# APPELLATE PRACTICE

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

JOSEPH P. SULLIVAN, PRESIDING JUSTICE

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**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION, FIRST DEPARTMENT**

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Acknowledgments

We would like to extend our thanks to Presiding Justice Joseph P. Sullivan, of the Supreme Court of the State of New York, Appellate Division, First Department, for his encouragement which guided the production of this work.

We would also like to thank the authors: Risa I. Gold, Principal Appellate Court Attorney, Appellate Division, First Department, and Leland S. Scopp, Chief Attorney of the Decision Department, Appellate Division, First Department. Finally, we would like to thank those who participated in the effort: Catherine O'Hagan Wolfe, Clerk of the Appellate Division, First Department; William T. O'Connell, Executive Administrative Assistant to Presiding Justice Joseph P. Sullivan; Joseph Bleshman, Deputy Clerk, Appellate Division, First Department; Sarah Crabtree and Amy Ostrau of the Office of Special Projects.

## INTRODUCTION TO *APPELLATE PRACTICE*

The best advice a senior partner could give to a young associate might be: "Don't reinvent the wheel." What lawyer has never experienced the situation where a seemingly simple legal question has led to hours of futile research? As the above advice suggests, it would be foolish not to seek guidance from an experienced lawyer or any other source in order to find a swift answer to a vexing legal question, especially where the answer may lie only an office or phone call away.

If the issue relates to the basics of filing and perfecting an appeal in a New York State appellate court, the Third Edition of *Appellate Practice*, an unofficial publication of the Appellate Division, First Department, Office of Special Projects, would be of invaluable assistance. This book offers a thorough discussion of the rules governing the viability and mechanics of taking an appeal in both civil and criminal cases, as well as the common pitfalls that novice appellate lawyers frequently encounter. *Appellate Practice* is written by attorneys and staff members of the Appellate Division, First Department, who have intimate knowledge and experience with the appellate process. Having reviewed this work, I am confident that appellate attorneys who practice in New York State, especially in the Appellate Division, First Department, will find *Appellate Practice* a valuable and unique resource.

The book is divided into three sections: 1) civil and appellate motion practice; 2) criminal appellate practice; and 3) brief writing and oral argument. The section on civil appeals discusses not only the mechanics in taking and perfecting an appeal, but it also the key concepts of aggrievement, appealability and reviewability – threshold questions which must be addressed before deciding whether to take an appeal from an order or judgment. Of particular interest to appellate counsel will be the subsection discussing the circumstances under which a stay of a court order pending an appeal may be obtained, always a popular topic amongst invariably optimistic appellants' counsel.

The section on criminal appeals is shorter but no less helpful. While appealability is less of a concern in criminal appeals, the issue of reviewability might take on even greater significance. As this section fully demonstrates, criminal appellate practitioners must become intimately familiar with the rules of preservation for all types of claims, the nature and scope of the Appellate Division's interest of justice jurisdiction and the harmless error doctrine.

The third section provides helpful tips on brief writing and oral argument, while being careful not to intrude on attorney independence. In the court's experience, appellate counsel are frequently interested in learning the court's preferences, if any, on issues such as the depth of factual recitation in the briefs, the order of arguments in the brief and the method of oral argument. This book provides some guidance in these areas.

*Appellate Practice, 3d Edition* will prove to be especially valuable in two ways. First, it integrates the different sources of authority that provide the legal rules for appellate practice in this State – the CPLR, the Rules of the Appellate Division, First Department, and case law. Without this resource, practitioners would be required to consult and cross-reference each of the different sources, without any guidance as to how they are read together. This book brings together these sources of authority into one volume and provides an easy-to-read commentary on each topic.

Second, this book is not limited to a discussion of the relevant statutes, rules and cases governing appellate practice in the Appellate Division, First Department. It also includes, where

applicable, the policies and practices of the Court. As most experienced appellate attorneys come to know, it is often imperative to learn the specific policies of a particular appellate court, especially in situations where there is no specific statute, rule or case covering a particular issue. Since the policies and practices of the Court are not available through traditional means of legal research, this book provides an indispensable source for such information.

Of course, simply because this book offers a valuable resource for appellate practice does not mean that consultation with the primary resources is unnecessary. This book is intended to be a practice guide, not an exhaustive treatise covering every conceivable aspect of the practice area. Thus, the primary sources of authority should be consulted to clarify or confirm any issues that are unclear.

I would like to thank the Office of Special Projects, its Director, Emily Olshansky, Esq., and its staff, for all of their hard work and effort in producing an effective guide for appellate lawyers.

Joseph P. Sullivan

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# PART I

# CIVIL APPELLATE AND MOTION PRACTICE

**Risa I. Gold, Esq.**

# PART I

# CIVIL APPELLATE AND MOTION PRACTICE

## I. OVERVIEW

An aggrieved party may seek to invoke the Appellate Division's review powers by timely taking and perfecting an appeal from a lower court's appealable order or judgment. This introductory statement summarizes concepts which are integral to civil appellate practice in the Appellate Division. A potential appellant who is aggrieved by a lower court's decision, as well as the prevailing opponent who may be compelled to argue the correctness of the lower court's decision in the Appellate Division, should become familiar with topics essential to New York civil appellate practice: (i) aggrievement; (ii) appealability; (iii) reviewability; (iv) mechanics of taking and perfecting an appeal; (v) disposition of appeal; and (vi) motion practice. The potential consequences of failing to abide by the rules include outright dismissal of the appeal or even the imposition of financial sanctions. Hopefully, this section will provide helpful guidance to a lawyer handling civil appeals in the Appellate Division, First Department.

## II. GOVERNING STATUTES AND RULES

### A. Appellate Division Jurisdiction

The focus of this section of *Appellate Practice* is on civil appeals from the Supreme Court and the Appellate Term to the Appellate Division, First Department. The Appellate Division of the Supreme Court, the principal appellate court in New York, is divided into four judicial departments and hears civil appeals from

the Supreme Court, the Surrogate's Court, the Family Court, the County Court [within New York City, there is no County Court], the Court of Claims and the Appellate Term.

The Appellate Division, First Department hears appeals from lower courts in the First Judicial District (New York County) and the Twelfth Judicial District (Bronx County). The mailing address of the Court is as follows: New York Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010. The telephone number is (212) 340-0400. The courthouse, clerk's office, administrative offices and Judges chambers are located at 27 Madison Avenue.

### B. CPLR Articles 55 And 57

The principal statutory authority for civil appeals is found in the Civil Practice Law and Rules. Article 55 of the CPLR consists of a set of general rules applicable to all appeals. Appeals to the Appellate Division are governed by CPLR Article 57 of the CPLR.

### C. Court Rules

Each Appellate Division has its own rules governing appeals in that court which can be found in title 22 of the Official Compilation of State of New York (cited as "22 NYCRR") and are reprinted in McKinney's New York Rules of Court. 22 NYCRR part 600 governs appeals in the Appellate Division, First Department. The most recent edition of the court rules should always be consulted since these contain any recent revisions. Where any doubts exist about the proper procedure to be followed in the Appellate Division, First Department, a Court motion clerk should be consulted.



## III. AGGRIEVED PARTY

### A. Introduction

One of the basic principles of civil appellate practice is that an appeal may be taken only by a party "aggrieved" by the order or judgment or a person substituted for him or her (CPLR 5511). There is no concise definition of the term "aggrieved" but it can generally be said that a party directly and adversely affected by the disposition of the lower court is "aggrieved" (*see*, *Matter of Richmond County Socy. For Prevention of Cruelty to Children*, 11 AD2d 236, 239 [2d Dept. 1960], *aff'd* 9 NY2d 913 (1961), *amended by* 10 NY2d 746 (1961), *cert denied* 368 US 290 [1961]). The "aggrieved party" requirement limits the Appellate Division's power to hear an appeal and therefore, an appeal which lacks an "aggrieved" party must be dismissed.

### B. Parties

The party "aggrieved" by an order or judgment who first appeals is the appellant (CPLR 5511). All parties who are interested in sustaining the judgment or order appealed from (generally, prevailing parties) should be made respondents (CPLR 5511; *see*, *New York Trust Co. v Weaver*, 270 App. Div. 989 [1st Dept 1946]). Insofar as a respondent is also aggrieved by the order or judgment being appealed, a cross-appeal may be taken from that order or judgment. On the cross-appeal, the parties are the cross-appellant and cross-respondent.

### C. Multiple Parties

Where there are multiple parties who are affected by the lower court's decision, the Appellate Division will only consider the appeal on the merits as to the appealing parties. Ordinarily, even an "aggrieved" nonappealing party will not be granted

affirmative relief based upon the success of the co-party's appeal. The co-party should jointly or separately appeal any determination adverse to himself/herself. Concomitantly, the appellant has no right to appeal a determination which is adverse to a co-party but not to himself or herself.

**D. Prevailing Party May Be Aggrieved**

Generally, where a judgment or order is entered in favor of a party, that party is not "aggrieved" and cannot appeal. There is authority suggesting that if the successful party receives an award less favorable than he sought or a judgment which denied him some affirmative claim or substantial right, he has a right to appeal or cross-appeal from the judgment or order entered in his favor (*Parochial Bus Sys. Inc. v Bd. of Educ.*, 60 NY2d 539 [1983]). It should also be noted, that a respondent may obtain review on an adverse intermediate order on the appellant's appeal from the final judgment even when the respondent has ultimately prevailed in the trial court (CPLR 5501[a][1]).

**E. Status As Party**

Insofar as the statute states that an aggrieved *party or person substituted for him* may appeal an order or judgment, the general rule is that persons or entities who were not original parties to the action in the lower court have no right to appeal without proper intervention or substitution. The procedures governing substitution are set forth in CPLR 1021 and 1022.

1. **Intervention**

In some situations where a nonparty to the original proceedings is adversely affected by a judgment or order, such as in a stockholders' derivative action, the interested shareholder who was not an original plaintiff will have standing to appeal *(see,*



*Auerbach v Bennet*, 47 NY2d 619 [1979]). Furthermore, where the order appealed from directs a nonparty to take or refrain from taking certain action, the nonparty will have standing to appeal (*see, Stewart v Stewart*, 118 AD2d 455, 458 (1st Dept 1986); *Brady v Ottaway Newspapers, Inc.*, 97 AD2d 451 [2d Dept 1983]).

There is no specific provision in the CPLR for seeking intervention at the appellate level. Most prospective intervenors in the appellate courts rely on the liberal provisions for seeking intervention found in CPLR 1012, 1013 and 7802(d).

2. ***Amicus Curiae***

Intervention is to be distinguished from the situation in which a nonparty's legal rights are not directly affected by the order appealed, but that person or entity nevertheless has a strong interest in the results of the appeal and wishes to present a position. Such a nonparty will not be granted intervention, but may seek leave to appear *amicus curiae* by motion (*see, Motion Practice, infra*).

**F. Premature And Moot Appeals**

An appeal is subject to dismissal if the party appealing it is not "aggrieved" either because the appeal is not ripe or it has become moot. Dismissal may be sought by the respondent on the appeal or by motion while the appeal is pending or the Court may dismiss an appeal on these grounds *sua sponte*.

1. **Premature Appeals**

Where the lower court renders conditional relief, the Appellate Division may find that the appealing party is not "aggrieved" absent fulfillment of the conditions ordered. Thus, in *Nieves v Union Hosp. of the Bronx*, 234 AD2d 143 (1st Dept 1996), the Appellate Division, First Department dismissed an appeal from

an order deeming an action dismissed against the City-defendant unless plaintiff or defendants advised the Court in writing by a date certain of a theory of liability against the City. The Court wrote, "[i]nasmuch as the order was conditional, appellants were not 'aggrieved' and their appeals are at best premature." Where a lower court order or judgment clearly contemplates that further action will be taken before the losing party will actually become aggrieved, resources can be saved by waiting to appeal the order or judgment upon satisfaction of the conditions contemplated. However, if there is any doubt that the right to appeal will be lost, the appeal should be timely taken and withdrawn if necessary (*see, Motion Practice, infra*).

2. **Moot Appeals**

The "aggrieved party" requirement also contemplates that the controversy is current and that the Appellate Division's determination will affect the parties' interests. Appeals will generally be dismissed where the rights of parties will not be affected by the Appellate Division's determination because the appeal has become moot or rendered academic (*Hearst Corp. v Clyne*, 50 NY2d 707 [1980]). A common instance in which an appeal is dismissed as moot is where a subsequent order or judgment has superceded the appealed order or judgment. Mootness may also result from the mere enforcement of the lower court's order or judgment prior to perfection of an appeal.

a. **Exceptions to Mootness Doctrine**

Ordinarily, dismissal of an appeal due to the fact that is has become moot cannot be prevented unless the Appellate Division finds an exception to the mootness doctrine as delineated by the Court of Appeals in *Hearst Corp. v Clyne, supra.* Where an issue presented, even though moot as between the parties, is novel, of



great public importance, typically evades review and is likely to recur, the appeal may not be dismissed as moot.

b. **Preventing Mootness**

By taking steps to maintain the status quo, an aggrieved party often can prevent an appeal from becoming moot. Where mootness will result by the enforcement of the lower court's order or judgment, an injunction or a stay of the appealed order or judgment is essential to maintain "aggrieved" status. Indeed, an aggrieved party's lack of diligence in attempting to maintain the status quo while an appeal is pursued constitutes a typical error in civil appellate practice. Pursuant to CPLR 5519, most appealable orders and judgments are *not* automatically stayed and therefore, an aggrieved party should promptly determine whether it will be necessary to obtain a discretionary stay or seek injunctive relief to maintain the status quo. Depending upon the immediacy of the lower court's order or judgment, an interim relief application also may be necessary to prevent an appeal from becoming moot (*see, Motion Practice, infra*).

## G. No Appeal From Relief Granted Upon Consent Or Default

The party against whom an order or judgment has been entered is not "aggrieved" if he or she did not properly contest the relief granted in the lower court (CPLR 5511; *Matter of Monique Twana C.*, 246 AD2d 351 [1st Dept 1998]).

1. **Appeal From Denial of Motion to Vacate**

Since a party who has consented to relief by the lower court or who has defaulted is not aggrieved and the resulting order or judgment is nonappealable, appellate relief may be obtained only upon further action by the losing party whereby the lower court

refuses to change its decision even after a proper appearance or an objection has been made. An order denying a motion to vacate the default judgment or order in the court that entered it is appealable. Thus, the party against whom a judgment or order has been entered should make an application to vacate the order or judgment (CPLR 5015 [a]) and appeal, if necessary, the resulting order or judgment denying such relief.

## IV. APPEALABILITY

### A. Introduction

Just as a party who is not "aggrieved" will not be able to obtain appellate court review, the Appellate Division is constrained to review only *appealable* orders and judgments. Appealability is generally concerned with whether a particular order or judgment of the lower court can be heard at all by the appellate court as distinguished from reviewability, which concerns the extent to which the appellate court can review a question presented in an appealable case. In very broad terms, a lack of appealability means that an appeal from a particular judgment or order in the court below simply cannot be reviewed by the appellate court, whereas a lack of reviewability affects what the appellate court can do about a complaint or issue which is raised in a case on appeal.

There are three levels of appealability: (i) an appeal as of right, whereby the appeal will be heard merely by taking an appeal; (ii) an appeal by permission, whereby permission to appeal must be granted before the appeal to the Appellate Division can be taken; and (iii) no right to appeal at all.



### B. Sources Of Appellate Division Jurisdiction

The sources of Appellate Division jurisdiction include the following: (i) the New York State Constitution, article VI, § 4(k); (ii) CPLR 5701 (appeals to the Appellate Division from the Supreme and County Courts); (iii) CPLR 5702 (appeals to the Appellate Division from other courts of original instance); and (iv) CPLR 5703 (appeals from other appellate courts to the Appellate Division).

### C. Broad Appealability

Appealability to the Appellate Division in civil cases is very broad and most notably includes appeals from non-final intermediate orders in contrast to the more restricted Federal civil appellate practice. Since most civil judgments and orders are appealable to the Appellate Division as of right, a prospective appellant should determine whether the appeal he or she wishes to pursue is available as of right by a process of elimination as follows:

i. if the appeal is from a judgment of the Supreme Court, it is appealable as of right unless it was entered subsequent to an order of the Appellate Division which disposes of all the issues in the action (CPLR 5701[a][1]). No appeal lies from a Supreme Court judgment entered in accordance with an Appellate Division order;

ii. if the appeal is from a Supreme Court order, it is appealable as of right if: (a) it was made on notice; (b) it does not constitute one of the types of orders listed in CPLR 5701(b) that must be appealed by permission; and (c) it falls within one of the categories of orders that are appealable as of right as set forth in CPLR 5702(a)(2), and

most notably subparagraphs (iv) and (v), which essentially provide that an order "which involves some part of the merits" or "affects a substantial right" is appealable as of right; or

iii. if the appeal is from an Appellate Term order, it is appealable only by permission.

## D. Appeals As Of Right From Supreme Court Judgments

CPLR 5701(a)(1) provides as follows:

> An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action.

Ordinarily, it is a judgment which finally determines the action that will be appealed, but an appeal as of right from an interlocutory judgment is also available. For instance, in a bifurcated personal injury trial in which the damage issue is held in abeyance, an interlocutory judgment of liability is immediately appealable prior to the subsequent trial assessing damages (*Hacker v City of New York*, 25 AD2d 35 [1st Dept 1966]).

### 1. Limited Review upon Appeals from Final Judgments

The lure of waiting to appeal a final judgment because an appeal is available as of right is tempered by the possible loss of reviewability of intermediate orders. As discussed below (*see, Reviewability, infra*), an "aggrieved" party's right to separately



appeal an intermediate order does not survive the entry of a final judgment and to obtain review of the non-final judgment or order upon an appeal from the final judgment, the intermediate order must necessarily affect the final judgment (CPLR 5501[a][1]).

## E. Appeals From Supreme Court Orders

Since there is broad appealability of orders from the Supreme Court, a most efficient means of determining whether an appeal may be taken as of right is to eliminate the possibility that the order cannot be appealed at all, or that it must be appealed by first seeking permission.

### 1. Ex Parte Orders not Appealable

No appeal lies from an ex parte order (CPLR 5701[a][2]). Since an aggrieved party may only appeal an order "made upon notice," the usual process of taking an appeal or moving for permission to appeal is simply foreclosed. Nevertheless, there are two separate means of obtaining appellate review of an ex parte order as set forth in CPLR 5701 and CPLR 5704.

#### a. Appeals of Denials of Motions to Vacate

Similar to the process of obtaining appellate review of a default judgment, CPLR 5701(a)(3) contemplates that a party aggrieved by an ex parte order will move, on notice, to vacate or modify the order. The order disposing of such a motion is appealable as of right.

