved the interpretation and application of statute of limitations provisions in the General Obligations Law to a mortgage foreclosure action. In between, I authored opinions in a wide variety of cases including product liability, insurance coverage, Dram Shop, Labor Law, SORA, and tax certiorari; Second and Fourth Amendment cases; child custody and child support cases; and matters involving punitive damages, the emergency doctrine, New York's Equal Access to Justice Act, and the seniority rights of a teacher in an Article 78 proceeding.

Some of the more memorable cases involved whether to recognize a valid, foreign same-sex marriage in New York (before passage in New York of the Marriage Equality Act); whether a corporation was an "arm of the tribe" and thus protected by the Seneca Nation of Indians' sovereign immunity; whether the use of a taser to obtain a buccal swab violated a person's Fourth Amendment rights; whether a defendant was deprived of a fair trial in a simultaneous jury trial of him and a bench trial of a co-defendant; the exercise of temporary emergency jurisdiction over children in a neglect proceeding; the application of New York's long-arm statute to an out-of-state seller of firearms; the voluntariness of a confession and waiver of Miranda rights by a criminal defendant with significant cognitive deficits; and the applicability of New York's implied consent law beyond the territorial jurisdiction of the state.

I also had the great privilege to serve on the Court of Appeals panel that decided *Bransten v. State*, 30 NY3d 434 (2017) a case involving whether the reduction of New York's contribution to health insurance benefits for state judges violated the state constitution's Judicial Compensation Clause. What a thrill it was to sit on that bench, even if just for one case.

My last session at the Appellate Division was held in the Francis M. Letro Courtroom at the University of Buffalo Law School in 2023. It was indeed special for me to hear my last round of oral arguments at the university, where I received my undergraduate and law degrees and where my father, who was in attendance that day, taught for decades. The time leading up to my last "sit" caused me to do serious reflection. In particular, it made me reflect on the importance of having some balance in your life as a lawyer, because it is so easy for us to consume ourselves with work. In my remarks before the arguments started, I advised the audience to make time to enjoy the leisure activities that they love and the company of family and friends. I was looking forward to taking that advice myself because, as I often say, this life is not a dress rehearsal.

I retired from the bench in August, 2023. I had great travel plans, I had just joined the board of trustees of the Buffalo Philharmonic Orchestra, and I could not wait to spend more time at my piano. I had no plans to continue working in the profession, but when my good friend, Terry Flynn, called and asked me to join his firm, Harris Beach, the idea of keeping my toe in the profession intrigued me. I joined earlier this year and am a member of the Appellate Practice Group, doing appellate consulting. I am also available to do mediation and arbitration work.

I have been a member of the legal profession for 39 years and have made every effort to serve that noble profession with dignity and respect. I have had wonderful lawyers as mentors, teachers and friends, and I have had good fortune and great opportunities. It was certainly the honor of a lifetime to serve on the Supreme Court and Appellate Division.

Amended Court of Appeals Rules for Amicus Relief

BY ALAN J. PIERCE AND MICHAEL HUTTER

Effective May 8, 2024, the Court of Appeals has amended its rules relating to amicus curiae relief. The amendments make significant changes to the deadlines for amicus motions as well as the involvement of a party or party's counsel.

Recusal or Disqualification: Rule 500.23

Amicus curiae relief will now be denied where acceptance of the amicus submission "may cause the recusal or disqualification of one or more Judges of the Court."

Timing of Motions under Rule 500.23(a)

Previously, amicus motions were to be noticed for a return date no later than the Court session preceding the session in which argument or submission of the appeal or certified question is scheduled. Under the new rule, the key date relates to service of the motion by a date tied to the last submission of the parties on the matter while complying with the return date requirements of Rule 500.21. All of the significant changes in the service deadlines are qualified by the phrase, "Unless otherwise directed or permitted by the Court."

For amicus curiae relief on normal course appeals and normal course certified questions, the motion shall be "served no later than 30 days after the filing date set for appellant's reply brief or, in the case of cross-appeals, the cross-appellant's reply brief," while also complying with Rule 500.21

For amicus curiae relief on appeals and certified questions selected for review by the alternative procedure, "The motion shall be served no later than 30 days after the filing date set for respondent's submission" and comply with Rule 500.21.

For amicus relief on motions for leave to appeal in civil cases, "The motion shall be served no later than 15 days after the return date of the motion for permission to appeal to which it relates" and comply with Rule 500.21.

Timing of Motions by Attorney General under Rules 500.11, 500.12, and 500.23(b)(1):

Amicus motions filed by the Attorney General may be filed "no later than 30 days after the filing date set for appellant's reply brief on normal course appeals and certified questions; no later than 30 days after the filing date set for respondent's submission on appeals and certified questions selected for alternative review; and no later than 15 days after the return date of a motion for permission to appeal."

Judicial Conduct Matters under Rule 530.8(c)

"Corresponding changes were made to the Court's Rules for Review of Determinations of the State Commission on Judicial Conduct."

