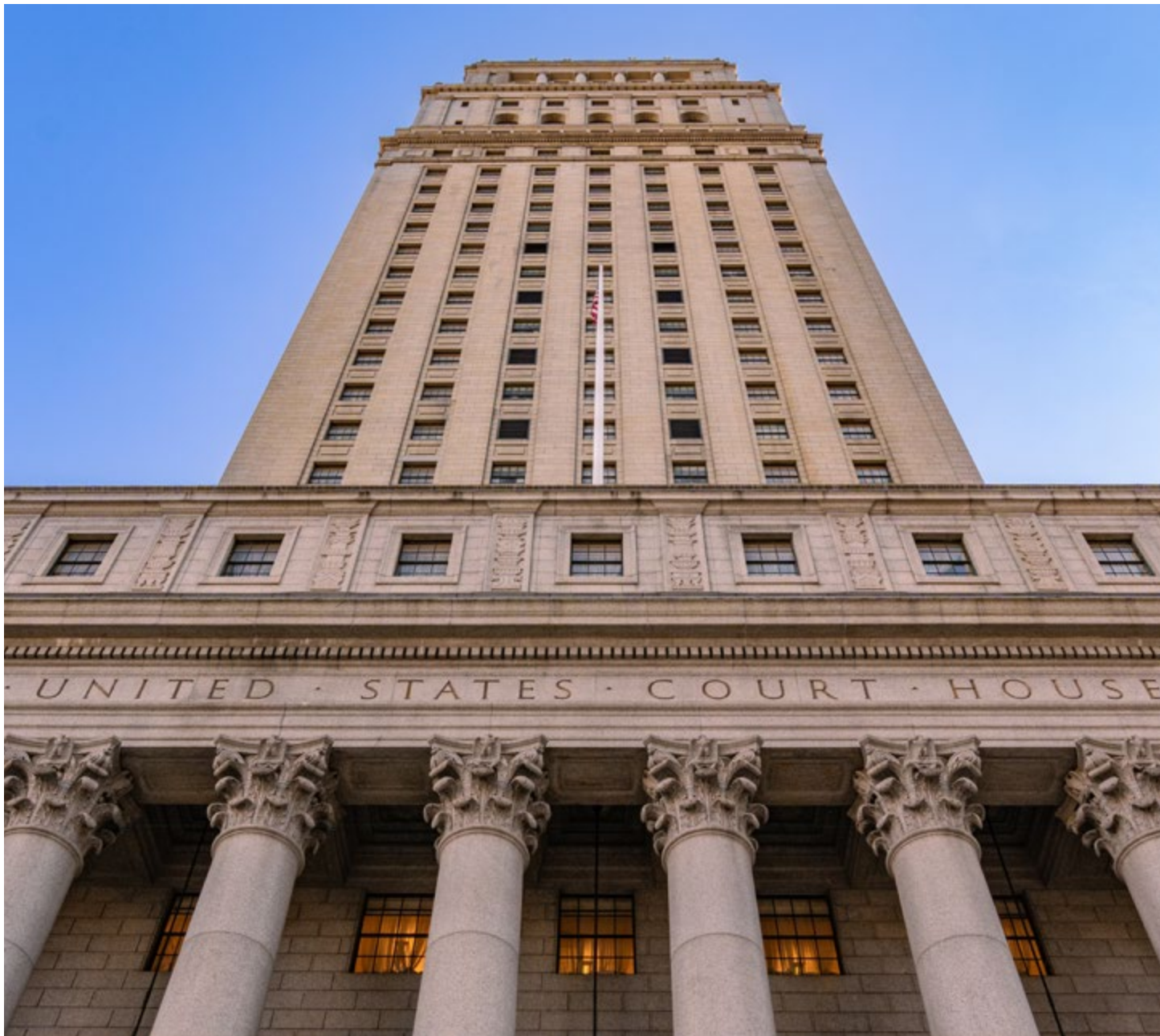




LEAVEWORTHY

The Newsletter of the NYSBA Committee on Courts of Appellate Jurisdiction

SUMMER 2026



Farewell to the Elephant



Break A Leg



Paternalism or Prudence



LEAVEWORTHY SUMMER 2026

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IN THIS ISSUE

Farewell to the Elephant	3
Break A Leg	4
Paternalism or Prudence	6
Controlling the Cost of an Appeal	8

MESSAGE FROM THE CHAIR,

Our Committee on the Courts of Appellate Jurisdiction has accomplished much over the last year to fulfill our mission of researching current issues in appellate practice, reporting on changes to that practice, educating the bar, and promoting access to the appellate courts.