#### b. CPLR 5704(a) Motions

CPLR 5704(a) provides an additional method for obtaining appellate review of an ex parte order which is in the nature of a motion to the Appellate Division. This motion is discussed in further detail in *Motion Practice, infra.*

2. **Appeals by Permission**

Assuming the order was made on notice, the potential appellant should next determine whether the order fits into any of the categories set forth in CPLR 5701(b), which lists three specific types of orders which are not appealable to the Appellate Division as of right. These include the following:

i. an order made in an Article 78 proceeding;
ii. an order requiring or refusing to require a more definite statement in a pleading (*see*, CPLR 3024); and
iii. an order ordering or refusing to order that scandalous or prejudicial matter be stricken from a pleading (*see*, CPLR 3024).

If the order does not fit within any of the CPLR 5701(b) categories, an appeal as of right still is not available if the order does not fit within any of the categories under CPLR 5701(a)(2). In either case, the appealing party must first move for permission to appeal pursuant to CPLR 5701(c). CPLR 5701(c) provides that any order not appealable as of right may be appealed to the Appellate Division by permission.

3. **Appeals as of Right**

CPLR 5701(a)(2) sets forth a specific list of appealable orders. The primary source of appeals from orders heard in the Appellate Division are covered by subparagraphs (iv) and (v), which essentially provide that an order which "involves some part of the merits" or "affects a substantial right" is appealable as of right. There is considerable precedent interpreting these provisions. Counsel is advised to peruse the annotations to determine the types of orders which the appellate divisions have held do not involve



some part of the merits or affect a substantial right. For example, courts have held that the following orders are not independently appealable as of right:

i. orders preliminary to the disposition of a motion on the merits;
ii. rulings made during a trial which may be reduced to an order;
iii. procedural rulings made after trial; and
iv. orders relating to the findings of a medical malpractice panel.

In addition to orders which involve some part of the merits or affect a substantial right, the CPLR specifies that a Supreme Court order is appealable as of right where it:

i. grants, refuses, continues or modifies a provisional remedy (CPLR 5701[a][2][i]);
ii. settles, grants or refuses an application to resettle a transcript or statement on appeal (CPLR 5701[a][2][ii]);
iii. grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits (CPLR 5701[a][2][iii]);
iv. determines the action and prevents a judgment from which an appeal might be taken (CPLR 5701[a][2][vi]); or
v. determines a statutory provision of the State to be unconstitutional, and the

determination appears from the reasons given for the decision or is necessarily implied in the decision (CPLR 5701[a][2][vii]).

## F. Appeals From Appellate Term Orders

An appeal may be taken to the Appellate Division from the Appellate Term only by permission (CPLR 5703[a]). Furthermore, when permission to appeal is sought from an order of the Appellate Term granting or affirming the granting of a new trial or hearing, the appellant must stipulate that, if the Appellate Division affirms the Appellate Term order, judgment absolute may be entered against appellant (CPLR 5703[a]).

## G. Appeals From Trial Courts Other Than Supreme Court

The appealability of a judgment or order to the Appellate Division, First Department from trial courts other than Supreme Court, including the Court of Claims, Surrogate's Court and Family Court, is governed by the court act regulating that particular type of court (CPLR 5702). The specific rules pertaining to these appeals are not discussed herein.

## H. Subsequent Orders

Appealability is also dictated by the appealing party's efforts to seek further review of the adverse order or judgment in the lower court which granted or denied the relief sought. The motions made in the lower court seeking review of an order or judgment also being appealed to the Appellate Division ordinarily do not affect the appealability of the original order or judgment, but appellate review of the subsequent order may be restricted.



### 1. Reargument

CPLR 5517(a) provides that the granting of a motion for reargument or the granting of an order upon reargument making the same or substantially the same determination as is made in the order appealed does not have any effect on the appealed order. The denial of a reargument motion also will not abate the original appeal. Thus, assuming the aggrieved party properly appeals the original order, a reargument motion will not affect the original appeal regardless of success. Of course, if reargument is granted, the appeal from the original order is likely to become moot and should be withdrawn (*see*, *Motion Practice, infra*).

The next question is whether the order disposing of the motion to reargue is also appealable? The answer is no; an order denying a motion to reargue is not appealable (CPLR 5701[a][2][viii]). Thus, if counsel does not appeal the original order, he or she waits to appeal the order upon reargument, and reargument is then denied, an appeal to the Appellate Division will be completely foreclosed. While the Appellate Division would refuse to hear an appeal from the subsequent order upon an appeal from the original order, the appealability of the original order remains unaffected.

However, where reargument is granted and the court makes the same or substantially the same determination, the order granting reargument is appealable (CPLR 5701[a][2][viii]). Having appealed the original order, counsel need not separately appeal the subsequent order granting reargument to obtain review. The appeal from the original order will bring up for review the subsequent order granting reargument (CPLR 5517[a]) and indeed, the appeal from the original order may be dismissed.

2. **Resettlement**

CPLR 5517(a)(2) provides that the granting of a motion to resettle the order has no effect on the original appeal. The denial of a motion to resettle also has no effect on the appealability of the original order. However, when resettlement is granted, the resettled order replaces the original one and the appeal from the original order will be dismissed as academic (*Standard Fruit & S.S. Co. v Waterfront Commn. of New York Harbor*, 56 AD2d 802 [1st Dept 1977]).

The denial of a motion to resettle an order is not appealable (*Herzog v Town of Thompson*, 251 AD2d 917 [3d Dept 1998]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). Thus, if the appealing party does not appeal the original order, the opportunity to appeal will be lost (*see, Kitchen v Port Auth. of New York and New Jersey*, 221 AD2d 195 [1st Dept 1995]).

3. **Renewal**

CPLR 5517(a)(3) provides that the denial of a motion for leave to renew will have no effect on the original appeal. Furthermore, an order denying renewal is appealable and it is automatically brought up for review by an appeal from the original order. An order granting renewal is also appealable and is likely to abate the original appeal (CPLR 5701[a][2][viii]).

The appealing party is invariably protected where renewal is truly involved because an appeal from the original order brings up for review the subsequent order and an appeal from the subsequent order supersedes the original order and the entire record will be brought up for review. As noted below, however, appealing the original order is advisable since the Appellate Division could treat the renewal motion as a reargument motion if the motion court finds



that the party did not offer a reasonable excuse for failing to submit the additional material in the original moving papers.

4. **Caveats**

In applying the rules set forth in CPLR 5517, the Appellate Division will look beyond the motion designation to determine whether the motion actually is for reargument, renewal or resettlement. Much of the difficulty in determining the type of motion made in the lower court is resolved by a recent amendment to CPLR 2221 requiring the moving party to specifically identify the motion as one to reargue or renew (CPLR 2221[d] and [e]). In any case, one commentator has strongly advised that a party aggrieved by the original order should appeal it even if a subsequent order may alter the disposition (*see*, D. Siegel, *New York Practice*, §532, at 834 [2d ed. 1991]; Siegel's "Practice Review," Number 86 [August 1999]). To ensure complete review, the record on appeal should contain a copy of the subsequent order and the papers it is based on.

As is made clear by a recent Court of Appeals decision, taking an appeal from a reargument or renewal order does not extend the time to perfect the appeal from the original order (*Rubeo v Nat. Grange Mut. Ins. Co.*, 93 NY2d 750 [1999]). If an appellant both moves for leave to reargue or renew and files a notice of appeal from the original order, and then files a subsequent notice of appeal from the renewal or reargument order, but does not perfect the appeal from the original order in a timely manner, he or she may be precluded from perfecting the appeal of the renewal or reargument order.

## V. REVIEWABILITY

### A. Introduction

Having determined that the party has the right to appeal an order or judgment, the aggrieved party must next determine whether the issues sought to be raised are within the Appellate Division's scope of review. CPLR 5501(c) is the only provision in the CPLR dealing specifically with the scope of review exercised by the Appellate Division and provides, *inter alia*, that the "Appellate Division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal." CPLR 5501(c) also sets forth the standard of review of a jury's monetary award and, as recently amended, states that appeals from certain types of orders automatically subject a subsequently entered judgment to review by the Appellate Division as well.

### B. Broad Reviewability

The broad scope of appealability to the Appellate Division is matched by the Court's broad scope of review. Two primary topics dominate this subject matter: (1) the Appellate Division's review of intermediate judgments and orders as well as final judgments and orders, and (2) the Appellate Division's subject matter review includes questions of law, fact and exercises of discretion.

### C. Review Of Final And Non-final Judgments And Orders

CPLR 5501(a), which has general application to the New York State appellate courts, enumerates the matters brought up for review on an appeal from a final judgment. There is no scope of review provision comparable to CPLR 5501(a) dealing with interlocutory orders.



#### 1. Interlocutory Orders and Judgments

While an appeal to the Court of Appeals from a non-final determination is available only in a few narrow instances, the Appellate Division's review powers are not encumbered by the finality requirement. Ordinarily, a direct appeal from an intermediate order brings up for review the entire subject matter of the order unless the appellant specifies that the appeal is being taken only from part of the order.

However, if an appeal is taken from a final judgment or order, CPLR 5501(a) constrains the Appellate Division's review powers with respect to interlocutory orders and judgment. CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review:

> any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken.

Thus, the statute gives the losing party a strategic choice of either immediately appealing the adverse intermediate order or judgment or waiting for a final judgment. If the losing party opts to seek immediate review of the interlocutory order, he or she cannot later seek review of that interlocutory order on appeal from the final judgment. Even if the direct appeal from the intermediate order is dismissed for non-perfection, and the merits are never

reached, review of the intermediate order is foreclosed upon entry of the final judgment (*Motalvo v Nel Taxi Corp.*, 114 AD2d 494 [2d Dept 1985]). Thus, caution is advised that if an immediate appeal is taken, it be timely perfected or withdrawn with a preservation of rights provision prior to a final judgment.

Furthermore, if the non-final order does not "necessarily affect" the final judgment, waiting to appeal is futile. One commentator has suggested that if counsel has any doubt whether or not a final judgment will preserve for review an intermediate order and he or she definitely wants the intermediate order reviewed, counsel should immediately appeal the intermediate order (D. Siegal, *New York Practice* §530, at 830 [2d ed. 1991]). An appeal from an intermediate order may be withdrawn if it appears that a judgment is imminent and that the right to appellate review of the order will terminate.

By virtue of a recent amendment to CPLR 5501(c), the risk of losing the right to obtain review of an intermediate order by entry of judgment prior to the appellate disposition is eliminated where the appeal is from the lower court's grant of dismissal on the pleadings or summary judgment. The notice of appeal from these orders is deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal. Thus, while most appeals from intermediate orders terminate upon entry of a final judgment and the appellant may only obtain review upon an appeal from the final judgment, the pending appeal from the order granting summary judgment or a dismissal order is deemed to incorporate the judgment as well. No separate appeal from the judgment need be taken and indeed, the statute provides that the Court impose taxation of costs only upon a single appeal from the order/judgment



combined.

Review of interlocutory orders and judgments on appeal from a final judgment includes review of non-final orders or judgments that were adverse to the respondent and which, if reversed, would entitle respondent in whole or in part to prevail on that appeal (CPLR 5501[a][1]). There can be no review if the order in question had previously been the subject of an appeal by the party who is the respondent on the appeal from the final judgment, and the order in question must still be one which "necessarily affects" the final judgment. For example, if the party who is the respondent lost a motion for a provisional remedy, but won the judgment, the order denying the provisional remedy would not affect the final judgment and will not be reviewed. By contrast, if the respondent lost a motion to dismiss on the basis of the statute of limitations, that order certainly affects the final judgment and would be reviewed.

2. **Appeals from Final Judgments**

CPLR 5501(a)(2) through (5), which apply generally to New York appellate courts, and CPLR 5501(c), which applies solely to the appellate divisions, are the provisions dealing with the scope of review exercised by the appellate divisions with respect to civil trials. Typically, after a trial, an aggrieved party can seek review of the proceedings leading up to the verdict as well as the verdict itself. This includes the following:

a. **Denial of Motion for New Trial**

An appeal from a final judgment brings up for review any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken (CPLR 5501[a][2]). Thus, if the aggrieved party moves for a new trial and

does not take an immediate appeal, on an appeal from the final verdict, the aggrieved party may argue that the lower court improperly denied the motion for a new trial.

b. **Trial Errors**

An appeal from a final judgment brings up for review any objectionable court remarks and rulings, as well as the court's charge to the jury (CPLR 5501[a][3], [4]). As discussed below, trial court rulings and other dispositions that are not embodied in an order or judgment are not directly appealable. Hence, an appeal from the final judgment is the only means of obtaining appellate review of most alleged trial errors.

CPLR 5501(a)(3) provides that an appeal from a final judgment brings up for review "any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected." Thus, under the statute, rulings made during the course of a trial are reviewable on appeal from a final judgment. These include decisions made on motions, evidentiary rulings, charges to the jury and failures to charge as requested. Additionally, CPLR 5501(a)(4) provides that any remark made by the Judge to which appellant objected is reviewable on an appeal from a final judgment.

(i) Preservation Requirements and Exceptions

Both paragraphs (3) and (4) of CPLR 5501(a) refer to the necessity of an objection in order to preserve an issue for appellate review. To the extent that these provisions are binding on the Appellate Division, any potential appellate issue pertaining to a ruling made by the trial court, its charge, or the Trial Judge's



remarks will not be reviewed by the Appellate Division unless the issue was first brought to the attention of the trial court. To preserve an error for appellate review, an appropriate objection must have been taken in the trial court, or it must appear that there was no opportunity to object. Formal, post-objection "exceptions" to rulings of the court are no longer necessary, but it is necessary that a party make known the action which he or she is asking the court to take or the objection to the action taken by the court (CPLR 4017, 4110-b).

The general rule that errors that were not brought to the attention of the trial court will not be considered on appeal is subject to certain exceptions. Where the lower court clearly lacked jurisdiction, this issue may be raised for the first time on appeal. Furthermore, the Appellate Division has broad discretionary power to review issues not properly preserved in the trial court "in the interests of justice." The Appellate Division will consider unpreserved issues where it appears necessary to do so in order to meet the interests of justice or to prevent the invasion or denial of essential rights, such as in the case of "fundamental" trial error. However, if the Appellate Division concludes that an appellant's failure to object was intentional, it will not review in the "interests of justice."

Parenthetically, the Court of Appeals has no "interests of justice" review power since it is constitutionally limited to the review of questions of law. Accordingly, where the Appellate Division reviews an unpreserved issue, any further appellate review is foreclosed.

## D. Issues Subject To Review

The main statutory provision distinguishing the Appellate Division's scope of review from that of the Court of Appeals is CPLR 5501(c), which gives the Appellate Division the authority to review questions of fact and exercises of discretion, as well as purely legal issues. The determination whether an issue involves a question of fact or one of law is not of critical significance in deciding whether to appeal to the Appellate Division in the first place, but the Appellate Division will have to make this determination in disposing of the appeal to facilitate further review by the Court of Appeals, whose jurisdiction is limited to reviewing questions of law (*see, Disposition, infra*).

### 1. Review of Facts

Unlike the Court of Appeals, the Appellate Division is not confined to reviewing questions of law, and indeed, the Appellate Division's fact-finding powers are essentially coextensive with those of a trial court. The court has "the power to review the record and make its own findings of fact or can remand for findings of fact to be made" (*Weckstein v Breitbart*, 111 AD2d 6 [1st Dept 1985]).

#### a. Nonjury Cases

The scope of the Appellate Division's review of a nonjury trial is as broad as that of the Trial Judge (*Jossel v Filicori*, 235 AD2d 205 [1st Dept 1997]). The Appellate Division is not confined to deciding whether the Judge's decision was against the weight of the evidence; the court "may weigh the relative probative force of conflicting inferences that may be drawn from the testimony and grant the judgment which upon the evidence should have been granted by the trial court." Even though this power exists, the Court may be reluctant to exercise it with regard to credibility judgments and usually "will give deference to Supreme



Court's assessment of the quality of the evidence and credibility of the witnesses" (*Callanan Indus. v Olympian Dev. Ltd.*, 225 AD2d 941 [3d Dept 1996]). However, this principle of judicial self-restraint is inapplicable to factual findings not involving credibility determinations. "Where . . . the findings made by the trial court are based in large part upon considerations other than the credibility of witnesses, this court need not accord its findings great deference. We are equally empowered to draw inferences and make findings of fact based on evidence in the record" (*Orbit Holding Corp. v Anthony Hotel Corp.*, 121 AD2d 311 [1st Dept 1986]). Generally, the Appellate Division will only make new findings of fact where the record is complete and the facts can be established from review of that record. Where the record is inadequate, the Appellate Division will remand for a new trial or a hearing on the matter in dispute.

#### b. Jury Cases

The Appellate Division lacks the power to make new findings of fact in a jury case. In such cases, the Appellate Division's powers of review of factual findings is limited to whether the jury's determination was against the weight of the evidence. Where the Appellate Division sets aside a jury verdict as against the weight of the evidence, it must remand the case for a new trial. The Court applies the same test as the trial court on a motion to set aside the verdict; it must determine whether a particular factual question was correctly resolved by the trier of facts (*see, Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). "If it appears that, upon all the credible evidence, a different finding would have been reasonable, we must weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from that testimony" (*Larkin v State*, 84 AD2d 438 [4th Dept 1982]).

2. **Review of Legal Sufficiency of Evidence**

In addition to its power to review questions involving the interpretation of applicable statutes, rules, etc., the Appellate Division is empowered to review the legal sufficiency of the evidence to support a verdict. In passing on the question of legal sufficiency, the Appellate Division basically applies the same standard a trial court uses when asked to direct a verdict. The Appellate Division must conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead a rational person to the conclusion reached by the jury on the basis of the evidence presented at trial. In reversing for insufficiency of the evidence, the Appellate Division may dismiss the action for failure to prove a prima facie case, or direct judgment for the party against whom the verdict was entered.

3. **Exercise of Discretion**

The Appellate Division exercises the same discretion as the trial court. The manner in which the Appellate Division exercises this discretion, however, may dictate whether further review will be available in the Court of Appeals. When the Appellate Division determines that there has been an abuse of discretion by the lower court as a matter of law, a question of law is presented to the Court of Appeals. However, where the Appellate Division determines that the lower court has improvidently exercised its discretion and the Appellate Division substitutes its own discretion for that of the lower court, the Court of Appeals will decline review unless it determines that a substantial question of abuse has been presented or the result reached is so outrageous as to shock the conscience. Furthermore, as previously noted, the Appellate Division exercises discretion which is not reviewable by the Court of Appeals when it reviews an issue in the interests of justice.