Involvement Of A Party In The Amicus Motion under Rule 530.8(c)

It is now mandatory that any motion for amicus relief includes a statement of the following:

1. The identity of movant and the movant's interest in the matter;

2. Whether a party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner;

3. Whether a party or a party's counsel contributed money that was intended to fund preparation or submission of the brief; and

4. Whether a person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief and if so, the identify of each such person or entity.

Amicus counsel can obtain breifing schedules by calling the clerk at 518-455-7701 or at the docket section of "Court-PASS" on the court's website.

Alan Pierce is a partner in litigation practice and leader of appellate practice at Hancock Estabrook. He was chair of the Committee on Courts of Appellate Jurisdiction.

Michael Hutter is a Professor of Law at Albany Law School and Special Counsel to Powers & Santola, LLP.

NYSBA PUBLICATIONS

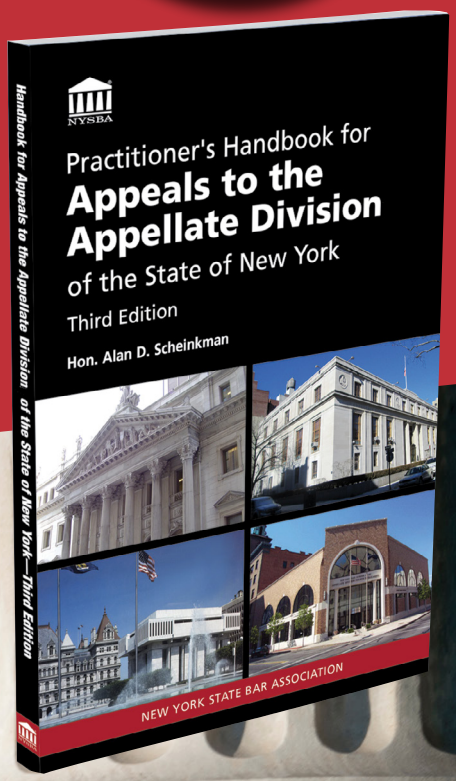
THIRD EDITION

Practitioner's Handbook for

Appeals to the Appellate Division

of the State of New York

Hon. Alan D. Scheinkman



Written by Hon. Alan D. Scheinkman and reviewed by members of the NYSBA Committee on Courts of Appellate Jurisdiction (CCAJ), *Practitioner's Handbook for Appeals to the Appellate Division of the State of New York*, Third Edition, is an invaluable guide for handling appeals to the four Appellate Divisions. It covers all aspects of taking a civil or criminal appeal to the New York State Appellate Division, including panel assignments and calendaring, correcting defects, cross appeals and joint appeals, and 'poor person' appeals.

The taking and the perfecting of a civil or criminal appeal includes meeting inflexible time requirements, getting the record and briefs together, and bringing the appeal to argument or submission. The Practice Rules of the Appellate Division came into effect after the release of the extremely popular second edition, but important nuances still exist between Departments. The third edition covers these changes as well as other important developments.

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Records on Appeal: Time for All-Digital Copies

BY ROGER A. SACHAR JR.

An adversary and I recently found ourselves in Courtroom 130 at the New York County Supreme Court. Room 130 serves as the motion courtroom. Before the pandemic, it was a beehive of activity where attorneys and court runners submitted hard copies of motion papers for the hundreds of applications filed each week in New York County. With the transfer to e-filing, the towering stacks of briefs, affirmations, and exhibits that once lined the railings are no more.

I recall that back in 2018, while perfecting my first appeal to the First Department, I visited the clerk's office on the court's term filing deadline date and encountered a long table stacked high with records on appeal. In the twenty or so minutes it took me to get to the front of the line, appellate printers kept hauling in box after box of record after record.

But the First Department, as well as Second Department, have now "temporarily" suspended the requirement for paper records on appeal. That, in turn, led to a discussion with my colleague about how much all that paper cost and how much are we saving?

To answer that question, I downloaded all the records for appeals calendared for three separate days at the First Department and the Second Department. I multiplied that number by the average cost per page for a record, based on an informal survey of appellate printers. While not a completely scientific method, the results are striking. The average cost per day for copies of printed records on appeal would be about $27,000 in the First Department. The cost in the Second Department was more merciful: about $10,000.

In 2023, the First Department held 113 days of argument. Based on the numbers above, that means that $3 million dollars was saved by not having printed records. In the Second Department, I counted 120 argument days, meaning that printed records on appeal would cost $1.2 million.

While I understand that certain judges may prefer hard copies of the record on appeal, although that number is likely far outweighed by those who utilize remotely viewable electronic versions of the record, it would seem that a preference for hard copy records is more than counterbalanced by the $4.2 million in annual costs to litigants that electronic records save.

Mark Twain wrote, "Often, the less there is to justify a traditional custom, the harder it is to get rid of it." By my calculations, on each argument date, the daily volume of pages in hard copy records placed before the First Department would be the equivalent of 395 copies of Twain's "Adventures of Tom Sawyer." The Second Department clocks in at 151 copies. In the 21st century, where digital communications is the norm, it is difficult to justify the unnecessary expense of all that paper. It should not be hard to permanently require the filing of electronic records on appeal instead of printed ones.

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