Our report entitled “Delays in Perfecting Indigent Criminal Appeals” was adopted by the bar association’s Executive Committee and House of Delegates and is now official NYSBA policy. Thank you to Erin Tresmond and all members of the Indigent Criminal Appeals Subcommittee who invested their time and effort to create such a compelling report. This year, too, New York Court of Appeals Chief Clerk and Legal Counsel Heather Davis accepted an invitation to one of our meetings to discuss changes to the rules and policies of the Court of Appeals.

Our committee has accomplished all this important work while maintaining our Pro Bono Appeal Program, which provides appellate representation to those who cannot afford to hire an appellate attorney in state court and are ineligible for assigned counsel, as well as our Moot Court program, which assembles a panel of experienced appellate counsel to help prepare attorneys with cases before the Court of Appeals. As we enter the final year of my term as chair, I look forward to strengthening our existing programs and advocating for changes to appellate practice that will expand access to justice.

Henry Mascia
Chair, CCAJ
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Farewell to the Elephant

AARON EITAN MEYER

In May, the Bronx Zoo euthanized Happy, an Asian elephant believed to have been born in Thailand in 1971. Happy is best known to the legal community from a recent case in which the Court of Appeals affirmed by a 5-2 margin that elephants may not be the subject of a writ of habeas corpus in *Matter of Nonhuman Rights Project, Inc. v. Breheny* (*Breheny*), 38 N.Y.3d 555 (2022).

Happy's unusual legacy neither started nor ended with the impassioned dissents authored by then Judge and present Chief Judge Wilson and Judge Rivera, or by then Chief Judge DiFiore's pointed conclusion that the "continuing dialogue regarding the protection and welfare of nonhuman animals" should be directed to the legislature rather than the courts (*Breheny*, 38 N.Y.3d at 577).

Twenty years ago, Joseph M. Plotnik, Frans B. M. de Waal, and Diana Reiss published a study in which, for the first time outside of humans and apes, except for a singular report on dolphins, they demonstrated that an Asian elephant was able engage in mirror self-recognition by spontaneously using the mirror to touch an otherwise imperceptible mark on its own body. (PNAS, *Self-Recognition in an Asian Elephant*, <https://www.pnas.org/doi/10.1073/pnas.0608062103>) The remarkable elephant that showed intelligent self-awareness was Happy.

In affirming the denial of habeas corpus in *Breheny*, Chief Judge DiFiore stated that "no one disputes that elephants are intelligent beings deserving of proper care and compassion." (38 N.Y.3d at 565-566). To a modern reader, this might seem to be no big deal. The grainy black-and-white film of 1903 in which the Edison Company electrocuted Topsy the Elephant after she killed a drunken spectator the previous year seems like the horror of a far distant past.

Still older accounts of elephants in court proceedings feel even more removed. *Scribner v. Kelly*, 38 Barb. 14 (Sup. Ct., Orange Co. 1862) involved a man who was injured after his horse became terrified at the sight



of an elephant crossing the road. The court held that the elephant's owner was not negligent because the plaintiff's horse became terrified not through any act of the elephant, but simply from "the fact that the object which he saw was an elephant." Just shy of two centuries ago, in *Wolcott v. Eagle Ins. Co.*, 21 Mass. 429 (1827) an insurance dispute, the Supreme Court of Massachusetts, Suffolk, and Nantucket spoke of a "cargo of racehorses, elephants, or other valuable animals."