4. **Money Judgments**

Under CPLR 5501(c), the Appellate Division is empowered to review the excessiveness or inadequacy of a jury's money judgment where an itemized jury verdict is required by CPLR 4111. The standard of review applied to such a question, which was changed in 1986, is whether the award "deviates materially from what would be reasonable compensation." The previous standard, which required that the award "shock the conscience" of the court, may remain in effect in other appellate courts (*see*, Siegel, *Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B CPLR C5501.10). The Federal courts, in diversity cases, must now follow the Appellate Division standard (*Gasperini v Center for Humanities, Inc.*, 518 US 415 [1996]). Upon altering a jury's money verdict, the Appellate Division is required to "set forth in its decision the reasons therefor, including the factors it considered" in applying CPLR 5501(c) (CPLR 5522).

Although not an "aggrieved party," the respondent may obtain review of a money verdict upon the appellant's appeal where the respondent previously stipulated to a different amount than the jury's verdict. CPLR 5501(a)(5) provides that an appeal from a final judgment brings up for review the following:

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

Thus, a plaintiff who has stipulated to the reduction of the amount awarded by a jury may argue for reinstatement of the verdict on an appeal by the defendant (*Kelly v M.C. Electric Co. Inc.*, 68 AD2d 657 [1st Dept 1979]). Similarly where the defendant has stipulated to an amount greater than the jury's verdict, defendant may seek reinstatement of the verdict on appeal by the plaintiff.

## E. Limitations Of Review

Even if the issues presented to the Appellate Division are technically within its scope of review, the Appellate Division may decline to grant relief to the appellant under various circumstances discussed below.

### 1. Issues Dehors the Record

Appellate courts are guided by the principle that issues that are "dehors" (outside) the record on appeal are outside their scope of review. Indeed, any matter for which the parties seek appellate review must be encompassed in the record on appeal. Defects or omissions in a record may result in an affirmance or an outright dismissal of the appeal. In a few limited instances, however, appellate courts can take judicial notice of law and facts which are not part of the record on appeal (CPLR 4511).

### 2. Harmless Error

An additional restraint on the Appellate Division's powers of review of trial errors is the harmless error doctrine. CPLR 2002 should be read in conjunction with CPLR 5501(a)(3) and (4). The statute provides as follows: "An error in a ruling of the court shall he disregarded if a substantial right of the party is not prejudiced." Thus, even when the Appellate Division agrees with the appellant's argument, duly preserved in the trial court, that the trial court's ruling or charge was erroneous, it may affirm the appeal upon the



ground that the substantial rights of the appellant were not prejudiced. Of course, the more grievous an error, or where multiple errors exist, the less likely the Appellate Division will affirm upon the doctrine of harmless error.

Furthermore, even if an error does not constitute "harmless error," the Appellate Division may decline to pass on certain issues raised where it has determined that other errors require reversal. For instance, the court may decline to consider whether a verdict was excessive where it orders a new trial because of the erroneous admission of evidence.

### 3. Stare Decisis, Law of the Case and Transferred Cases

The doctrines of stare decisis and law of the case also limit the Appellate Division's review powers. The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision. A decision by the Court of Appeals on the point at issue must be followed by the lower appellate courts. Within each department, once the Court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision (*Dufel v Green*, 198 AD2d 640 [3d Dept 1993]).

Stare decisis does not apply between the judicial departments of the Appellate Division. Although the Appellate Division, First Department is not bound to follow the decision of another department on the point in issue, the decisions of sister departments are persuasive and entitled to respectful consideration (*see, Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663 [2d Dept 1984]). Similarly, Federal court decisions are not binding on

State appellate courts, but are considered persuasive authority.

In recent years, some appeals from other departments (particularly the Second Department) have been transferred to the Appellate Division, First Department. When a case is transferred from one judicial department of the Appellate Division to another, the law of the originating intermediate appellate court governs, when the Court of Appeals has not yet spoken on the issue (*Doyle v Amster*, 79 NY2d 592 [1992]).

Unlike stare decisis, the law of the case doctrine has limited application to appeals in the Appellate Division, First Department. Law of the case, which is a procedural rule precluding redetermination of issues already decided in the context of the same litigation, is applicable where the same appellant brings a subsequent appeal in the same case and attempts to raise the same issue argued in the first appeal. A matter decided in a prior appeal is the law of the case and may not be relitigated absent a showing of a change in the law or new evidence affecting the prior determination (*Weiss v Flushing Natl. Bank*, 176 AD2d 797 [2d Dept 1991]). Furthermore, if the party appeals from only part of a judgment or order, in the event of a retrial and a second appeal in the same action, issues which could have been, but were not raised on the first appeal will not be considered on the second appeal. The unappealed ruling becomes law of the case (*Hohenberg v 77 W. 55th St. Associates*, 118 AD2d 418 [1st Dept 1986]).

4. **Frivolous and Fraudulent Issues**

Appellant should be wary of the distinction between bringing an appeal which may lack merit and bringing a frivolous appeal. The consequences of the former is merely an affirmance, whereas the latter subjects litigants and their counsel to financial



costs and sanctions. An appeal will be considered frivolous within the meaning of 22 NYCRR 130-1.1(c) if:

> (i) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (ii) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (iii) it asserts material factual statements that are false.

Although the Appellate Division exercises a great deal of discretion in determining an appropriate award of costs and/or the imposition of financial sanctions, it is required by the Rules of the Chief Administrator to set forth the reasons it found the conduct frivolous as well as the reasons why it found a certain amount imposed or awarded appropriate (22 NYCRR 130-1.2); and to impose not greater than $10,000 as a punitive sanction (22 NYCRR 130-1.2). A reasonable opportunity to be heard is required before a sanction is imposed (22 NYCRR 130-1.1[d]).

## VI. MECHANICS OF AN APPEAL

### A. Introduction

Once an aggrieved party has determined that a particular order or judgment is appealable to the Appellate Division, and that the issues which that party seeks to raise are reviewable by that Court, a number of steps must be taken to ensure that the appeal will be heard and appropriately decided. In essence, the mechanics of appealing a civil order or judgment to the Appellate Division

involve the following: (1) obtaining a proper order or judgment from which to appeal; (2) serving and filing a notice of appeal or a motion for permission to appeal ("taking" an appeal); (3) assembling the record as well as the briefs and presenting these to the Court ("perfecting" the appeal); and (4) oral argument (or submission of the appeal). It cannot be overemphasized that vigilance in adhering to proscribed procedure and timetables is absolutely necessary to ensure that the appeal receive timely and complete review. Relevant authority is contained in CPLR 5512-5516, 5520, and 5525-5531. The applicable Rules of the Appellate Division, First Department are referenced throughout.

## B. Appealable Paper

Since an appeal lies only from a properly entered order or judgment, no steps to appeal can be taken unless an "appealable paper" exists (CPLR 5512[a]). An appeal must be taken from an order or judgment as distinguished from the court's decision, ruling, memorandum, verdict, etc. Therefore, a trial court's decision that has not been reduced to a written order or judgment is not appealable, nor is a transcript embodying the court's ruling appealable unless it has been "so ordered" or a separate judgment or order has been entered (*see*, *Matter of Commitment of Juan Alejandro R.*, 221 AD2d 183 [1st Dept 1995]). Should the Appellate Division, First Department clerk's office discover upon inspection of the record that a duly entered order or judgment is lacking, the record will not be accepted for filing. If the appellant succeeds in having the appeal heard by the Appellate Division, it may be dismissed at that juncture for lack of jurisdiction.

Ordinarily, the prevailing party takes the necessary steps to enter an order or judgment. A judgment is entered when, after it



has been signed by the clerk of the trial court, it is filed by the Clerk (CPLR 5016[a]), so, too, with an order (CPLR 2220[a]).

If the prevailing party fails to settle promptly, the aggrieved party must take steps to obtain an "appealable paper" before appealing the judgment or order. CPLR 5512(b) provides that "[e]ntry of an order made out of court and filing of the papers on which the order was granted may be compelled by order of the court from or to which an appeal from the order might be taken." Thus, the aggrieved party may move in the Appellate Division for an order directing the prevailing party to file a judgment or order, or compel the filing by order to show cause in the lower court.

## C. Taking An Appeal

"Taking an appeal" involves serving and filing a notice of appeal or moving for permission to appeal. While this is a simple step in the entire process of having the appeal heard, the failure to timely and correctly take an appeal has grave consequences. The time period within which a party must take an appeal is nonwaivable and jurisdictional so that even the most meritorious appeal will be dismissed if it was not taken within the proscribed time limits. Even if the "aggrieved" party is uncertain about the merits of an appeal, the simple step of taking an appeal within the statutorily prescribed time period should be taken to preserve the right to appeal, because the appeal can later be withdrawn by a simple motion (*see*, *Motion Practice*, *infra*).

### 1. <u>Service of Order or Judgment</u>

Whether an appeal is taken as of right or by permission, the time to appeal does not commence until a copy of the order or judgment to be appealed with notice of entry has been served. Ordinarily, the prevailing party serves a copy of the order or

judgment with notice of entry on the aggrieved party, but service may also be accomplished by the losing party (CPLR 5513[a], [b]). Service of the order and judgment with notice of entry can be in any manner provided for in CPLR 2103(b) and the time when the order or judgment is actually received is irrelevant in computing the time to appeal. Rather, the 30 day time limit begins to run from the date the order or judgment is served either personally or by mail.

The reference to service "by a party" in the statute, the result of a 1996 amendment to CPLR 5513(a) (as amended by L 1996, ch 214, §1), was intended to clarify the time limit in a situation where the trial court itself serves the judgment or order, or takes some other action which was the functional equivalent to service. Professor Siegel has observed, "the amendment provides that only the service of the judgment or order (with notice of entry) by a party will start the time running," and the prior actual notice of the order or judgment by the court is of no moment (D. Siegel, *Supplementary Practice Commentaries* [McKinney's Cons Laws of NY, Book 7B, CPLR 5513, 2000 Supp Pamph, at 40-41]).

2. **Strict Time Constraints**

An appeal must be taken or a motion made for permission to appeal within 30 days after service of the order or judgment with notice of entry by a party. Thus, if the prevailing party personally delivers a copy of the order or judgment on the losing party, the losing party has 30 days in which to take an appeal or make a motion. Similarly, if the losing party serves the order or judgment, he or she has 30 days in which to take the same steps.

If the prevailing party serves the order or judgment by mail or by overnight delivery service, the losing party will have an additional five days to take an appeal (CPLR 2103[b] [2], [6];



5513[d]). Similarly, as recently clarified by an amendment to CPLR 5513 adding paragraph (d) (as amended by L. 1999, C. 94, §1), the potential appellant will also have an additional five days in which to serve and file the notice of appeal if he or she is the party who serves the order or judgment to be appealed.

3. **Extensions**

The statutory time can only be extended in a case fitting one of the statutory exceptions specified in CPLR 5514:

a. **Wrong Method**

CPLR 5514(a) provides as follows:

> If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

This statute applies where the appellant mistakenly files a notice of appeal as of right when permission to appeal is necessary, or when appellant mistakenly seeks permission to appeal when such permission is unnecessary. Assuming the wrong step is taken within the 30 day period, CPLR 5514(a) permits the right step to be taken within an additional 30 day period from the date of service of the order dismissing the appeal or denying the motion for leave. However, the Court's decision whether to allow this corrective step

to be taken is discretionary and should not be considered a means of extending the time to take an appeal.

b. **Disabled Counsel**

CPLR 5514(b) provides as follows:

> If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within 60 days from the date of death, removal or suspension, or commencement of such incapacity or disability.

This corrective period is only available if the disability occurs within the initial 30 day period. The 60 day period begins to run from the date of the disabling event. The extension does not apply to the voluntary discharge of an attorney by his client (*Siegel v Obes*, 112 AD2d 930 [2d Dept 1985]).

c. **Substitution or Mistake**

Finally, CPLR 5514(c) provides as follows: "[n]o extension of time shall be granted for taking an appeal or for moving for permission to appeal, except as provided in this section, section 1022, or section 5520." The first of these exceptions provides for a 15 day extension of time for taking an appeal following the



substitution of a party. CPLR 5520(a) allows the court from or to which an appeal is taken or the court of original instance to grant an extension of time for curing an omission, so long as the notice of appeal or notice of motion for permission to appeal was either served or filed in time. Essentially, this addresses the situation where, owing to a "mistake" or "excusable neglect," an obviously broad standard -- either service or filing of the notice of appeal -- but not both -- is omitted.

4. **Dismissal of Untimely Appeals**

An untimely appeal is subject to dismissal upon motion or by the court *sua sponte (see, Motion Practice, infra)*. The Appellate Division, First Department clerk's office may discover that the appeal is untimely upon receipt of the notice, but it is more likely that the issue will be raised by the respondent in a motion to dismiss. Since CPLR 5520(a) permits the Court to overlook the timely filing *or* service of the notice of appeal, the motion to dismiss will likely be denied if appellant has failed to timely take one of these steps, but not both.

5. **Mechanics of Taking an Appeal as of Right**

CPLR 5515(a) provides as follows:

> An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered . . . A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken.

The Rules of the Appellate Division, First Department require that appellant file two original notices of appeal with the lower court (22 NYCRR 600.17[c]) and that these notices be accompanied by a pre-argument statement, proof of service, and where applicable, a copy of the opinion or short form order which contains a memorandum (22 NYCRR 600.17[a]). The lower Court Clerk will transmit necessary documents to the Appellate Division, First Department (22 NYCRR 600.17[c], [d]). CPLR 8022(a) additionally requires the appellant to pay the County Clerk a $50 fee upon filing a notice of appeal.

a. **Contents of Notice of Appeal**

The notice of appeal must contain the name of the appellant, the judgment or order or part thereof appealed from, and the designation of the court to which the appeal is taken. The caption of the notice of appeal should bear the name of the court of original jurisdiction and name the parties in their original capacities. Pursuant to 22 NYCRR 130-1.1(a), the notice of appeal must be signed in ink by the appellant's attorney (or the appellant if *pro se*), with the name printed or typed directly below the signature. If every part of the judgment or order is being appealed, the notice should state "from every part thereof" or equivalent language. If the appeal is from a final judgment, any non-final determination that affects the final judgment is automatically brought up for review, and it is thus unnecessary to specify the non-final determinations sought to be reviewed in the notice of appeal. Indeed, it is dangerous to do so, for insofar as appellant specifies the parts of the order or judgment appealed from in the notice of appeal, the appellant may waive the right to appeal from other parts and essentially limit the Appellate Division's power of review.



Defects in the form of the notice of appeal not relating to timeliness that do not "prejudice a substantial right of a party" may be disregarded (CPLR 2001). CPLR 5520(c) provides that "[w]here a notice of appeal is premature or contains an inaccurate description of the judgment or order appealed from, the appellate court, in its discretion, when the interests of justice so require, may treat such a notice as valid." Note that relief from such "defects in form," is discretionary, and reliance on this section is "a dangerous concept to depend on because of possible differences of opinion as to what qualifies as a mere 'form' defect" (D. Siegel, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR C5520:1). Accordingly, it may be wise to move in the Appellate Division for correction of the notice of appeal. By way of example, mistakenly referring to a judgment as a (nonappealable) "verdict" has been held to be a mistake which cannot be disregarded (*Soto v Montanez*, 201 AD2d 876 [4th Dept 1994]).

b. **Filing and Service**

Two notices of appeal and the previously specified accompanying documents must be filed with the Clerk of the Court of original instance. Although filing may be accomplished by mail, the papers are deemed filed when they are received. Hence, appellant's appeal will not be timely filed if the notice of appeal is placed in the mail 30 days after the order or judgment was served by the prevailing party, because the five day mailing toll is not available with respect to filing the notice of appeal.

A copy of the notice of appeal and accompanying documents must also be served on all of the original parties as well as the "adverse party." Indeed, the County Clerk may not accept the appeal for filing absent proof of service. Service should be made upon all of the attorneys who represented the parties in the court

below, unless the parties otherwise give notice. Service is accomplished in the same manner as service of papers in general. If service is by mail, the appeal is taken when the notice of appeal is dropped in the mailbox (CPLR 2103[b][2]). Thus, as distinguished from filing the notice, appellant's service of the notice of appeal by mail on the 30th day is timely (per the five day extension for mailing). Furthermore, as discussed above, pursuant to CPLR 5520(a), if within applicable time limits either service or filing of a notice of appeal (but not both) is omitted by mistake or "excusable neglect," the appellant may move in either the court of original instance or the Appellate Division for permission to make late service or filing.

c. **Pre-argument Statement**

The Rules of the Appellate Division, First Department require that a "preargument statement" be filed together with the notice of appeal in every civil case (22 NYCRR 600.17). This is a document separate from the notice of appeal, which must contain the following information: (i) the title of the action; (ii) the full names of the original parties and any change therein; (iii) the name, address, and telephone number of counsel for appellant; (iv) the same information for counsel for respondent; (v) the court, and county, or administrative body, from which the appeal is taken; (vi) in general terms, the "nature and object of the cause of action or special proceeding" (*e.g.*, contract-personal services, sale of goods, tort-personal injury, automobile accident, malpractice, equity-specific performance, injunction, etc.); (vii) the result reached in the court or administrative body below; and (viii) the grounds for seeking reversal, annulment, or modification. Additionally, where appropriate the statement must indicate "whether there is any related action or proceeding now pending in any court of this or any jurisdiction, and if so, the status of the case." If an additional



appeal is pending in the same action, counsel must indicate the date of entry of the order or judgment and attach a copy of the notice of appeal and the pre-argument statement. If a "pre-argument conference" is scheduled, respondent must file a counter pre-argument statement.

d. **Pre-argument Conference**

22 NYCRR 600.17(e) also provides for pre-argument conferences in civil appeals. After the notice of appeal and pre-argument statement are received by the Appellate Division, First Department from the trial court, the Appellate Division may direct counsel and the parties to attend a pre-argument conference before a judicial administrative officer or such other person as may be designated by the court. If a pre-argument conference is not scheduled within 20 days after the filing of a notice of appeal, any party may apply to the Court to have such a conference (22 NYCRR 600.17[f]). The Court may or may not grant the request. Generally, only cases which have settlement potential or require a narrowing of the issues will be referred to a pre-argument conference. Within 10 days after an order directing a pre-argument conference has been entered, respondent must file a counter pre-argument statement, together with proof of service. The counter statement must set forth the extent to which respondent challenges the assertions made in appellant's pre-argument statement. The statement must also include an explanation of the grounds for granting the relief sought (22 NYCRR 600.17[g]). If counsel fails to comply with any of the provisions of the rule, counsel may be subject to sanctions (22 NYCRR 600.17[h]). Following the conclusion of the conference, if the parties enter into a stipulation, the Court shall file an order of approval (22 NYCRR 600.17[i]). Otherwise, of course, the appeal will continue.