The courts made reference to a dumb animal versus a live sentient person and whether "neither the instinctive act of an unreasoning animal, nor the impulsive, involuntary act of a sentient being directly brought about by an act of negligence, will break the line of causation." (*Ft. Worth v. Patterson*, 196 S.W. 251, 253 (Court of Civil Appeals of Texas 1917)).

And yet, there were always times when courts acknowledged instances when the

cause of injury "involved here is a horse, not a machine but a sentient animal..." which led to a finding that the horse's owner was negligent in his treatment of the animal. (*Walke v. Premier Pocahontas Collieries Co.*, 94 W. Va. 38, 43 (Sup. Ct. of Appeals of West Virginia 1923)).

It would be a mistake to think that case law regarding animals is a straightforward march toward acknowledging their sentience. Yet, Supreme Court of Errors of Connecticut acknowledged in 1938 that the Hartford City Library's work could not properly be "classed as 'humane' in the ordinary acceptance of that word, for it neces-

(CONTINUED ON PAGE 9)



Aaron Meyer is a partner at The Willis Law Group and focuses on federal and state litigation and special investigations. He is a member of the NYSBA Committee on Courts of Appellate Jurisdiction and the Committee on Animals and the Law. He is a regular contributor to *Leaveaworthy*.

Break A Leg

BY MARK DIAMOND AND CHARLES FELDMAN



It goes without saying that appellate and trial lawyers are talented, wise and potent. Still, many are not up to snuff when it comes to communicating with a panel or judge in a direct and persuasive manner. It is a critical skill that goes beyond the facts of the case or the strength of one's arguments.

This is not surprising. With so few cases proceeding to trial, attorneys do not have this opportunity to learn verbal jousting. Fifty years ago, about twelve percent of civil cases and fifteen percent of criminal cases reached trial in federal courts. Today, only about two percent of all cases go to trial.

For similar reasons, many attorneys have trouble advising a client or other witness, including expert witnesses, how to testify at a deposition or to a judge and jury in an

appealing and effective way. Nerves, fear of public speaking, lack of confidence, even guilt at having to explain oneself are just some of the things that can make a lay or expert witness a poor witness, a self-destructive witness.

These are the same things that can impact a lawyer when it comes to connecting with a judge and jury. Clear communications is not intuitive or a skill taught adequately in school.

F. Lee Bailey used to say that a good courtroom performance is five percent knowledge of the law and ninety-five percent knowledge of theater. While this may be hyperbole, there are tricks of the trade employed by professional performers and public speakers which lawyers and witnesses can

use to create a convincing appellate, trial, or deposition "performance."

Appellate and trial attorneys have a huge job remembering the facts of the case and formulating how the law should be applied. But that's not enough. An attorney has an audience, whether it be a client, a jury, a judge, or a panel. To be an effective lawyer, you have to satisfy your audience.

Do it by telling a story; by forming an arc to your case. The art of effective communication, whether it be on stage or in a courtroom, is good storytelling. Good storytelling connects you to your audience and your audience to the story. It shows that you are confident enough to encapsulate what happened and what you are trying to prove. It

entertains your audience. They will like you for it.

It is not trite to repeat that every story has a beginning, middle and end. Start with a quick synopsis of what happened and what you are going to prove. Think of your argument as a movie trailer. Hit the highlights of the story, making sure your audience knows your story is based on the facts. End with the conclusion that you want them to accept.

In oral argument to an appellate court, you have maybe fifteen seconds to present your trailer before you will be stopped with a question. Make those seconds work in your favor, for it is the only time you can say what you want and not spend your limited time with answers. When you are answering the court's questions, entertain them. Be affable and helpful. Show empathy with the audience that has to sit there and listen to you and the twenty people who come after you.

Nerves are a common problem no matter how experienced you are. But the more you try to fight nervous energy, the more nervous you become. Use nervousness to your advantage by displacing it. Something as simple as wiggling a pen or tapping your foot helps.

Learning better breath control can also help. Take one deep breath in and exhale through your mouth to the count of four. Rinse and repeat. Try progressively relaxing portions of your body. Unclench your jaws and shoulders. And do not drink coffee before your court appearance. Actors don't. They may have a drink, but it won't be coffee.