6. **Mechanics of Taking an Appeal by Permission**

As previously discussed, even where an appeal as of right does not exist, a losing party may seek permission to appeal a Supreme Court order (CPLR 5701[b] and [c]), and is always required to obtain permission to appeal an Appellate Term order (CPLR 5703). The process of taking an appeal where permission is required commences by service and filing of motion papers seeking permission to appeal.

a. **Contents and Form of Motion Papers**

Motions in the Appellate Division, First Department are governed by Rule 600.2 (*see*, *Motion Practice*, *infra*). Pursuant to the Rules of the Appellate Division, First Department, the motion papers for leave to appeal must contain the following:

> a copy of the order or judgment and opinion, if any, of the court below, a concise statement of the grounds of alleged error and a copy of the order of the lower court denying leave to appeal, if any. If the application is to review an order of the Appellate Term granting or affirming the granting of a new trial or hearing, the papers must also contain a stipulation by counsel consenting to the entry of judgment absolute against appellant in the event of affirmance by the court

(22 NYCRR 600.3[b][2]).

Pursuant to NYCRR 130-1.1(a), the motion papers must be signed in ink by the appellant's attorney (or appellant if *pro se*),



with the name printed or typed directly below the signature.

b. **Permission to Appeal a Supreme Court Order**

Permission to appeal from the Supreme Court may be sought from either the Judge who issued the order, or, upon refusal by that Judge, from a Justice of the Appellate Division. Alternatively, permission may be sought directly from a Justice of the Appellate Division (CPLR 5701[c]).

Obviously, the first of these choices permits two chances to obtain permission. However, 22 NYCRR 600.3(a) requires that the motion papers to the Appellate Division, First Department state whether any previous application has been made and, if so, to whom and the reasons given, if any, for its denial. Accordingly, counsel must weigh the fact that leave has previously been refused as well as the reasons given by the lower court and these items may be given great weight by an Appellate Division Justice if such course is chosen.

c. **Permission to Appeal an Appellate Term Order**

Permission to appeal from the Appellate Term must first be sought from that court, and, if refused, may then be sought in the Appellate Division (CPLR 5703(a); 22 NYCRR 600.3[b][1]).

d. **Time Limitations**

The motion must be made within the 30 day period prescribed by CPLR 5513. All motions are "made" when a notice of the motion or an order to show cause is served (CPLR 2211). Where either the Supreme Court or the Appellate Term has refused to grant permission to appeal, an applicant asking for such permission from the Appellate Division must move for that relief within 30 days from the date of service by a party of the order denying leave to

appeal (CPLR 5513[b]).

Pursuant to statute, motions for permission to appeal must be noticed to be heard at a motion day at least eight days and not more than 15 days after the notice of the motion is served, unless there is no motion day during that period, in which case at the first motion day thereafter (CPLR 5516). The Rules of the Appellate Division, First Department, which effectuate the statute, provide that "all applications for leave to appeal shall be submitted without oral argument and shall be made returnable at 10 o'clock in the forenoon of a regular business day of the court during the period September 1 through June 20." (22 NYCRR 600.3[b][3]). CPLR 5514 governs extensions of time and it applies to appeals by permission (*see*, *Extensions*, *supra*).

e. **Taking an Appeal after Permission has been Granted**

Two copies of the order granting permission to appeal must be filed with the Clerk of the Court of original instance (22 NYCRR 600.17[c]). A copy of the order granting leave must be served on all the parties. In addition, a copy of the order appealed, as well as a pre-argument statement, must be filed and served (22 NYCRR 600.17[a]).

7. **Taking a Cross-Appeal**

If both sides are aggrieved by different aspects of the same order, a cross-appeal may be required to permit all parties to raise all issues. CPLR 5513 provides as follows:

> A party upon whom the adverse party has served a notice of appeal or motion papers on a motion for permission to appeal may take an appeal or make a motion for permission to appeal within ten days after such service or within the time limited by subdivision (a) or (b) of this section, whichever is longer, if such appeal or motion is otherwise available to such party.



If the 30 day period for an original appeal has expired, the cross-appellant still has an additional 10 days to file a notice of appeal measured from the adverse party's service of its notice of appeal. The same is true when permission is required.

**D. Perfecting The Appeal**

After a notice of appeal has been filed or permission to appeal obtained, the next step is to perfect the appeal, which involves preparing and filing the record on appeal and brief, and calendaring the appeal so that it can be heard by the Appellate Division. CPLR 5525 through 5532 contain the underlying requirements for perfecting an appeal. Supplementary requisites are found in the Rules of the Appellate Division, First Department (22 NYCRR 600.1, 600.4, 600.5, 600.7, 600.10, 600.11, and 600.12).

1. **Presenting a Record to the Appellate Division**

The method used to present the record on appeal should not be confused with the record on appeal itself. The record on appeal essentially consists of everything upon which the lower court based its determination and it is filed in the Appellate Division (unless a statement in lieu of the record is being utilized) as the framework for appellate review. All appeals are heard on this record, but the format for presentation of the record varies as discussed below.

The content of a record on appeal is governed by statute and

depends upon whether the appeal is from a final judgment or from an interlocutory judgment or any order. In the case of a final judgment, the record should consist of the following: (i) the notice of appeal; (ii) the judgment roll; (iii) the corrected transcript of the proceedings of a trial or hearing or a statement pursuant to CPLR 5525(d) -- statement in lieu of the record/reconstructed proceedings; (iv) any relevant exhibits or copies of them, which were before the court of original instance; (v) any other reviewable orders; and (vi) any opinions in the case (CPLR 5526).

The record on appeal from an interlocutory judgment or any order should consist of the following: (i) the notice of appeal; (ii) the judgment or order appealed from; (iii) the transcript, if any; (iv) the papers and other exhibits upon which the judgment or order was founded; and (v) any opinions in the case (CPLR 5526).

If either the full record method or appendix method of presenting the record are to be used, certain preliminary steps need be taken to assemble a record appropriate for filing in the Appellate Division, First Department.

a. **Obtaining a Corrected Transcript**

Under CPLR 5526, the record on appeal must include "the corrected transcript of the proceedings or a statement pursuant to subdivision (d) of CPLR 5525 if a trial or hearing was held." Thus, if the order or judgment being appealed arises from any type of trial or hearing, the first step in perfecting the appeal is to obtain, settle and file the transcript of the lower court proceedings.

Needless to say, many interlocutory appeals involve motions decided "on the papers" and no steps need be taken to include transcripts in the record. Additionally, no transcript is necessary



where a party appeals from a judgment entered upon a referee's report, or a decision of the court upon a trial without a jury, and the appellant relies only upon exceptions to rulings on questions of law made after the case is submitted (CPLR 5525[b]).

Normally, the transcript is obtained at the same time or before the appeal is taken. The appellant must contact the court reporter to order the entire transcript unless the parties stipulate that only a portion of the record be transcribed (CPLR 5525[a] and [b]). Fees are required unless the appellant is the State or any political subdivision of the State, or an officer or agency of same (CPLR 5525[a]). Under the CPLR and the Rules of the Appellate Division, First Department, the fee for a transcript is set by agreement of the stenographer and the attorney, unless the transcript is ordered by the Court itself, in which case the fee is set at $1.375 per page (CPLR 8002; 22 NYCRR 108.2[a], [b][1]).

CPLR 5525(b) and 22 NYCRR 600.5(c) allow the parties to stipulate that only a portion of the record be transcribed. Indeed, the Rules of the Appellate Division, First Department, pertaining to the full record method, specifically encourage these types of stipulations, stating as follows: "Where feasible, the parties shall stipulate, pursuant to CPLR 5525, subdivision (b), that only a portion of the proceedings need be filed." Notwithstanding this evident preference for abbreviation, the appellant is cautioned to provide an adequate portion of the transcript since the Court, finding selected portions inadequate for review of the issues, may dismiss such an appeal.

CPLR 5525(a) provides that the "court reporter must serve upon appellant the ribbon copy and a carbon copy of the typewritten transcript." Pursuant to the rules of the Appellate Division, First

Department, the appellant may request that only the "ribbon" copy of the transcript be prepared by the court reporter (22 NYCRR 600.5[f]).

Once obtained, the transcript must be "settled" (CPLR 5525; 22 NYCRR 600.5[e]). Appellant has 15 days after receiving the transcript to make any proposed corrections and serve them, together with a notice of settlement on the respondent, who in turn has 15 days to propose corrections and serve them on appellant. If the parties agree on the correctness of the transcript, either initially or ultimately after mutually agreed upon corrections, they may so stipulate (CPLR 5532). If the respondent fails to propose corrections within 15 days, the transcript is deemed correct. Appellant must affix an affirmation certifying to compliance with these procedures *(see*, CPLR 5525[c][1], [2]; 22 NYCRR 600.5[e][2]). If there is a failure to agree, then the transcript must be submitted for settlement to the Judge or Referee before whom the proceedings were held. The appellant must give respondent at least four days notice of such submission.

After the transcript is settled, it must be served and filed. CPLR 5525(c)(i) provides as follows: "When he serves his brief upon the respondent the appellant shall also serve a conformed copy of the transcript or deposit in the office of the clerk of the court of original instance who shall make it available to respondent." When the full record method is be used, the entire transcript will normally be included in the full record served on opposing counsel and filed with the Appellate Division. If the appendix method is used, the transcript may be contained in the lower court record which is transmitted to the Appellate Division, First Department, but if it is not, it is appellant's responsibility to file the transcript in the Court.



If no stenographic record of a trial or hearing is taken or none is available because the stenographer cannot be located or notes have been lost or destroyed, then the appellant is required, within 10 days after taking the appeal, to prepare and serve the respondent with a statement of the prior proceedings from the best available sources, including his or her recollection, for use instead of a transcript (CPLR 5525[d]). The respondent then has 10 days to serve objections and corrections. In the absence of an agreement, the statement which is then used instead of a transcript, together with the respondent's objections and proposed amendments, is submitted to the original court for settlement. Pursuant to CPLR 5527, this same procedure can be followed when the parties agree on a "statement in lieu of record on appeal," even where stenographic minutes are available. Ultimately, it is the trial court's recollection that governs. Where it is simply impossible to reconstruct the proceedings below sufficient for appellate review, a new trial may be granted (*see*, *Tucker v City of New York*, 154 Misc 2d 100 [Civ Ct Kings County 1992]). The appellant has the burden to show that an adequate substitute for the transcript cannot be reconstructed.

b. **Exhibits**

Under CPLR 5526, the record on appeal must include "any relevant exhibits." Where the full record and appendix methods are to be used, the Rules of the Appellate Division, First Department permit the parties to stipulate that certain exhibits are not relevant. The stipulation must contain a list of the exhibits to be omitted, a brief description of each exhibit and a statement that said exhibits will not be relied upon or cited in the briefs of the parties to the appeal (22 NYCRR 600.10[b][1][vii]; [c][2][iv][b]).

c. **Statement Pursuant to CPLR 5531**

CPLR 5531 requires that a statement describing the action be included in the record on appeal. This is a statement, drafted by counsel, which sets forth the following:

i. the index number of the case in the court below;
ii. the full names of the original parties and any change in the parties;
iii. the court and county in which the action was commenced;
iv. the date the action was commenced and the dates on which each pleading was served;
v. a brief description of the objects of the action;
vi. a statement as to whether the appeal is from a judgment or order or both, the dates of entry of each judgment or order appealed from, and the name of the Judge or Justice who directed the entry of the judgment or made the order being appealed; and
vii. a statement as to which method of appeal is being used.

CPLR 5531 requires that the statement be prefixed to the papers constituting the record on appeal and that a copy of this statement also be filed with the Clerk at the time the record on appeal is filed. Thus, as further discussed below, the manner in which the CPLR 5531 statement becomes part of the record on appeal depends upon the method being used to present the appeal.

d. **Filing Fee**

CPLR 8022(b) provides as follows:

> The clerks of the Appellate Divisions of the supreme court . . . are entitled, upon the filing of a record on a civil appeal or a statement in lieu of record on a civil appeal, as required by rule 5530 of this chapter, to a fee of two hundred fifty dollars ($250), payable in advance.



The $250 fee is also collected for the commencement of a special proceeding in the Appellate Division. 22 NYCRR 600.15 provides that upon the filing of the record, or the statement in lieu of the record, $250 by check or money order payable to "Appellate Division, First Department," shall be collected "except in the case of a party who by statute or order of the court has been authorized to prosecute a cause as a poor person or is exempted from the fee requirement by CPLR 8017" (the State and agencies).

e. **Methods of Presenting Record**

After the transcript has been obtained and settled, and the record, compiled, counsel must choose a method by which to present the record to the Appellate Division. Essentially, there are three alternative ways of presenting a record for appeal: (i) the full-reproduced record ("full record"); (ii) the appendix method; and (iii) the statement in lieu of a record.

Counsel's choice of presenting the record often depends upon the extent to which he or she believes the record will assist the Court in deciding the issues raised. Financial resources may also dictate the choice of using the appendix method even when reproduction of the full record would be preferable. Although the appendix method offers a less expensive and more easily prepared alternative to the full record method, this choice runs the risk of complaints of inadequacy or distortion. The statement method, which essentially requires the parties to agree on how the facts and

issues should be framed, is rarely encountered in practice. It should be noted that in some types of appeals, such as election cases, special rules govern (22 NYCRR 600.9).

(1) Full Record Method

This is the most complete method of perfecting an appeal essentially requiring the appellant to reproduce multiple copies of the entire original record. It should be remembered, however, that CPLR 5525(b) and 22 NYCRR 600.5(c) allow the parties to stipulate that only a portion of the record be transcribed. The full record method is authorized by CPLR 5528(a)(5) and 22 NYCRR 600.5(c). The contents and form of the record are governed by CPLR 5526 and 22 NYCRR 600.10(b). No appendix is required if the full record method is chosen.

(a) Contents

According to the Rules of the Appellate Division, First Department (22 NYCRR 600.10[b]), a fully reproduced record must contain the following:

i. an index of the record's contents;
ii. a CPLR 5531 statement;
iii. the required contents of a record on appeal from a final judgment or an interlocutory judgment or any order as described in CPLR 5526 (discussed above);
iv. a stipulation or order settling the transcript pursuant to CPLR 5525(c) (discussed above);
v. the opinion in the case or a statement that there was none;
vi. relevant exhibits or a stipulation dispensing with the printing or filing of exhibits (discussed above); and
vii. a certification or stipulation waiving certification. Pursuant to CPLR 2105, 5532, and 22 NYCRR 600.10(b), this can be either a certification by counsel, a certificate of the clerk, or a stipulation waiving certification.



(b) Format

Where the full record is being used, the front cover of the record must contain the title of the case, the names, addresses and telephone numbers of the attorneys for the parties and the index number in the court below (22 NYCRR 600.10[b][3]). As to general form of reproduction, CPLR 5526 requires that:

> [a]ll printed or reproduced papers comprising the record on appeal shall be eleven inches by eight and one-half inches. The subject matter of each page of the record shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or recross examination shall be stated at the top of each page.

In addition, the Rules of the Appellate Division, First Department detail the format of records, appendices and briefs to be submitted (22 NYCRR 600.10[a]). This rule addresses such matters as the quality and size of paper to be used, method of binding, type size, captions, page numbering and headings, etc.

(c) Filing

Where the full record method is selected, 30 days after settlement of the transcript, appellant must file with the Court a duly certified copy of the record plus nine copies of such certified reproduced record as well as proof of service of two copies (22 NYCRR 600.5[c]).

(2) Appendix Method

When the appendix method is being used, only one copy of the original record on appeal is filed with the Appellate Division, and "only such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent" are reproduced for the Court's use (CPLR 5528[a]). When the record is quite voluminous and/or the issues raised relate to a small portion of the record, use of an appendix, rather than reproduction of the entire original record, may be advisable.

CPLR 5528(a) authorizes the use of the appendix method and the assumption throughout CPLR 5528 is that the appeal is being prosecuted by this method.

(a) Contents

22 NYCRR 600.5(a) authorizes the use of the appendix method and contains a list of the items an appendix must contain. 22 NYCRR 600.10(c)(2) requires that the appendix contain at a minimum the following:

i. the notice of appeal;
ii. the judgment, decree, order, etc., appealed from, including motion papers, opinion below or a statement that there was none, findings of fact and conclusions of law, and, if relevant, the charge to the jury, verdict, etc.;
iii. relevant excerpts from transcripts of testimony or motion papers, including all portions which may reasonably be relied upon by all sides, excerpted in a fashion which is not misleading because of incompleteness or lack of surrounding content;
iv. copies of critical exhibits or a stipulation agreeing to the omission of same approved by a Justice of the court. A list of omitted exhibits is required, and special rules exist as to the time for filing exhibits and bulky exhibits such as cartons or machinery; and
v. an index of the contents of the appendix.

(b) Format

22 NYCRR 600.10(a), the general rule governing such matters as the quality and size of the paper to be used, the method of binding, type size, captions, page numbering and headings, etc., applies to appendices. Moreover, when this method is used, the outside front cover of the appendix, whether bound separately or together with the brief, must contain the title of the case and the names, addresses and telephone numbers of the attorneys for the parties and the index number in the court of original instance (22 NYCRR 600.10[c][3]). The appendix must be printed or reproduced on recycled paper and a notice: "Printed [Reproduced] on recycled paper" must appear on the bottom of the cover (22 NYCRR 600.10[e]).

(c) Filing

Where the appendix method is used, the papers constituting

the original record must be subpoenaed from the Clerk of the Supreme Court and filed with the Appellate Division, First Department within 30 days after settlement of the transcript (22 NYCRR 600.5[a][1]). If a settled transcript of the proceedings or statement in lieu thereof is not included in the papers subpoenaed, the appellant is required to file the "ribbon" copy of the transcript when the appellant's brief is filed (22 NYCRR 600.5[a][3]). Where a full or partial transcript of the proceedings is made part of the record on appeal, at the time counsel serves the brief upon the respondent, the appellant must serve a copy of the transcript or deposit it in the office of the clerk of the court of original instance, who shall make it available to the respondent (22 NYCRR 600.5[a][4]).

Since the appendix is part of the appellant's brief, it need not be served and filed until appellant's brief is served and filed (22 NYCRR 600.11[b][2]). Time requirements in this regard are discussed below. Appellant must serve two copies of the appendix on each respondent and 10 copies must be filed in the Court (22 NYCRR 600.11[b][2]).

(d) CPLR 5531 Statement

At the time appellant subpoenas the record from the lower court clerk, he or she must deliver to the clerk two copies of the CPLR 5531 statement. The lower court clerk is responsible for transfixing one copy of this statement to the top of the record to be filed in the Appellate Division, First Department and the other copy must be included along with "a certificate listing the papers constituting the record on appeal and stating whether all such papers are included in the papers transmitted" (22 NYCRR 600.5[a][2]).



(e) Insufficient Appendix

Appellant is under a statutory duty to insure that the appendix fairly presents enough material to support the arguments of both sides, and respondent has both an opportunity to object to the appendix and a chance to file a supplementary appendix. Nevertheless, where an appendix is insufficient for appellate review on the questions presented, both CPLR 5528(e) and 22 NYCRR 600.10(c)(1) allow the Court to reject the appendix and impose costs. The appeal may also be dismissed.

(3) Agreed Statement Method

This rarely seen option essentially allows the parties to dispense with the record on appeal altogether, replacing it with an agreed upon statement rather like a problem posed in a bar examination. CPLR 5527 provides as follows:

> When the questions presented by an appeal can be determined without an examination of all the pleadings and proceedings, the parties may prepare and sign a statement showing how the questions arose and were decided in the court from which the appeal is taken and setting forth only so much of the facts averred and proved or sought to be proved as are necessary to a decision of the questions.

The statement may also include portions of the transcript of the proceedings and other relevant matter. It shall include a copy of the judgment or order appealed from, the notice of appeal and a statement of the issues to be determined. Within 20 days after the appellant has taken his appeal, the statement shall be presented to

the court from which the appeal is taken for approval as the record on appeal. The court may make corrections or additions necessary to present fully the questions raised by the appeal. The approved statement shall be printed as a joint appendix (*see also*, 22 NYCRR 600.5[b][1]).

The statement in lieu of record must be prefixed with a CPLR 5531 statement. Within 30 days after approval of the statement by the court from which the appeal is taken, appellant must file the original and nine copies of the statement, with proof of service of two copies (22 NYCRR 600.5[b][2]).

f. **Cross-Appeals**

Although a cross-appellant must consult with the appellant with respect to filing either a joint record or joint appendix, and also bear the cost of the record equally (22 NYCRR 600.11[d][1]), it is the duty of the first filer of a notice of appeal to perfect the appeal (22 NYCRR 600.11[d][2]).

2. **Briefs**

In addition to filing a record, appendix, or statement, perfecting the appeal requires the preparation, service and filing of an appellant's brief. This is the document in which an appellant makes the claims which allegedly require reversal of the order or judgment being appealed. The respondent's brief contains arguments addressing and rebutting the arguments raised by the appellant. The appellant then has an opportunity to reply to respondent's arguments in a reply brief. Briefs are essentially documents of persuasion, and their preparation involves considerations of style, tactics and professional judgment. However, there are statutes and court rules pertaining to content, format and time requirements which must be followed and are



addressed below.

a. **Format requirements**

The technical requirements governing the format of all appellate documents are contained in CPLR 5529 and 22 NYCRR 600.10(d)(1). The following are the highlights of these rules, as they apply to briefs:

i. as to length, principal briefs (appellant's and respondent's) may not exceed 50 printed or 70 typed pages, exclusive of the contents of any addenda, except with the permission of the Appellate Division. Without such permission, reply briefs may not exceed 35 typed or 25 printed pages;

ii. the name of counsel who will argue or submit the appeal must appear at the upper right hand corner of the brief;

iii. all briefs must be printed or reproduced on recycled paper. A notice: "Printed [Reproduced] on recycled paper" must appear on the bottom of the cover. Generally, paper must be of a "good grade of white, opaque, unglazed paper," 8½ by 11 inches. Binding must be on the left side, with metal fasteners or sharp edges covered by tape or similar material. Elaborate regulations designed to insure readability govern type size, margins, captions, headings, etc., and often vary with the chosen method of reproduction. Consult the Rules of the Appellate Division, First Department if in doubt (22 NYCRR 600.10[a][3]-[7]);

iv. boldface type is only permitted for point headings or subheadings. It is also required that omissions in quoted excerpts be indicated by *** or similar devices. New York citations must be to the official reporter, and foreign jurisdictions must be cited in both the official and national reporters; and

v. the Clerk of the Court is empowered to reject briefs which contain unauthorized material.

b. **Content requirements**

(1) Appellant's Brief

CPLR 5528(a) and 22 NYCRR 600.12(d)(2) establish certain content requirements for appellant's briefs. An appellant's brief must contain, in this order:

i. an index or a table of contents, containing the titles of the argument points;

ii. a table of cases (alphabetically arranged, statutes, and other authorities, indicating the pages of the brief where they are cited);

iii. a concise statement of the questions raised on appeal, not to exceed two pages, and without names, dates, amounts or particulars. Each question shall be numbered, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;

iv. a concise statement of the nature of the case and the facts which should be known to determine the questions involved, with supporting references to the appendix (or full record). If there has been a



stay pending the determination of the appeal, this must be included;

v. the appellant's argument, with proper headings;

vi. the CPLR 5531 statement, as an addendum at the end of the brief;

vii. the opinion below, in cases where there is no printed record or appendix; and

viii. a reference to the date of joinder of issue, if the appeal involves alimony and counsel fees.

(2) Respondent's Brief

CPLR 5528(b) and 22 NYCRR 600.10(d)(3) provide that a respondent's brief shall conform to the form of an appellant's brief, "[e]xcept that a counterstatement of the questions involved or a counterstatement of the nature and the facts of the case shall be included only if the respondent disagrees with the statement of the appellant."

(3) Appellant's Reply Brief

CPLR 5528(c) and 22 NYCRR 600.10(d)(4) provide that an appellant's reply brief shall conform to the requirements of the original appellant's brief without repetition.

3. **Placing the Appeal on the Calendar**

In the Appellate Division, First Department, unless otherwise ordered by the Court, appeals must be placed on the calendar within 20 days after the filing of the record on appeal or statement in lieu of a record on appeal (22 NYCRR 600.11[a][1]). The Rules of the Appellate Division, First Department require that a record on appeal be filed promptly (within 30 days of settlement of the transcript, or if there is no transcript, within 30 days of filing the notice of appeal). This 30 day deadline is not always strictly enforced and

some appellate practitioners file the record at the same time that they place the appeal on the calendar. An appeal is placed on the calendar by filing the note of issue, together with the required number of briefs, and by tendering a filing fee ($250).

a. **Enumerated and Nonenumerated Appeals**

The Rules of the Appellate Division, First Department divide appeals into two categories: enumerated and nonenumerated (22 NYCRR 600.4). Appeals must be noticed as enumerated or nonenumerated. The types of appeals which fit into these categories are set forth in 22 NYCRR 600.4, but whether an appeal is enumerated or nonenumerated will have no effect on how or when it is placed on the calendar. The only consequence arising from this difference is that appeals in the enumerated category are permitted oral argument without permission of the Court.

b. **Filing Notes of Issue and Briefs**

To have the appeal placed on the calendar, whether it is enumerated or nonenumerated, the appellant is required to file two copies of a note of issue with proof of service (22 NYCRR 600.11[b][1]).

The content of the note of issue is specified in 22 NYCRR 600.11(b)(1)(i) and must include the following: the date the notice of appeal was served, the date the record on appeal or statement in lieu thereof was filed, the nature of the appeal or cause, the court and county in which the action was commenced, the index or indictment number, the date the judgment or order was entered, the name of the Justice who made the decision, the term for which it is noticed, and the names, addresses and telephone numbers of the attorneys for all of the parties. When appellant files the note of issue, he or she is also required to file 10 copies of the brief, or brief



and appendix, conforming to the requirements of 22 NYCRR 600.10, with proof of service of two copies thereof (22 NYCRR 600.11[b][2]).

In the Appellate Division, First Department, appeals are noticed for a particular term of the Court and that term is dictated by the date of appellant's filing and the Court's calendar. An appeal must be placed on the calendar at least 57 days before the first day of the term for which the matter has been noticed. Thus, if the appellant seeks to have an appeal heard during a particular term of the Court, he or she should consult the Court's calendar to ascertain the deadline to file an appellant's brief, which is set at 57 days before the first day of the term. Before the beginning of each term, the Clerk of the Court makes up a calendar designating when each appeal will be heard and this is published in the *New York Law Journal*.

c. **Filing Answering and Reply Briefs**

When the appeal is perfected and respondent has been served with appellant's brief, the respondent should consult the Court's calendar to determine the term in which the appeal will be heard and accordingly, the date respondent's brief is due. The due date will be at least 27 days before the first day of the term for which the appeal has been noticed. The respondent must file 10 copies of the answering brief, or brief and appendix with proof of service of two copies (22 NYCRR 600.11[c]). Appellant may file a reply brief within nine days after service of the respondent's brief (22 NYCRR 600.11[c]).

d. **Cross-Appeals**

As previously noted, if respondent plans to cross-appeal, he or she must coordinate the filing of a joint record or joint appendix,

which contains a copy of the cross-notice of appeal. The respondent-cross-appellant addresses the points and arguments of his/her cross-appeal in the respondent's brief. The appellant has nine days to file a reply brief; the respondent cross-appellant then has nine days to reply (22 NYCRR 600.11[d]).

4. **Time Limitations to Perfect Appeals**

Appellant's brief must be filed not more than 20 days after filing the record on appeal. 22 NYCRR 600.11(2) provides as follows: "The clerk will place no appeal or cause on the calendar where the necessary papers and brief are not offered for filing within the 20 day period prescribed by this section, unless the time for filing has been enlarged by justice of the court." Thus, the deadline to perfect an appeal is dictated by the date the record is filed.

Somewhat confusing, however, is the fact that there are two different court rules prescribing time limitations for perfecting an appeal. On the one hand, as previously discussed, the outside deadline to perfect an appeal (file record and briefs) is 30 days from settlement of the transcript or, where there is no transcript, 30 days from the filing of a notice of appeal. On the other hand, 22 NYCRR 600.11(a)(3) provides as follows:

> The clerk will place no civil appeal or cause on the calendar where the necessary papers and briefs are not offered for filing within nine months of the date of the notice of appeal from the judgment or order appealed from . . . unless the time for filing has been enlarged by order of the court.



As a practical matter, appeals perfected within nine months of the filing of the notice of appeal are rarely dismissed. If the 30 day time period to file the record has passed and no motion to dismiss has been made by respondent, the Clerk of the Court will accept a filing. An adverse party, however, may move to dismiss under the 30 day rule and if that occurs, the likely result is that dismissal will be granted if appellant does not perfect for a term specified in the order entered on the motion. The nuances of such motion practice are discussed further in *Motion Practice*, *infra*.

It should also be noted in calculating deadlines that where service of a record, appendix, note of issue, or appellant's or respondent's briefs is made through the post office, the service must be made five days prior to the last day designated in the Rules of the Appellate Division, First Department (22 NYCRR 600.11[e], *citing* CPLR 2103[b][2]).

5. **Adjourning a Calendared Appeal**

The Rules of the Appellate Division, First Department provide that an enumerated appeal that has been placed on the calendar may be adjourned only once by written stipulation of counsel, provided the stipulation is received by the Clerk of the Court 26 days before the first day of the term for which the appeal has been noticed (*i.e.*, the day after respondent's brief is due) and the matter is not being adjourned to the June Term (22 NYCRR 600.11[g]). In practice, while this rule is not always strictly followed, abuses will not be tolerated and counsel seeking further adjournment should expect to make a motion. If an appeal is not argued or submitted during the term to which it has been adjourned, it will be marked off the calendar.

6. **Court's Dismissal Calendar**

In May of each year, the Appellate Division, First Department publishes a calendar of civil appeals which have not been brought on for hearing within nine months from the filing of the record (22 NYCRR 600.12[c][1]). This calendar contains cases that were marked off the calendar more than 60 days prior to May 1st. Thus, dilatory appellants receive an additional 60 days in which to move to restore the case to the Court's calendar prior to publication of the dismissal calendar. The dismissal calendar is published in the *New York Law Journal* for five consecutive days and is called by the Clerk on the fifth day of publication (22 NYCRR 600.12[c][3]). The appellant must furnish an affidavit satisfactorily explaining the delay in prosecution and providing the information set forth in 22 NYCRR 600.12(c)(4) either before or on the call of the calendar, to avoid *sua sponte* dismissal of the appeal (22 NYCRR 600.12[c][4]).

## E. Oral Argument Or Submission

Enumerated appeals may be argued orally or submitted without argument at counsel's discretion. However, if the parties do not take the proper steps to notify the Appellate Division, First Department clerk's office of their intent to argue the appeal, the appeal will be deemed submitted without oral argument. Permission to argue nonenumerated appeals is required and the appeal is placed on the calendar as submitted unless there has been an order granting the parties oral argument (22 NYCRR 600.11[f][3]).

The parties should consult each other to determine whether the case will be argued or submitted and if the appeal is to be argued, how much time each side desires. A maximum of 15 minutes oral argument time is permitted for each side and only one counsel on each side may be heard except when the Court has



ordered otherwise (22 NYCRR 600.11[f][2]). One of the parties should write to the Clerk requesting argument times for both sides before the deadline for the term in which the case is calendared (22 NYCRR 600.11[f][1]). Ordinarily, oral argument requests must be made on or before the day after respondent's brief is due. If the attorney for one of the sides desires additional time after a written request has been made, counsel may obtain additional time for good cause shown by making a written request to the Clerk before the day of argument (22 NYCRR 600.11[f][2]). Brief covers should also indicate the name of counsel who will be arguing the appeal (*e.g.*, "To be argued by NAME"). If appellant's counsel desires rebuttal time, this should be indicated at the call of the calendar and the time for rebuttal is deducted from the argument time previously requested. Thus, if appellant seeks five minutes rebuttal, the calendar call will indicate 10 minutes argument time, five minutes rebuttal. At the calendar call, parties who did not previously request argument time may also make an oral application for oral argument, but such requests will only be granted in the discretion of the Court.

At the calendar call, the Justice Presiding will call the calendar. When their case is called, counsel for the appellant and the respondent must stand and indicate the amount of time requested for oral argument. If the attorneys fail to appear, the case will be deemed submitted. The request can be for less time than was previously requested and as previously indicated, appellant's counsel should indicate any time requested for rebuttal.

## F. Date Appeal Is Argued Or Submitted

The list of cases to be heard in a specific term is published in the *New York Law Journal* about one week after appellant's last day to file the brief and note of issue for that term. Thus, for instance,

if appellant's deadline to perfect for the January Term is November 8th, a list of cases placed on the Court's calendar for the January Term will be printed in the *New York Law Journal* on about November 15th. There are no July or August Terms in the Appellate Division, First Department. Thus, an appeal that is perfected after the deadline for the June Term (about March 20th) will not be heard until the Court's next September Term at the earliest.

Approximately one week prior to a given term, a day calendar for the term is published in the *New York Law Journal*. Arguments are heard on Tuesday, Wednesday and Thursday afternoons (at 2:00 P.M.), and on Friday mornings (at 10:00 A.M.) except holidays (22 NYCRR 600.1[a]).

A bench consisting of at least four Justices is assigned to each argument date prior to the term, but this information is not available to the public until 3:00 P.M. on the day preceding the argument date, at which time the parties may call the clerk's office. On the day of the argument, the *New York Law Journal* publishes the names of the Justices sitting that day. Generally, five Justices are assigned to sit on any given calendar day.

## VII. DISPOSITIONS OF APPEALS

### A. Introduction

After the appeal has been taken and perfected, the Appellate Division Justices assigned to the appeal will make a determination whether error was committed in the lower court and if so, what can be done about it. Consistent with its broad scope of review, the Appellate Division has broad powers to dispose of the case. CPLR



5522, 5523, 5524, and 5712 address various facets of the Appellate Division's dispositional authority.

### B. Types Of Appellate Division Dispositions

CPLR 5522(a), applicable to all New York State appellate courts, provides as follows:

> A court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment, or order before it, as to any party. The court shall render a final determination or, where necessary or proper, remit to another court for further proceedings. A court reversing or modifying a judgment or order without opinion shall briefly state the grounds of its decision.

The power to reverse or modify includes the power to order "restitution of property rights lost by the judgment or order, except that where the title of a purchaser in good faith and for value would be affected, the court may order the value of the purchase price restored or deposited in court" (CPLR 5523). Of course, the Appellate Division may also decide not to reach the merits of the issues raised on appeal because of some procedural defect, and the appeal may simply be dismissed.

#### 1. <u>Final Determination or Remittitur to Trial Court</u>

Whether the Appellate Division's determination will constitute a final determination or involve remittitur for further proceedings is generally dictated by the scope of review which has been exercised. Thus, for instance, where the Appellate Division

reverses a jury trial upon a finding that the jury's verdict was against the weight of the evidence, the Appellate Division must reverse and order a new trial. However, in a nonjury case, the Appellate Division can reverse and grant judgment in favor of the party who lost in the lower court.

## C. Form And Content

CPLR 5522(a), 5522(b), and 5712 set forth the information that must be included in the Appellate Division's disposition. CPLR 5522(a), the principal provision authorizing the appellate courts to dispose of a case, provides little guidance regarding the form and content of an appellate court disposition. The only significant requirement is that an appellate court "state the grounds of its decision" if reversal or modification has been ordered. Although this requirement does not apply to affirmances, the Appellate Division, First Department normally utilizes a brief memorandum to set forth the grounds for an affirmance. Occasionally, the order of affirmance will be accompanied by a statement that the order or judgment has been affirmed "for the reasons stated [in the memorandum of the lower court or in the opinion of the Judge of the lower court]."

Where the Appellate Division is required to or elects to articulate the basis for its disposition, it may do so in the form of a memorandum, a signed opinion, or a per curiam opinion. The signed opinion is usually reserved for cases that are novel, involve factual or legal issues of public importance, and/or involve gray areas of law that may also elicit dissenting opinion[s]. It should be noted that while all appeals are assigned to one particular Justice, the signed opinion is the only type of appellate disposition that reveals authorship of the decision. An unsigned memorandum does not reveal the viewpoints of the individual Justices on the panel and



is not considered to have the same precedential significance as a signed opinion. The unsigned memorandum also is not drafted to provide a comprehensive analysis of the areas of law involved, but is intended merely to inform the parties of the grounds for the court's decision. Despite these warnings about the limited precedential value of memorandum decisions, it is suggested that citation to the Court's most recent memorandum decisions is quite useful to demonstrate its recent adherence to legal precedent.

When the Appellate Division raises or lowers a jury's itemized verdict, it must set forth in its decision the reasons it found a jury's itemized verdict to be excessive or inadequate and the factors it considered in complying with CPLR 5501(c).

Finally, regardless of the form of the Appellate Division's decision, it must include the information necessary to resolve whether a further appeal will be available. CPLR 5712 prescribes what the Appellate Division is required to include in its dispositive order in anticipation of a possible further appeal to the Court of Appeals.