Don't feel rushed. That's easy to say. But you are the performer and if you want to slow down your performance within reason, do it. We've rarely heard a judge tell a lawyer he's speaking too slowly. Normally, it's the opposite. The attorney is rushing to get his argument across and in so doing, losing his audience.

Speak with conviction as if you really believe what you are saying. Volume modulation is critical. But that does not mean shouting. Morris Dees at the Southern Poverty Law Center was a great public speaker. He would start his story at a high-ish volume and slowly get softer and softer as it progressed. This lured his listeners into what he was saying and gave his conclusions, his whole argument, the sound of sincerity and intimacy.

Each lawyer has his or her own style. Pick one and go with it. Or try several. But whatever you do, do not speak so low that the audience cannot hear you. Beyond not hearing you, they will be skeptical about what you are saying.

Performing is a two-way street. Make eye contact during your longer answers. Make believe you're sitting in your living room talking with people you know. Go from one judge, or one juror, to the other, spending a second or two on each one. Look for body language from the people you are speaking to. You will know when a judge is frustrated with what you are saying. Unless you are married to the point you are arguing, finish it and move on. Your time is limited and you may have reached a point of diminishing return.

How you dress makes a difference. David Boies is one of the wealthiest attorneys in the country. But when he appears in court he wears an off-the-rack sports jackets from Sears: always neat, but looking like an ordinary Joe. It was his costume. By contrast, during the John Gotti trials, Bruce Cutler wore the most expensive suits. They found what worked for them and used it.

Keep it light. In an appeal, you're talking to a professional audience that has already made up its mind, probably. So it is even more important that they like you. It could make the difference if they are sitting on a fence about an issue. And don't forget, your case is a story that you control. The courtroom may be a bastion of law, but in the end, it's a theater.



Mark Diamond is a trial and appellate attorney who has represented clients in almost every U.S. Court of Appeals.



Charles Feldman was a veteran reporter for CNN who covered numerous cases including the Gotti, Claus von Bulow, and Imelda Marcos trials.

Paternalism or Prudence

BY JOHN SPENSIERI

The power of a New York Appellate Division to reduce a jury's award may appear to be an act of judicial paternalism by substituting its judgment for that of the jurors who heard the witnesses, observed the evidence, and rendered the verdict. Yet, the power to review and reduce excessive verdicts is part of the court's duty under NY Const art VI § 5.

Unlike the Court of Appeals, which generally reviews only questions of law, the Appellate Division and Appellate Term possess broader authority to review questions of both law and fact. That is critical in damages review, for when a party challenges an award as excessive or inadequate, the Appellate Division is not limited to asking whether there was evidence to support the verdict. In fact, under CPLR 5501(c) "the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

That statutory command gives the Appellate Division several related powers. It may review the facts to determine if there was sufficient evidence to support the jury's damages award. It may also compare the award against reasonable compensation approved in analogous cases. It may determine whether the award falls outside that permissible range.

Where the award materially deviates from reasonable compensation, it may order a new trial on damages unless the prevailing party stipulates to a reduced amount. This process, commonly referred to as remittitur, does not erase the jury's function; rather, it places the verdict within the outer limits of reasonableness established by New York law. The tension, then, is not simply between judge and jury. It is between deference to the jury's fact-finding role and the Appellate Division's statutory obligation to maintain consistency, proportionality, and reasoned limits in civil damages awards.

CPLR 5501(c) is important for two reasons. First, the statute is compulsory. It does not

merely permit the Appellate Division to review a damages award; it directs the court to determine whether the award materially deviates from reasonable compensation. Second, the statute does not ask whether the award "shocks the conscience." New York moved away from that more deferential formulation in favor of the "deviates materially" standard, which requires a more searching comparison between the verdict under review and awards sustained in comparable cases. (see *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996)).

CPLR 5501(c) also operates in tandem with CPLR 4111, which governs itemized verdicts. (see Thomas Newman & Steven Ahmuty Jr., *Appellate Division Review of Discretionary Rulings*, <https://www.duanemorris.com/articles/article3698.html>). Itemization matters because damages are not reviewed as one undifferentiated number. Instead, the Appellate Division can examine specific categories of damages, such as past pain and suffering, future pain and suffering, future medical expenses, lost earnings, or loss of consortium.