As an initial matter, CPLR 5712(a) provides: "Every order of the appellate division determining an appeal shall state whether one or more justices dissent from the determination." This is important information, since a party taking an appeal from an order of the Appellate Division which finally determines the action has an appeal as of right to the Court of Appeals where there is a dissent by at least two Justices on a question of law in favor of the party taking such appeal (CPLR 5601[a]).

Along the same lines, the CPLR requires the Appellate Division to give the Court of Appeals some guidance on whether

the case turned upon questions of law, fact or both. This is also critical to review in the higher Court. Specifically, CPLR 5712 provides as follows:

> [w]here the appellate division reverses or modifies or sets aside a determination and thereupon makes a determination, except when it reinstates a verdict, its order shall state whether its determination is upon the law, or upon the facts, or upon the law and the facts: (i) if the determination is stated to be upon the law alone, the order shall also state whether or not the findings of fact below have been affirmed; and (2) if the determination is stated to be upon the facts, or upon the law and the facts, the order shall also specify the findings of fact which are reversed or modified, and set forth any new findings of fact made by the appellate division with such particularity as was employed by the statement of the findings of fact in the court of original instance; except that the order need not specify any new findings of fact if the appeal is either from a determination by the court without any statement of the findings of fact or from a judgment entered upon a general verdict without answers to interrogatories.

Moreover, CPLR 5712(b) provides as follows: "[w]henever the appellate division, although affirming a final or interlocutory



judgment or order, reverses or modifies any findings of fact, or makes new findings of fact, its order shall comply with the requirements of subdivision (c)."

If the Appellate Division does not comply with CPLR 5712 by specifying the findings of fact that were reversed or modified and setting forth any new findings of fact, CPLR 5612(a) requires the Court of Appeals to presume that the Appellate Division did not consider the questions of fact. If the Court of Appeals then reverses or modifies the Appellate Division determination, it will remit the case to the Appellate Division.

**D. Costs And Disbursements**

CPLR 8107 provides as follows:

> The party in whose favor an appeal is decided in whole or in part is entitled to costs upon the appeal, whether or not he is entitled to costs in the action, unless otherwise provided by statute, rule or order of the appellate court. Where a trial is directed upon appeal, costs upon the appeal may be awarded absolutely or to abide the event.

Despite the mandatory tone of this provision, appellate courts clearly have discretion not to award costs to a prevailing party. 22 NYCRR 600.13 provides as follows: "Costs upon an appeal under CPLR 8107 shall be allowed only as directed by the court in each case." Costs therefore are awarded on a discretionary basis, which is indicated in the decretal paragraph of the court's order. The amount of costs on appeal to the Appellate Division is governed by

CPLR 8203(a), which provides as follows: "Unless the court awards a lesser amount, costs awarded on an appeal to the appellate division shall be in the amount of two hundred fifty dollars."

A party to whom costs are awarded on appeal is entitled to tax his or her necessary disbursements. CPLR §8301(a) sets forth a list of permissible disbursements, although it should be noted that courts exercise discretion in allowing these items as taxable disbursements. These include the expense of securing copies of opinions, and "the reasonable expenses of printing the papers for a hearing, when required." Although the cost of printing appellate briefs and records may be a taxable disbursement under CPLR 8301(a)(12), where printed papers on appeal consist largely of irrelevant matter, disbursement for printing the record may be disallowed.

CPLR 8401 sets forth the procedure whereby the Clerk taxes costs and disbursements and should be consulted when the prevailing party seeks entry of an order or judgment in the court of original instance.

## E. Court's Decree

All decisions on appeal, whether they be in the form of an opinion or memorandum, contain a decree which sets forth the Appellate Division disposition. The Appellate Division, First Department uses an introductory paragraph in memorandum decisions which sets forth the following:

i. the disposition of the lower court, specifying whether certain relief was granted, denied or modified;
ii. whether the lower court's order or judgment is now being affirmed, modified or reversed;



iii. whether the affirmance, reversal or modification is upon the law, upon the facts, or upon the law and the facts;
iv. whether the relief that had been granted, denied or modified by the lower court is now being granted, denied or modified; and
v. whether or not the prevailing party is entitled to costs.

## F. Entry And Implementation Of Disposition

As distinguished from lower court practice, the parties are not burdened with having to take any steps to have the appellate order entered in the court. Entering the order is the responsibility of the clerk's office as set forth in CPLR 5524(a). After the appeal has been decided, an order is prepared by the Court which embodies the Court's disposition and is automatically entered in the Appellate Division, First Department's clerk's office. This is the appealable paper from which further appeal may be taken pursuant to CPLR 5512(a). The date of entry in the Appellate Division determines the time frame for taking further appeal. Once the order is entered in the Court, the winning party must serve his or her adversary with a copy of the order with notice of its entry.

### 1. Remittitur

After entry of the order in the Appellate Division, the order and record are sent by the Clerk to the Clerk of the trial court. This is known as the "remittitur." The Appellate Division's remittitur sets in motion the enforcement process. CPLR 5524(b) provides as follows:

> A copy of the order of the court to which an appeal is taken determining the appeal, together with the record on appeal, shall be remitted to the clerk of the court of original

> instance except that where further proceedings are ordered in another court, they shall be remitted to the clerk of such court. The entry of such copy shall be authority for any further proceedings. Any judgment directed by the order shall be entered by the clerk of the court to which remission is made.

While an appellate remittitur is the responsibility of the Court, it is incumbent upon the party seeking further proceedings to promptly inquire of the Clerk of the appellate court to ascertain the status of the remittitur (*see, Siegel's Practice Review, No. 73* [July 1998]). If the need should arise to correct a remittitur, a motion must be made to the Appellate Division. However, if the judgment entered upon the order of the Appellate Division does not conform to the Appellate Division order, a motion to correct the judgment should be made in the lower court.

2. **Death**

The death of a party after argument or submission of the appeal in a civil case does not preclude decision and disposition of the appeal. The order or judgment of the Appellate Division will be entered nunc pro tunc as of the day on which the appeal was argued or submitted.

### G. Finding Out About The Disposition

A conference among the Justices who heard the appeal is conducted immediately after the oral argument. However, the appeal is not necessarily conclusively decided at this time, and the amount of time it will take to decide the appeal depends on a numerous factors including, but not limited to, the difficulty and



number of issues presented, the size of the record, whether the Justices are in agreement about the disposition, the number of cases for that particular term, and the length of the decision.

Counsel should wait a few weeks until after the appeal has been argued or submitted to attempt to ascertain the disposition. It is never prudent to call a Justices's chambers or a Court Attorney to request this information. Rather, a party anxious to obtain the disposition should call the Court's direct line and will be put in touch with a clerk or court officer who can check whether the appeal is on the Court's most current decision list. Except for the months of July and August, decision lists are issued on a weekly basis on Tuesdays and Thursdays after 1:00 P.M. During the summer months, decision lists are only issued on Thursdays. The current practice of the clerk's office is to send courtesy copies of the orders entered and any memorandums or opinions to appellate counsel. Furthermore, memorandum decisions are published in the *New York Law Journal* a few days after the decision lists are released. The memorandum decisions and opinions of the Appellate Division, First Department are also available in computer databases, such as *Lexis, Westlaw*, and the New York State Courts' website soon after the decision lists are released.

## VIII. CIVIL MOTION PRACTICE

### A. Introduction

Motion practice in the Appellate Division, First Department is quite extensive. Motions are made at various stages in the appellate process depending upon the relief sought, *e.g.*, whether it is made: (i) before a notice of appeal has been filed or when there is no direct appeal at all; (ii) after a notice of appeal has been filed and prior to an appellate determination; or (iii) after the appeal has

been decided. Motion practice in the Appellate Division, First Department is governed by 22 NYCRR 600.2 with many cross-references to the CPLR.

## B. Court's Motion Calendar

A motion calendar is prepared for the Court on every regular business day between the Tuesday following Labor Day and June 30th. During the summer months, motions are returnable only on Mondays (22 NYCRR 600.2[a][1]). All motions are returnable at 10:00 A.M., and are submitted to the Court without argument (22 NYCRR 600.2[d][1]). No calendar of motions is published or called (22 NYCRR 600.2[c]).

## C. Time Requirements For Service And Filing Of Motions

### 1. Service

CPLR 2214(b) sets forth the time limits for serving motions and answering and reply papers, and is applicable to most motions made in the Court. The movant must serve the motion at least eight days prior to the return date of the motion. If service is made by mail, five days are added. Upon filing the original motion, the clerk's office will check the affidavit of service to ensure that the movant has given at least eight days notice if the motion was served by personal delivery, or 13 days notice where the motion was served by mail. Answering papers must be served at least two days before the return date. The five day extension of CPLR 2103 is not applicable. However, the last sentence of CPLR 2214(b) is designed to remedy the situation where the movant desires an opportunity to reply before the return date. The movant should give at least 12 days notice (if personal service is used) and specify that answering papers must be served at least seven days before the return date. The movant may then serve his reply papers the day



before the return date.

### 2. Filing

The moving party must file with the clerk's office the original moving papers with proof of service thereof by noon the day preceding the return date of the motion (22 NYCRR 600.2[a][4]). By 4:00 P.M. of the business day preceding the return day, original answering and reply papers must be filed with the clerk's office with proof of service, "[u]nless for good cause shown they are permitted to be filed at a later time." Although the clerk's office may occasionally accept a late filing, there is no guarantee that a late submission will be considered before a decision on the motion is rendered.

### 3. Special Rule for Permission to Appeal

As previously discussed, CPLR 5516 requires that the movant give at least eight days notice (if personal service is used), but forbids the movant from setting a return date more than 15 days after service. If service is made by mail, five days is added. If there is no motion day falling within this period, the motion is made returnable on the first motion day thereafter. Since CPLR 5516 does not address the time frames for serving answering and reply papers, CPLR 2214(b) is applicable.

### 4. Seeking Expedited Service

The granting of short service is one of the means of granting relief where a party has made an interim relief application. The time constraints imposed by CPLR 2214(b) may be modified by a Justice of the Court where a party appears in Court specifically requesting expedited service or where the party moves for interim relief pending the motion. Indeed, in the absence of an adversary, a Justice of the Court will be constrained to grant expedited service

as relief on an interim relief application. A party who appears in Court to request expedited service must set forth the reasons for requesting expedited service. Furthermore, where one of the parties has sought interim relief, the attorneys typically work out a formal motion schedule with the Court Attorney who has handled the application. Usually the movant serves the adversary with the motion at the time an application is made and the adversary requests a certain amount of time to respond. The return date is adjusted to the parties' wishes, but normally the reply will be due by 4:00 P.M. on the day preceding the return date.

5. **Adjournment of Motions**

22 NYCRR 600.2(d)(2) provides as follows:

> Applications brought on by notice of motion or order may be adjourned once by consent of the parties. Except in extraordinary circumstances, in the absence of such consent or approval of the court the application will be deemed submitted on the adjourned return date. Notices or stipulations of adjournments shall be submitted in writing.

As previously discussed with respect to the adjournment of appeals, adjournments on consent are typically granted as a matter of course, but abuses are not tolerated.

## D. General Rules Applying To Motion Practice

All motion papers must conform to the following rules:



1. **Contents**

The papers must state the nature of the application or relief sought, the return day, the names, addresses and telephone numbers of the attorneys for all parties in support, and who are entitled to notice. If the appeal has not been heard, a copy of the notice of appeal or motion for permission to appeal should be attached to prove jurisdiction. In addition, the lower court's order, judgment or determination sought to be reviewed must be included (22 NYCRR 600.2[a][3]).

2. **Format**

CPLR 2101 governs the size of paper used, legibility, language, caption, indorsement by attorney, copies and defects in form. All papers submitted on a motion must be signed in ink by the attorney (or the party if *pro se*), with the signer's name printed or typed directly below (22 NYCRR 130-1.1[a]).

3. **Filing**

22 NYCRR 600.2(a)(6) provides as follows:

> All papers may be filed either by personal delivery or by ordinary mail. If filed by mail, they shall be considered filed only upon receipt; and the envelope must be marked "Motion Papers." If acknowledgment of receipt of the papers is desired, there must be enclosed with the papers being filed by mail a self-addressed, postage-prepaid postal card bearing the title of the cause, the nature of the motion, the date on which it is returnable and statement of the papers filed. Such postal

> card, when stamped and returned by mail, shall serve as a receipt for the papers listed thereon.

22 NYCRR 600.2(a)(8) provides: "All parties filing papers pertaining to a motion or special proceeding shall include therewith a stamped self-addressed envelope."

**E. Applications For Interim Relief**

If the rights of a moving party may be prejudiced while a motion is *sub judice*, the movant should make an application for interim relief. The typical situation is when the party moves for an interim stay while moving before a full bench for a stay of the order or judgment pending determination of the appeal therefrom. However, the "Application for Interim Relief" is a misnomer in the few situations in which a single Justice may grant relief without the issue being presented to a full bench. For instance, some CPLR 5704(a) applications seeking full relief are made to a single Justice and never presented to a full bench. Bail applications and Family Court stays do not go to a full bench.

22 NYCRR 600.2(a)(7) authorizes the use of interim applications and is mainly concerned with the adequacy of notice to the opposing party. The rule provides as follows:

> [w]hen an application is presented for an interim stay or other relief pending the determination of a motion, the party seeking such relief must inform the clerk at the time of submission whether the opposing party has been notified of the application and whether such party



> opposes or consents to the granting of the relief sought.

Some highlights of the procedure are as follows:

1. **Presence of Adversary**

As an initial matter, ex parte relief is rarely granted by an individual Justice and accordingly, the rules of each appellate court require the moving party to give reasonable notice to an adversary party of an intended application. The party seeking interim relief should contact the adversary to arrange a time when counsel for both sides can be present in Court. If the adversary is not cooperative, the applicant may seek the assistance of the clerk's office to compel the adversary's appearance. Counsel can arrange to appear at the Appellate Division, First Department courthouse any time during regular business hours. It is advisable not to arrange to meet on Monday afternoons between Labor Day and mid-June when the Justices meet for their weekly conference.

2. **Completion of Application Form**

Upon arrival in the Court, the moving party presents any moving papers to a motion clerk. The motion clerk will check the papers for proper execution, return date, result of any prior motion for the same relief, entry of the order in the court below and filing of a proper notice of appeal. The clerk will have the moving party fill out a "Summary Statement on Application for Expedited Service and/or Interim Relief." This form contains the information necessary to process the application. The entire form is filled out by the moving party, except for the space entitled "Disposition and Information" pertaining to the return date and service of responding papers.

3. **Presentation to Court Attorney**

An Appellate Division, First Department Court Attorney is assigned to handle interim applications. Usually, the Court Attorney will first review the summary sheet and any motion papers. He or she will then confer with counsel to confirm his or her understanding of the issues and to determine whether the parties can come to an agreement pending determination of the formal motion. Indeed, the Court Attorney will likely attempt to persuade the parties to resolve the application without presenting it to a Justice. Most often, an agreement can be reached upon the condition that the principal motion is timely heard and resolved. The parties then stipulate to the terms of the agreement, work out a short service schedule and the summary sheet is brought to a Justice to "so order" the agreement.

4. **Presentation to Single Justice**

If an agreement cannot be reached, the lawyers are permitted to present their arguments before a single Justice in his or her chambers. Only attorneys or *pro se* litigants are permitted to argue the application. Litigants are not permitted in chambers. After hearing argument from both sides, the Justice will either inform the attorneys of the decision in chambers, or the Court Attorney will inform the attorneys in the clerk's office of the Justice's decision. If the Justice feels that additional time is needed to decide the application, arrangements can be made to inform the attorneys of this decision by telephone.

5. **Disposition**

Upon rendering the decision, the Justice or the Court Attorney will write a short order under the section of the form entitled "Disposition." This will be initialed by the Justice and constitutes an order.



6. **Service and Return Date of Motion**

After the application for interim relief is decided, the "[t]ime and manner of service of motion papers shall be directed by a justice" (22 NYCRR 600.2[a][7]). In practice, however, unless there is major disagreement between the parties with respect to service and return date, a schedule for service is usually worked out between the attorneys and the Court Attorney in the clerk's office. Provision may be made for expedited service. If a decision on the motion is urgent, the motion may be marked "Expedite," or "Telephone Attorneys." The attorneys may agree upon a method of service. The Court Attorney will make copies of the summary statement containing the disposition and distribute these to all parties.

## F. Motions Where There Is No Appeal

The jurisdiction of the Appellate Division, First Department to hear motions is usually invoked because there is an appeal pending or the Court has decided an appeal. However, there are a few situations in which the filing of a notice of appeal or the appeal itself is not a predicate for the Court granting motion relief.

1. **Motions for Permission to Appeal**

As previously discussed, an aggrieved party usually has the option of making a motion to the Appellate Division, First Department for permission to appeal if there is no appeal as of right.

2. **Motions for Extension of Time to Take Appeal**

The aggrieved party who has failed to timely take an appeal may make a motion in the lower court or the Appellate Division for an extension of time to file a notice of appeal or move for permission to appeal.

### 3. Motions to Review Ex Parte Order

As previously discussed, there is no appeal from an ex parte order and therefore, the filing of a notice of appeal is not necessary to obtain review pursuant to CPLR 5704(a). Although appellate review of an ex parte order can be sought by moving to vacate the order and then appealing the order denying vacatur (CPLR 5701[a][3]), the quicker method to obtain appellate review of an ex parte order is to make a motion or application pursuant to CPLR 5704(a). The CPLR 5704(a) application and/or motion can also be made in conjunction with the motion to vacate.

It should be noted that in *Matter of Willmark Service Sys. Inc.*, 21 AD2d 478 (1st Dept 1964), the Court announced that review by motion would be limited to "unusual circumstances," and the Court expressed a clear preference for the vacatur method of appellate review. However, Professor Siegel has stated "this narrow construction . . . does not appear to be followed today" (D. Siegel, *Practice Commentaries,* McKinney's Cons Laws of NY, Book 7B, CPLR C:5704:1). Indeed, when the need to grant immediate relief is compelling, the Appellate Division, First Department will not hesitate to grant CPLR 5704(a) relief.

#### a. Distinction between Orders Denying and Granting Relief

The statute distinguishes between ex parte orders which have been granted and those which have been denied in the court below.

(i) Ex Parte Relief Granted

If the order was granted, either a full bench of the Appellate Division or a single Justice may vacate or modify the order. In moving before a single Justice, the movant need only present the original papers submitted below, together with an affidavit



describing the disposition made. The moving party must provide the adversary with notice of the application and if the adversary is not present, counsel is not likely to obtain anything more than short service of the motion. A single Justice also may not grant the relief requested but may grant an interim stay pending determination by a full bench.