This allows the court to determine whether a particular component of the award is excessive or inadequate, even if other portions of the verdict are supported by the record and within the realm of reason. (A trial court has a related but distinct role under CPLR 4404(a) which permits it, after a jury trial, to set aside a verdict or order a new trial where appropriate.)

The Appellate Division's role is not simply to second-guess a jury because the award appears high or low. The court is instead tasked with determining whether the verdict can be reconciled with reasonable compensation under New York law. That inquiry necessarily requires the court to look beyond the individual verdict and consider the broader body of comparable appellate authority. The appellate court must determine whether the award falls within the range of compensation that New York law recognizes as reasonable. (see Timothy Capowski & John Watkins, CPLR 5501(c) *Review in the*

Age of Summation 'Anchoring' Abuse, Shaub Ahmuty Citrin & Spratt, <https://www.sacslaw.com/publication-7>).

This is where the charge of paternalism becomes an issue. On one hand, remittitur undeniably permits judges to alter the practical effect of a jury's damages determination. On the other hand, the "deviates materially" standard does not authorize free-floating judicial preference. It requires the Appellate Division to place the award within a legal framework of reasonable compensation, informed by precedent and applied across cases. The question is not whether the court likes the verdict. The question is whether the verdict can be justified within the boundaries that New York law has set.

Viewed this way, CPLR 5501(c) is less a rejection of the jury than a mechanism to promote consistency. It recognizes that pain and suffering cannot be measured with mathematical precision, but it also rejects the idea that such awards are immune from meaningful review. The statute attempts to preserve the individualized nature of damages while preventing awards from becoming arbitrary, disproportionate, or detached from comparable precedent.

That does not mean that damages review is mechanical. No two plaintiffs are identical, and no two injuries unfold in precisely the same way. The Appellate Division does not simply match a body part to a dollar amount and call the inquiry complete. Rather, the court considers the nature and extent of the injury, the treatment received, whether surgery was required, whether the condition is permanent, the plaintiff's age, the duration of pain and suffering, the effect on employment, and the extent to which the injury altered the plaintiff's daily life. This comparative process is especially visible in pain-and-suffering awards, which are inherently difficult to quantify.

Whether the Appellate Division's power to reduce jury verdicts is good or bad depends largely on how one understands the role of a



jury verdict in the first place. If the verdict is viewed as the final, nearly untouchable expression of community judgment, then remittitur can appear to be judicial paternalism.

This should not be dismissed too quickly. Civil damages, particularly pain and suffering, are deeply fact-sensitive. Jurors see the plaintiff. They hear the testimony. They observe the human consequences of the injury in a way that an appellate panel reviewing a paper record does not. There is something uncomfortable about a court reducing an award for pain, disability, humiliation, or loss of enjoyment of life by comparing it to numbers from prior cases. Human suffering does not always fit neatly into precedent.

But the opposite concern is just as real. Without meaningful appellate review, damages awards can become unpredictable, inconsistent, and detached from any common measure of reasonableness. Two similarly injured plaintiffs could receive dramatically different awards based not on the merits of

their claims, but on venue, jury composition, advocacy, sympathy, or the emotional force of a particular trial. That kind of variability may feel democratic in one sense, but it can also undermine equal treatment under the law.

In that sense, remittitur is best understood not as anti-jury, but as a guard against outlier verdicts. The jury remains the primary fact-finder. The jury still determines credibility, causation, injury, and damages in the first instance. But the Appellate Division makes sure that the final number does not drift beyond the bounds of legal reasonableness.

New York's system is sound in theory but dependent on disciplined application. Remittitur is good when it promotes proportionality, consistency, and predictability. It is troubling when it becomes reflexive skepticism toward large verdicts. The legitimacy of the practice depends on whether the Appellate Division explains its reasoning, engages with genuinely comparable cases, and respects the jury's central role while still

enforcing the statutory limits imposed by CPLR 5501(c).