(ii) Ex Parte Relief Denied

If the lower court Judge has refused an application for ex parte relief, only a full bench of the Appellate Division can grant the order refused by the lower court. Any relief sought by application can be granted by a single Justice only on an interim basis.

## G. Motions While Appeal Is Pending

Most motions are made after the notice of appeal has been filed, but before the appeal has been decided. The most common motions made to the Appellate Division are motions for poor person relief, aimed at relieving a party of some of the ordinary expenses of an appeal; motions for a stay, so that the order being appealed will not be effectuated until after its validity can be contested on appeal; motions for a preliminary injunction or restraining order, aimed at restraint of a party's actions during the pendency of the appellate process; and various motions connected to the perfection of the appeal itself, such as extensions of time to file the record or briefs.

### 1. Motions for Poor Person Relief

After the filing of a notice of appeal, a party may be unable to pay for the costs of printing or reproducing the record on appeal, or may have insufficient funds to pay counsel fees in whole or in part. A party unable to sustain the expense of an appeal may apply

to the Court for status as a poor person. The governing statute, CPLR 1101(a) provides as follows:

> Upon motion of any person, the court in which an action is triable, or to which an appeal has been or will be taken, may grant permission to proceed as a poor person. Where a motion for leave to appeal as a poor person is brought to the court in which an appeal has been or will be taken such court shall hear such motion on the merits and shall not remand such motion to the trial court for consideration. The moving party shall file his affidavit setting forth the amount and sources of his income and listing his property with its value; that he is unable to pay for the costs, fees and expenses necessary to prosecute or defend the action or to maintain or respond to the appeal; the nature of the action; sufficient facts so that the merit of his contentions can be ascertained; and whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such costs, fees and expenses. An executor, administrator or other representative may move for permission on behalf of a deceased, infant, or incompetent poor person.

The key to obtaining "poor person status" is the filing of a



sufficient affidavit containing all relevant information with respect to the applicant's financial situation. An attorney's affirmation as to the client's indigence will not suffice -- the statute specifically requires an affidavit from the party and an insufficient showing of need will lead to the denial of the application. The applicant must also inform the Court of the nature of the action and include in the affidavit "sufficient facts so that the merits of his contentions can be ascertained." If sufficient facts to permit review of the merits are not included, poor person relief may be denied. In passing upon the merits, the Court need only determine whether there is arguable merit to the appeal, although CPLR 1101(b) allows the Court to require the moving party to file with the affidavit "a certificate of an attorney stating that he has examined the action and believes there is merit to the moving party's contention."

The potential benefits of poor person status are set forth in CPLR 1102. Any or all of the following may be accomplished by obtaining poor person status for appellate purposes:

a. **Counsel may be assigned** (CPLR 1102[a])

However, this is extraordinary relief which usually is not granted in civil cases. Moreover, because there is generally no statutory mechanism for compensating an assigned attorney in civil cases, and representation by counsel is not a legal condition to access to the Court, counsel is not usually assigned in civil cases unless such counsel agrees to serve without compensation (*see, Matter of Smiley*, 36 NY2d 433 [1975]; *Matter of Enrique R. v Commr. of Social Services*, 126 AD2d 169 [1st Dept 1987]).

b. **A transcript may be secured at public expense** (CPLR 1102[b])

A poor person has an automatic right to a stenographic

transcript. However, where such relief is sought, the local fiscal authority must be given notice of the poor person application in order for poor person relief to be granted (CPLR 1101[c]). Accordingly, when the applicant moves for poor person relief in the Appellate Division, First Department, in addition to serving all other parties, the applicant must serve notice upon Corporation Counsel of the City of New York. If the motion is granted, CPLR 1102(b) requires the Clerk of the Court, within two days after the filing of the order, to notify the court stenographer, who, within 20 days must make and certify two written transcripts of the appropriate stenographic minutes, deliver one to the applicant or attorney and file the other with the Court Clerk. Note that the City may subsequently be reimbursed for this expense out of any recovery by the applicant (CPLR 1103).

c. **The applicant may be permitted to serve and file typewritten briefs and appendices and fewer copies may be required** (CPLR 1102[c])

Although the relief contemplated by the statute allows the applicant to furnish "one legible copy [of typewritten documents] for each appellate justice," the Appellate Division, without formally according the applicant poor person status, also has plenary authority to permit a person to appeal on one or more typewritten record and briefs, and submit whatever number of copies are directed by the Court.

d. **The applicant may be relieved of the obligation to pay any costs or fees unless he or she obtains a recovery by judgment or settlement** (CPLR 1102[d])

22 NYCRR 600.15(a)(5) provides that a party who has been authorized to prosecute a cause as a poor person is not required to pay $250 upon filing the record, or the statement in lieu of the



record, on a civil appeal. Again, however, the Court, in its discretion, may later direct payment of such fees out of the recovery of all or part of the costs and fees. To effectuate the restitution, any recovery by judgment or by settlement had in favor of a party granted poor person status, shall be paid to the Clerk of the Court in which the order granting poor person status was entered (CPLR 1103). Distribution of the recovery is then made pursuant to Court order.

2. **Stays of Orders or Judgments**

When an order or judgment has been entered in favor of the prevailing party, except in certain limited circumstances, the taking of an appeal or moving for permission to appeal does not in itself stay enforcement of the judgment or order pending appeal. Without a stay, an appellant who has satisfied a money judgment against him or her will have to seek restitution if the order or judgment is reversed on appeal. Furthermore, the enforcement of the order or judgment could render an appeal moot. Hence, the parties should be familiar with the statutes and rules governing the appellant's right to a stay.

a. **Types of Stays**

(i) Automatic and Discretionary

In civil cases, a stay of the order or judgment pending appeal to the Appellate Division is governed by CPLR 5519. Under CPLR 5519(a), (b) and (g), a stay is obtained automatically (without motion) by serving the notice of appeal or an affidavit of intention to move for permission to appeal, and, where necessary, taking the additional steps discussed below. An appellant who is not eligible for an automatic stay may obtain a discretionary stay by making a motion in the court of original instance or the Appellate Division

(CPLR 5519[c]).

(ii) Governmental Stays

Where the appellant or moving party is the State or any political subdivision of the State or any officer or agency of the State or of any political subdivision, the appellant obtains an automatic stay upon filing a notice of appeal or an affidavit of intention to move for permission to appeal. The automatic stay provision generally applicable to government entities is limited to 15 days in the situation where a government entity has revoked the license of a small corporation, partnership or natural person, which license was then reinstated by the Supreme Court in an Article 78 proceeding (CPLR 5519[a][1]). After this period, the government must apply for a stay pursuant to CPLR 5519(c).

(iii) Money Judgments

An order or judgment directing the payment of a sum of money is automatically stayed if the appellant furnishes an undertaking in that sum (CPLR 5519[a][2]). Undertakings are governed by CPLR Article 25, and the appellant seeking a stay under CPLR 5519(a)(2), should refer to these provisions. The statute only requires that an undertaking be "given." However, one commentator has recommended that "the better and safer practice is to serve a copy of the appeal bond on the respondent and to file the original with the court of original instance" (Newman, *New York Appellate Practice,* §6.02[2][a], [vol. 1]). Where an insurance company is involved but the policy does not completely cover the judgment or order, the insured may also post an undertaking to make up the balance pursuant to CPLR 5519(a)(2). An order or judgment directing the payment of money in installments is also automatically stayed if the appellant furnishes an undertaking in a sum fixed by the court of original instance (CPLR 5519[a][3]).



(iv) Personal Property and Execution of Instruments

An order or judgment which directs the delivery of personal property, is automatically stayed by either posting an undertaking in the sum fixed by the court of original instance or placing the property in the custody of an officer designated by the court of original instance (CPLR 5519[a][4]). An order or judgment which directs the execution of any instrument may be automatically stayed if the instrument is executed and deposited in the office where the original judgment or order is entered to obtain an automatic stay. No undertaking is required (CPLR 5519[a][5]).

(v) Real Property

A judgment or order which directs that real property under appellant's control be conveyed or delivered may be automatically stayed where:

> [a]n undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from taking of the appeal until the delivery of possession of the property.

(CPLR 5519[a][6]).

In addition, if the order or judgment directs the sale of

mortgaged property and the payment of any deficiency, the undertaking must provide for the payment of the deficiency judgment.

(vi) Multiple Grounds

Note that under CPLR 5519(a)(7), if the judgment or order appealed from directs the performance of two or more of the acts specified in subparagraphs(a)(2) through (6) above, to obtain an automatic stay the appellant or moving party must comply with the conditions specified in each applicable subparagraph.

(vii) Insurers

When an appeal is taken from a judgment or order entered against an insured in an action which is defended by an insurance company, CPLR 5519(b) applies. In essence, if the policy liability limit is less than the amount of the judgment or order, all proceedings to enforce the judgment or order to the extent of the policy coverage are automatically stayed pending the appeal, where the insurer complies with the following requirements:

i. files with the Clerk of the Court in which the judgment or order was entered a sworn statement of one of its officers, describing the nature of the policy and the amount of coverage together with a written undertaking that if the appeal is lost, the insurer will pay the amount in question to the extent of the limit of liability in the policy, plus interest and costs;
ii. serves a copy of the statement and undertaking upon the judgment creditor or his or her attorney; and
iii. delivers or mails to the insured written notice that the enforcement of such judgment or order, to the extent that the amount it directs to be paid exceeds the limit of liability in the policy, is not stayed in respect to the insured. The insured may obtain a stay of enforcement of the balance of the amount by giving an undertaking pursuant to CPLR 5519(a)(2) in an amount equal to that balance.



The insurance company is free to avoid the procedures of this subdivision by proceeding under subdivision (a)(2).

(viii) Medical Malpractice

A special procedure is applicable in an action for medical, dental or podiatric malpractice, where the appeal is taken from a judgment in excess of $1,000,000 (CPLR 5519[g]). If certain undertakings are given, the Appellate Division must stay all proceedings to enforce the judgment pending the appeal if it finds that there is a "reasonable probability that the judgment may be reversed or determined excessive." In making a determination under this subdivision, the Court is instructed not to consider the availability of a stay pursuant to CPLR 5519(a) or (b) (*see*, D. Siegel, *Practice Commentaries,* McKinney's Cons Laws of NY, Book 7B, CPLR C5519:8 for a discussion of the practicalities of the subdivision).

(ix) Discretionary

The appellant who is ineligible for an automatic stay under the above provisions may apply to the Appellate Division for a stay pursuant to CPLR 5519(c). Furthermore, pursuant to CPLR 5519(c), the Appellate Division may vacate, limit or modify an automatic stay upon motion. Indeed, where the appellant is a governmental body, officer or agency, only the Appellate Division is authorized to vacate, limit or modify the automatic stay. Stays or modifications of existing stays are sought by motion and the relief

granted is largely discretionary. The factors the Court will consider include the apparent merit of the appeal, the harm that might result to the appellant if the stay is denied, and the potential prejudice to the respondent if the stay is granted. Ordinarily, in granting a discretionary stay, an undertaking will be required. Often, a discretionary stay will be granted only upon appellant's promise that the appeal will be prosecuted promptly.

(x) Interim Stays

Where enforcement of the judgment or order appealed from is imminent, the appellant may find it necessary to make an oral application for an interim stay pending determination of the motion. Appellant should move for interim relief in the Appellate Division simultaneously with, or immediately after service and filing the notice of appeal. The notice of appeal, pre-argument statement, and order or judgment appealed from should be attached to the motion. Since an interim stay is not granted on the merits in any case, it is preferable for the parties to reach an agreement to maintain the status quo while the motion is pending.

(xi) Stays Pending Appeal to the Court of Appeals

CPLR 5519 (d) and (e) govern the situation where a further appeal is taken to the Court of Appeals. A stay shall continue for five days after service upon the appellant of the order of affirmance or modification with notice of its entry in the Court to which the appeal was taken.

b. **Stay Limitations**

Stays have certain limitations. CPLR 5519(f) provides that "[a] stay of enforcement shall not prevent the court of original instance from proceeding in any matter not affected by the judgment or order appealed from or from directing the sale of



perishable property." With regard to automatic stays, the Appellate Divisions Second, Third and Fourth Departments have held that the automatic stay applies only to an attempt to enforce the appealed judgment or order. Thus, in those departments, a governmental entity should not expect the trial of the action to be automatically stayed where the order appealed denies dismissal since the automatic stay provision applies only to the executory enforcement of the order. The Appellate Division, First Department, however, has not subscribed to this view.

If a stay of the order or judgment being appealed from is insufficient to protect a party, the remedy may be a motion for a temporary restraining order or preliminary injunction.

3. **Preliminary Injunctions or Temporary Restraining Orders**

While CPLR 5519 is concerned with staying enforcement of the order or judgment being appealed, CPLR 5518 deals with restraint of a party's activities other than enforcement of the appealed judgment or order which may nevertheless cause irreparable harm during the pendency of the appeal. The statute provides as follows: "[t]he appellate division may grant, modify or limit a preliminary injunction or temporary restraining order pending an appeal or determination of a motion for permission to appeal in any case specified in section 6301."

CPLR 6301 is the general statute governing the issuance of preliminary injunctions or temporary restraining orders. Thus, in essence, the Appellate Division's powers are the same powers enjoyed by the Supreme Court during the action's pre-trial and trial stages. Decisions on applications for either a preliminary injunction or a temporary restraining order pending appeal are within the

discretion of the Court. However, injunctive relief will only be granted where the party seeking such relief demonstrates a reasonable probability of success on appeal and proves there is a risk of irreparable injury if the relief is not granted. If the injunction or restraining order would have the effect of determining the appeal on the merits, the Court may direct an expedited appeal rather than granting the provisional remedy. Since a full bench must decide a motion made pursuant to CPLR 5518, a single Justice will decline to grant an interim application made pursuant to CPLR 5518, but may expedite the motion instead.

4. **Motions Related to the Appellate Process**

There are several common motions directed to various aspects of the appellate process, including the following: the motion to enlarge the time to perfect the appeal, the motion to dismiss the appeal for failure to prosecute or to dismiss on other grounds, the motion to supplement the record on appeal, the motion to strike all or portions of a brief or record, the motion to extend the time to file such documents, the motion to withdraw an appeal, and motions relating to counsel on appeal.

a. **Motions Concerning Time**

As to motions addressed to the timeliness of perfecting the appeal, it will be recalled that an appeal is "perfected" by filing and serving the record or appendix, together with the appellant's brief. The outside deadline to perfect an appeal is nine months from the date the notice of appeal was filed. After this date, the appeal is deemed abandoned and the Clerk will not accept the record or brief without a court order (22 NYCRR 600.11[a][1]). When this date is past, the respondent may move to dismiss the appeal for lack of prosecution on eight days notice (22 NYCRR 600.12[b]). On the other hand, if the time to perfect the appeal is about to expire, the



appellant should move for an enlargement of time to perfect the appeal.

(i) Dismissals

If the appeal has not been timely perfected, the Appellate Division, First Department can grant either a conditional or unconditional dismissal pursuant to a respondent's motion to dismiss the appeal. The respondent's motion to dismiss for failure to prosecute must include a copy of the notice of appeal and a supporting affidavit which recites relevant chronology, including the date the notice of appeal was filed and the date the record and briefs were due to be served and filed.

The appellant may oppose the dismissal motion and/or cross-move for an enlargement of time to perfect the appeal. In *Tonkonogy v Jaffin*, 21 AD2d 264 (lst Dept 1964), the Court warned dilatory appellants that "[m]ere perfunctory opposition to the motion to dismiss will not suffice to entitle the appellant to further time to perfect his appeal." The following factors will be considered and should be addressed by the appellant: the extent of the delay in perfecting the appeal, whether there was a reasonable excuse for the delay, the merits of the appeal, and any possible prejudice to the respondent.

Since the general policy of the Court is to decide appeals on their merits, the Appellate Division, First Department, is likely to grant only a conditional dismissal order where appellant submits opposition papers containing the aforementioned information. The conditional dismissal requires appellant to perfect the appeal by a date fixed by the Court to avoid dismissal. If this condition is not met, the respondent can submit ex parte a final order of dismissal, which should be accompanied by proof of service of the earlier

conditional order. If the appellant should need an additional extension, appellant should move for an enlargement of time well before the conditional date for dismissal expires.

(ii) Enlargements

If the appellant cannot perfect the appeal prior to the nine month deadline, appellant should move for an enlargement of time to perfect the appeal. The motion should be supported by an affidavit setting forth the excuse[s] for the delay. The appellant is advised to attempt to obtain a stipulation agreeing to an enlargement of the time to perfect the appeal. The motion may also be made after the nine month deadline passes, although the risk of denial is greater.

b. **Content of Motions**

As to motions concerned with the content of the papers on appeal, there are many varieties. The parties to an appeal may disagree on whether a record or appendix includes all the necessary papers or, on the other hand, whether it contains improper material. An appellate brief may also contain prejudicial material or information dehors the record on appeal. In such cases, the aggrieved party's remedy is to move to correct the record and/or briefs or dismiss the appeal. Examples of motions that may be made pertaining to the records and briefs on appeal include the following:

i. the motion to enlarge or supplement the record on appeal;
ii. the motion to strike certain papers from the record on appeal;
iii. the motion to strike the appellant's record on appeal;
iv. the motion to dismiss the appeal because the record is



deficient or improper; and
v. the motion to strike portions of a brief which are prejudicial or dehors the record on appeal.

c. **Calendaring Motions**

Other motions are concerned with the timeliness of papers filed subsequent to appellant's perfection of the appeal, as well as calendaring the appeal. These include the following:

(i) Respondent's Brief

It is often the case that the respondent needs additional time to file a respondent's brief. If the respondent can file the brief close to the deadline for the term in which the appeal is noticed, an application may be made to a single Justice who may sign an order permitting the late filing and service of respondent's brief. Alternatively, the respondent may seek an adjournment to another term. The Rules of the Appellate Division, First Department permit one adjournment by stipulation if it is filed no later than 26 days before the first day of the term for which the appeal has been noticed (22 NYCRR 600.11[g]). If more than one consent adjournment is to be sought, or the adversary does not agree to additional adjournments, the respondent should be prepared to move for an extension of time to file a respondent's brief.

(ii) Preferences and/or Expediting Service of Briefs

A party to an appeal may seek a preference in the hearing of an appeal (CPLR 5521). Family Court cases, which are not discussed herein, are granted preferences as a matter of right (CPLR 5521[b]), but most preferences are sought at the discretion of the Court. 22 NYCRR 600.12(a)(2) provides that a preference under CPLR 5521 may be obtained upon good cause shown in an application made to the Court on notice to the other parties to the

appeal. A discretionary appellate preference is not lightly granted and the showing that needs to be made is similar to that required to obtain a stay: the merits of the appeal should be addressed as well as the harm that will result if a preference is not granted and the lack of prejudice to the opposing party if a preference is granted.