Thus, the question is not whether remittitur is either paternalism or prudence. It can be either. Used carefully, it is a necessary mechanism for prudence: a means to prevent arbitrary or materially excessive awards. Used carelessly, it becomes paternalism: a judicial substitution of institutional preference for community judgment. New York law attempts to strike a balance by preserving the jury's role while mandating appellate courts to keep damages within the range of reasonable compensation.



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Controlling the Cost of an Appeal

BY ANDREW MICHAEL DEBBINS

In this age of e-mail, NYSCEF, and PACER it is easy to forget tasks that still require the use of paper. As appellate practitioners we know that the largest printing cost is for hard copies of the record on appeal.

Our appellate courts still require printed copies of the record. In the Appellate Division, the appellant must file anywhere between one and six hard copies (an original and five copies) of the record on appeal, depending on the department hearing the appeal and the method of perfecting it (22 NYCRR § 1250.9 [a]). The Court of Appeals requires an original and nine copies of the record, or an appendix, depending on the method chosen by the appellant (22 NYCRR § 500.14). In the Second Circuit, a party represented by counsel must submit six copies of the appendix when required. (2d Cir. Local Rule 30.1[b]).

Paper copies for service on other parties can add large and unexpected costs for an unwary appellate practitioner. The Federal Rules of Appellate Procedure require one copy of the appendix be served on counsel for each party, but the Second Circuit sensibly provides that electronic filing of the appendix constitutes sufficient service upon the other parties (Fed. R. App. P. 30(a)(3); 2d Cir. Local Rule 30.1[b]). With some exceptions, the rules of New York's Appellate Division require service of a hard copy of the record upon every other party to the appeal. New York's Court of Appeals requires service of three copies of the record on each of the other parties.

Thus, in appeals with many parties, the cost of printing hard copies of the record on appeal can be exorbitant. That is especially so in the Court of Appeals, where the rules require three copies be printed and served on each party. The simple reference to "service" in the Court of Appeals' rules, its lack of electronic filing, and CPLR Rule 2103(b) (7) offer no obvious way to avoid printing and serving these hard copies.



I recently faced high printing costs in a Court of Appeals product liability appeal that had thirteen separately represented defendants. The appellate printer's eye-popping estimate for printing and serving three hard copies of the record on each defendant totaled more than the cost of a single-family home in my upstate home town. The six-figure bill in my appeal correctly raised eyebrows.

Engaging an experienced and knowledgeable appellate printer is often well worth the cost, simply for their guidance in navigating court rules and filing practices. Many attorneys never take the extra time to understand or question printing costs. Common sense should prevail and in my recent experience it did. We avoided printing voluminous copies for service by securing the consent of every party to electronic service of the record and opening brief, and we sought permission from the Clerk of Court to file proof of such electronic service. That simple courtesy from our adversaries and common sense by the Clerk saved our clients hundreds of thousands of dollars in printing costs.

Whether or not court rules strictly permit electronic service be replaced with hard copies, there is no reason a court should insist on killing trees if the parties agree to electronic service. We owe it to our clients to reduce their bills, especially when a few phone calls to opposing counsel and the clerk can save clients so much money. Seeking consent to electronic service is a simple way that a savvy appellate practitioner can offer clients a high return on investment. But you should not count on an appellate printer — no matter how experienced or knowledgeable — to suggest it *sua sponte*.



Andrew Debbins is a trial attorney, appellate practitioner, and partner at Connors Law LLP in Buffalo. He is a member of the NYSBA Committee on Courts of Appellate Jurisdiction and the Western District of New York Local Rules Committee. He is a regular contributor to *Leaveworthy*.

Farewell to the Elephant

(CONTINUED FROM PAGE 3)

sarily carries an implication of compassion for men or animals in their sentient needs and feelings.” (*Seymour v. Attorney Gen. of Connecticut*, 124 Conn. 490, 497 (Sup. Ct. of Errors of Connecticut 1938)).

Almost ninety years later, in *Brebeny*, Judge DiFiore reiterated in even stronger terms that, as a matter of fact, “unquestionably, nonhuman animals are sentient beings that, albeit without liberty rights, have been af-

forded many special protections by the New York Legislature — long considered a leader in animal welfare.” (38 N.Y.3d at 575-576). A number of bills have been introduced to codify animal sentience in New York but none have been enacted. The most recent, which was limited to companion animals, was sponsored by State Senator Monica Martinez and Member of Assembly Jessica Gonzalez-Rojas in the 2025-2026

Legislative Session (S.9569 and A. 11094, respectively).

Time will tell how Happy is remembered: As an elephant who showed that it was not only hominids who could recognize themselves in mirrors, as the subject of a major case that went to the Court of Appeals, or as a living being who was beloved by her keepers, curators, and veterinarians. It is safe to say, however, that she will be remembered.



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/.

PUBLICATIONS

**THIRD
EDITION**

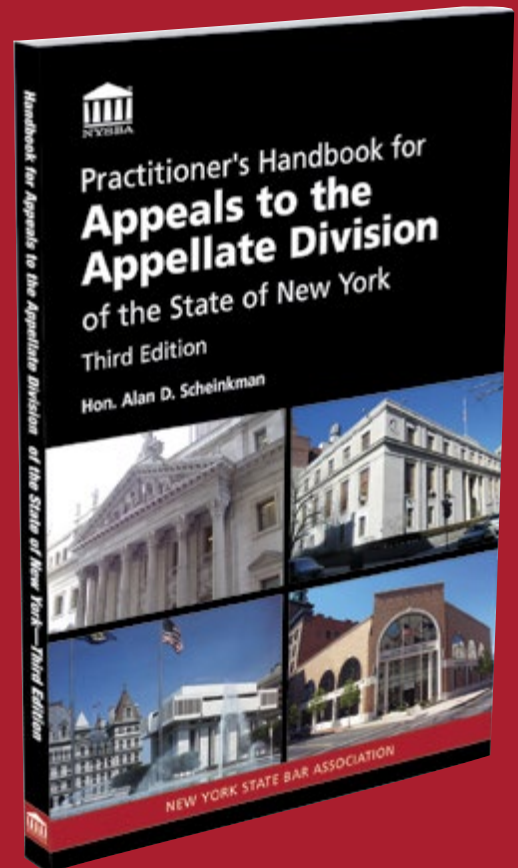
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Practitioner's Handbook for **Appeals to the Appellate Division** of the State of New York

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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PUBLICATIONS

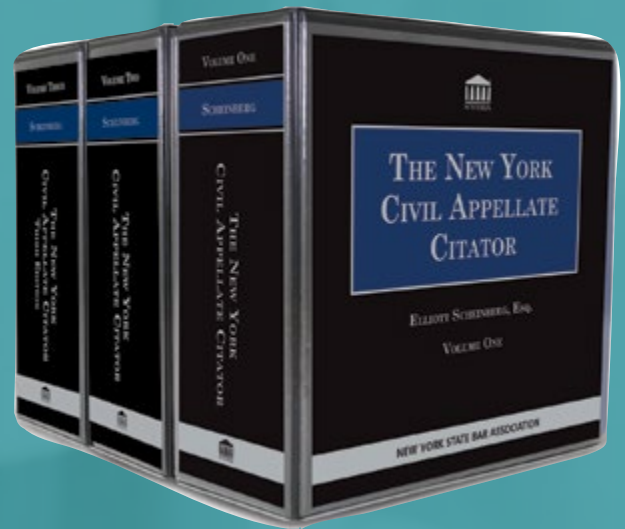
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The New York Civil Appellate Citator

By Elliott Scheinberg, Esq.

Hailed as an “extraordinary work” by highly recognized retired appellate judges, this “unparalleled,” extensive compendium is a finessed compilation of appellate authority, foundational and uniquely esoteric, on all aspects related to civil appeals to the Appellate Division.

- A broad section on issue preservation
- General and specific trial objections on appeal
- The intersection between CPLR 5701(a)(2) and CPLR 2215(a)
- The treatment of standing and subject matter jurisdiction



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

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.