The Rules of the Court of Appeals with regard to required procedural information serves as a guideline for what information may be helpful to the Appellate Division, First Department in deciding a preference motion:

> The application should include the following: (1) a statement of the nature of the case; (2) the jurisdictional predicate for appeal to the Court of Appeals [not necessary in appellate division]; (3) the state of readiness of the appeal; (4) all relevant dates, such as the dates of the orders and judgments below, the notice of appeal or order granting leave, the dates of filing of briefs and papers on appeal; and (5) the reason why a calendar preference is needed and why it should be granted

(22 NYCRR 500.8[b]).

A party may move for a preference in the calendaring of the appeal, such as at the beginning of the term, and/or move to expedite the briefing schedule. A party may compel early perfection of the appeal in certain extraordinary situations, *i.e.*, where the respondent is terminally ill or where the respondent will be threatened with imminent harm if the appeal is not decided



expeditiously.

(iii) Consolidation

In cases where separate appeals are taken from the same judgment by different parties, a motion may be made to consolidate the appeals. The same party may also seek to consolidate appeals from different orders in the same case. Consolidation is granted in the discretion of the Court. However, there is a preference to hear appeals on a single record.

The perfection of consolidated appeals should be upon one record and brief, but if one of the appeals has already been perfected, the existing record may be enlarged or supplemented upon a consolidation order. While the Appellate Division, First Department will not consolidate different cases, it may permit consolidation to the limited extent of ordering that the appeals be heard together solely for the purposes of argument. The moving party must persuade the Court that a joint hearing of the appeals is warranted because of the following reasons: (i) there are common questions of law or fact, and (ii) their joint hearing would serve to reduce calendar congestion and economize legal and judicial effort.

(iv) Postponing Oral Argument

For good cause shown, oral argument may be postponed. However, if the appeal has reached the day calendar, argument will be postponed only in exceptional cases and not merely for the convenience of counsel.

d. ***Amicus Curiae* Motions**

The Court of Appeals is the only New York appellate court to promulgate a rule specifying the criteria for granting a motion for permission to file an *amicus curiae* brief and anyone who seeks

permission to file such a brief in the Appellate Division, First Department is well advised to consult this rule (*see*, 22 NYCRR 500.11[e]). The motion should be made well in advance of the argument of the appeal and it should include a copy of the proposed brief. The Appellate Division has wide discretion to grant or deny the nonparty's motion to file an *amicus curiae* brief. The *amicus* is rarely granted permission to participate in oral argument.

e. **Post-perfection Dismissal Motions**

Many of the rules discussed throughout this book provide jurisdictional and nonjurisdictional grounds for dismissing an appeal that has been perfected. These motions, primarily made by the respondent, include the following:

(1) the respondent may move to dismiss the appeal where the Appellate Division lacks jurisdiction. Such a motion may be made where appellant has appealed a nonappealable order (such as a default judgment) or where an appeal has been taken to the wrong appellate court. In the latter situation, the appeal will not be dismissed, but will be transferred to the appellate court which is authorized to review such judgment or order;

(2) the respondent may move to dismiss the appeal because an order or judgment was not duly entered;

(3) the respondent may move to dismiss the appeal because appellant failed to file a timely notice of appeal;

(4) the respondent may move to dismiss an appeal from an intermediate order where an appeal has been taken from the final judgment;

(5) the respondent may move to dismiss the appeal on the ground that it is moot;

(6) the respondent may move to dismiss the appeal because



the appellant either is not a party or is not aggrieved by the judgment or order appealed from.

A clear showing must be made before dismissal will be granted. An appeal may be withdrawn by motion. The motion should include an affidavit by the appellant affirming the desire to withdraw the appeal and stating the reasons for seeking withdrawal. In such a case, the appellant should try to obtain a stipulation signed by the attorneys for all parties to the appeal, consenting to the dismissal.

f. **Motions Concerning Counsel**

Other motions are related to counsel's role. In general, a party has an absolute right to discharge counsel at any time with or without cause (CPLR 321). An attorney may seek to withdraw as appellate counsel without consent of the client pursuant to CPLR 321(b)(2), which provides as follows:

> An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

D.R. 2-110(c) sets forth the grounds upon which an attorney can seek to withdraw. These include irreconcilable differences between the attorney and client with respect to appellate strategy, a wholly frivolous appeal and the failure of the client to pay legal expenses or fees.

As to this latter ground, the courts have warned that an attorney's right to withdraw is not absolute. If an attorney seeks to withdraw for nonpayment of bills, he must submit to the court a detailed account of the services rendered to the client so that the court may determine whether the services performed justify a finding that the retainer has been exhausted (*see*, *Charles Weiner Corp. v D. Jack Davis Corp.*, 113 Misc 2d 263 [Civ Ct New York County 1982]).

## H. Post-decision Motions

There are two principal motions that can be made after an appeal has been decided: the motion for reargument and the motion for leave to appeal to the Court of Appeals.

### 1. Motions for Reargument

The losing party may move to reargue the appeal. 22 NYCRR 600.14(a) provides as follows:

> Motions for reargument shall be made within 30 days after the appeal has been decided and shall be submitted without oral argument. The papers in support of the motion shall concisely state the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portions of the record and the authorities relied upon.

Reargument motions are rarely granted. The motion for reargument can be, and usually is, made in conjunction with an application for leave to appeal to the Court of Appeals.



### 2. Motions for Leave to Appeal to Court of Appeals

The losing party may move for leave to appeal to the Court of Appeals. Substantively, the decision as to whether to attempt to appeal to the Court of Appeals often hinges upon considerations of appealability, reviewability, and the limited scope of the high Court's jurisdiction. For a thorough discussion, consult such works as Cohen and Karger, "Powers of The New York Court of Appeals," or Davies, Stecich and Gold, *et al.*, "New York Civil Appellate Practice." Procedurally, note that 22 NYCRR 600.14(b) provides as follows:

> Applications for permission to appeal to the Court of Appeals shall be made in the manner and within the time prescribed by CPLR §5513(c) and 5516 and must be submitted without oral argument. The moving papers shall include a copy of the order of the court from which leave to appeal is requested, and shall set forth the questions of law to be reviewed by the Court of Appeals. The moving party should consult CPLR 5602(b) to determine the circumstances under which he or she must make a motion for leave in the appellate division. In all other circumstances, the motion for leave may be made to the appellate division or the Court of Appeals

CPLR 5602(a).

Other factors that should be considered include the following:

i. the motion must be made within 30 days of

service of the Appellate Division order;

ii. the return day of the motion must comply with CPLR 5516;

iii. when the Appellate Division grants permission to appeal in response to a properly filed motion, CPLR 5713 dictates that the order contain the following information:

> When the appellate division grants permission to appeal to the court of appeals, its order granting such permission shall state that questions of law have arisen which in its opinion ought to be reviewed. When the appeal is from a non-final order, the order granting such permission shall also state that the findings of fact have been affirmed, or reversed or modified and new findings of fact made, or have not been considered, shall specify the findings of fact which have been reversed or modified and set forth new findings of fact with at least the same particularity as was employed for the findings of fact below and shall certify the questions of law decisive of the correctness of its



> determination or of any separable portion of it.

iv. questions of law must be certified by the Appellate Division for review by the Court of Appeals.

## I. Motion Costs

It is the general policy of the Court to award $100 costs when denying motions to reargue or upon granting motions to dismiss appeals. Except where motions to dismiss are granted, costs are not awarded to a moving party whose application has been granted since the movant has already obtained relief.

# PART II

# CRIMINAL APPELLATE PRACTICE

**Leland S. Scopp, Esq.**

# PART II
# CRIMINAL APPELLATE PRACTICE

## I. INTRODUCTION

Although every criminal trial attorney should know how to research a legal issue, write a memorandum of law for the court, and make an oral argument, appellate procedure is quite different. Counsel, especially when representing the appellant, must be familiar with numerous procedural and technical considerations and mechanical steps. The attorney who undertakes an appeal may be excited about the prospect of helping to shape the future development of the law, only to find himself or herself beset by such concerns as whether or not a brief has to say "Printed on Recycled Paper."

This book is not intended as an encyclopedia of everything one might need to know about preparing an appeal. The most important source of information about the technical and mechanical aspects of appellate practice are the rules of the various appellate courts. Clerks of appellate courts, and companies which print briefs and records may also be important sources of such information.

## II. JURISDICTION

### A. Appellate Courts

This topic deals with the types of judgments and orders in criminal cases which may be appealed, and the courts to which they may be appealed. The typical criminal appeal is of course, a defendant's appeal from a judgment of conviction, but a number of other types of appeals exist as well.



The question of whether something *can* be appealed, that is, whether the court has jurisdiction to hear the appeal, is quite separate from the question of whether something *should* be appealed, that is, whether there are any viable issues to be raised. If a judgment or order is appealable, the court has jurisdiction regardless of the merits of any issues to be raised, although this certainly does not justify a frivolous appeal. Conversely, no matter how meritorious an issue may be, merit alone cannot create a right to take an appeal, such as, for example, an interlocutory or interim appeal of a pre-trial ruling, where no such right exists under the CPL. Similarly, the concept of appealability must be distinguished from reviewability. Reviewability, which will be discussed separately, deals with the authority (or, in some situations, willingness) of a particular level of appellate court to consider a particular issue raised within a jurisdictionally valid appeal.

This part of the book is not intended to cover every conceivable criminal appellate situation; the practitioner would be advised to consult the CPL when faced with an unusual procedural posture. For example, several CPL provisions, such as CPL 450.70, create special rules for capital cases, none of which will be discussed here. A practitioner handling a capital case should naturally become familiar with those provisions.

#### 1. <u>Appeals by Defendant</u>

A defendant always has the right to directly appeal to an intermediate appellate court from a judgment (CPL 450.10). A judgment consists of a conviction (by verdict or plea of guilty) and a sentence. A judgment includes all aspects of the disposition, including surcharges, restitution, orders of protection, and certification as a sex offender under Article 6-C of the Correction Law, commonly known as "Megan's Law" (*People v Hernandez*,

93 NY2d 261 [1999]). However, a risk level determination under Megan's Law is *not* appealable (*People v Stevens*, 91 NY2d 270 [1998]), except that, as provided by Correction Law 168-d, a *civil* appeal may be taken from a determination made after January 1, 2000.

A defendant may also appeal from a sentence without appealing from the conviction, but even if the only issue raised is the legality or excessiveness of a sentence, the appeal may still be called an appeal from "the judgment." A practical example of a situation where an appeal is likely to be taken from the sentence alone is where a defendant wants to challenge a revocation of probation (*see*, CPL 450.30[1]). A defendant may also appeal to an intermediate appellate court from an order setting aside a sentence on the People's motion made pursuant to CPL 440.40 (CPL 450.10[3]).

In 1984 the Legislature attempted to provide that a claim of excessiveness of a plea-bargained sentence could only be raised on appeal by permission instead of by right. This statutory scheme, found in CPL 450.10(1) and elsewhere, was declared unconstitutional by the Court of Appeals (*People v Pollenz*, 67 NY2d 264 [1986]) but not repealed, and should be disregarded. A defendant may, however, make a valid *waiver* of the right to appeal the excessiveness (but not the legality) of a sentence, along with various other issues, as part of a plea or sentence bargain, but this merely forecloses appellate review of the waivable claims, without depriving the appellate court of jurisdiction to hear the appeal (*People v Callahan*, 80 NY2d 273 [1992]; *People v Seaberg*, 74 NY2d 1 [1989]).

In the situation in which the only issues raised on appeal are



issues that have been foreclosed by a valid waiver of the right to appeal, the appellate court will affirm rather than dismiss the appeal. Various issues relating to the scope and validity of appeal waivers have been litigated in recent years, and these cases should be consulted (*see*, *e.g.*, *People v Kemp*, 94 NY2d 831 [1999]; *People v Hidalgo*, 91 NY2d 733 [1998]; *People v Muniz*, 91 NY2d 570 [1998]; *People v Moissett*, 76 NY2d 909 [1990]). A defendant may not appeal as of right from an order denying a motion to vacate a judgment or set aside a sentence made under CPL Article 440. Instead, a defendant must go to an individual Judge of the intermediate appellate court to obtain a certificate granting leave to appeal (CPL 450.15, 460.15). The procedure for obtaining such a certificate is set forth in the rules of each of the departments. In granting leave to appeal from denial of a 440 motion, the intermediate appellate court may decide to consolidate that appeal with any direct appeal from the same judgment or sentence that may be pending. However, if leave to appeal has not been obtained, the court considering the direct appeal is limited to the trial record and will not consider any further record generated in connection with the 440 motion.

2. **Appeals by the People**

The various situations in which the People may appeal are listed in CPL 450.20, and further explained in CPL 450.40, 450.50, and 450.55. The most common types of People's appeals are appeals from orders dismissing or reducing accusatory instruments or counts thereof, orders setting aside verdicts and dismissing and/or directing new trials of accusatory instruments or counts thereof, orders granting defendants relief under CPL Article 440 (appealable as of right, not by permission as in the case where a defendant wishes to appeal denial of a 440 motion), and orders suppressing evidence as the result of pre-trial suppression hearings

(where the People file a statement that the deprivation of the suppressed evidence has rendered the People without sufficient proof to prosecute the charge). The People may appeal a sentence, but only on grounds of illegality.

The statute giving the People the right to appeal is narrowly construed. For example, the right to appeal from an order suppressing evidence does not extend to an order *precluding* evidence for failure to give timely notice pursuant to CPL 710.30 (*People v Laing*, 79 NY2d 166 [1992]).

## B. Court of Appeals

Except for the special rules for capital cases, there is no right to appeal to the Court of Appeals, and permission to appeal is sparingly granted. It is necessary to obtain a certificate granting leave to appeal from a Judge of the Court of Appeals, or, if the appeal is from an order of the Appellate Division, from a Justice of that Court (as a practical matter, most likely a Justice who dissented) (CPL 460.20).

There are several other jurisdictional requirements for appeal to the Court of Appeals. The order of the intermediate appellate court must be adverse or partially adverse to the party wishing to appeal (CPL 450.90). This means, for example, that a defendant who succeeds in obtaining reversal of the entire judgment may not appeal to the Court of Appeals on the ground that such defendant disagrees with the corrective action taken by the intermediate appellate court, such as ordering a new trial when the defendant was looking for a dismissal (*People v Jackson*, 80 NY2d 112 [1992]).

The fundamental jurisdictional requirement for an appeal to the Court of Appeals has generated a wealth of case law, too



voluminous to be summarized here. The Court of Appeals, unlike intermediate appellate courts, which have certain discretionary review powers (CPL 470.15), reviews only "questions of law" (CPL 450.90[2]; 470.05[2]), including the situation where there is a controlling question of law accompanied by incidental, nondispositive factual determinations (CPL 450.90[2][a]). The ramifications of that rule, in very general terms, are as follows: Where a particular type of claim requires preservation (a complex subject discussed in other parts of this book), the intermediate appellate court may nevertheless choose to overlook the lack of preservation and review in the interest of justice (CPL 470.15[6][a]). The Court of Appeals, on the other hand, will not do so, since, in the absence of an exemption from the general requirement of preservation, an unpreserved issue cannot present an issue of law. Nor will the Court of Appeals review the intermediate appellate court's decision to exercise, or decline to exercise, its "interest of justice" review power. Likewise, the Court of Appeals will not review the harshness (as opposed to the constitutionality) of a legal sentence. The Court of Appeals will not review a question of fact, such as the weight (as opposed to the legal sufficiency) of the evidence supporting a verdict. With regard to questions of fact or mixed questions of law and fact, the scope of review in the Court of Appeals is limited to whether or not the determination was supported by the record. This is distinct from review of whether or not a factual determination was *correct*.

The Court of Appeals will dismiss an appeal, on jurisdictional grounds, when it decides that the intermediate appellate court order appealed from is not "on the law," even if the order recites that it *was* on the law (*see, e.g., People v Libbett*, 63 NY2d 763 [1984]). The Court of Appeals is not bound by the fact that the intermediate appellate court stated that its order was "on the law." Curiously, this

does *not* work in the opposite direction. If the intermediate appellate court states that its order is based on its discretion in the interests of justice, the Court of Appeals will *not* "look behind" that choice of language (*People v Albro*, 52 NY2d 619 [1981]). However, if the Court of Appeals finds that the intermediate appellate court erroneously concluded as a matter of law that a particular issue was preserved, or did not require preservation, it will remit the case to the intermediate appellate court for such court to decide whether or not to exercise its broader review power (*People v Cona*, 49 NY2d 26, 33-34 [1979]; *see also*, CPL 470.25[2][d], 470.40[2][b]).

## C. Intermediate Appellate Courts

Appeals from the Supreme Court and County Court go to the Appellate Division. Appeals from local criminal courts go to the Appellate Term in New York City and other locations where appeal to an Appellate Term has been made available by the rules of the Appellate Division, and otherwise to the County Court. The maximum number of courts that any single order or judgment can be appealed to is two: one intermediate appellate court and the Court of Appeals.

## D. Miscellaneous Appellate Issues

### 1. Interlocutory Appeals

As previously noted, there is virtually no situation in which an interlocutory appeal is permitted in a criminal case. However, there are a few specific situations in which an interlocutory appeal may be obtained in an indirect fashion. One rationale offered by the courts in some of these situations is that certain issues simply cannot be deferred until an appeal of the ultimate judgment of conviction, because such issues would become moot. These include



issues relating to pre-trial custody, and a limited number of issues raised by prosecutors. Double jeopardy, immunity, and other unusual situations also have special rules for obtaining interlocutory review.

### 2. Habeas Corpus

When a defendant is in custody pending trial and there is an issue as to the legality of the custody itself (as opposed to any issues as to the legality of any of the underlying proceedings resulting in or related to such custody), it may be possible to proceed by way of writ of habeas corpus (CPLR Art.70), and, if unsuccessful, take a *civil* appeal from the dismissal of the habeas corpus proceeding. Habeas corpus may be employed to challenge a bail determination on the grounds that it constituted an abuse of discretion (*People ex rel Parker v Hasenauer*, 62 NY2d 777 [1984]). Habeas corpus may also be employed to assert that a defendant is entitled to immediate release because the People were not ready within the time limits prescribed by CPL 30.30(2), such as 90 days for a felony. However, habeas corpus may *not* be employed to assert that an indictment should be dismissed for the People's unreadiness within the longer time limits prescribed by CPL 30.30(1), such as six months for a felony, because the latter claim may be raised on direct appeal of the ultimate conviction (*People ex rel Chakwin v Warden*, 63 NY2d 120 [1984]).

### 3. CPLR Article 78

In rare instances, rulings in criminal proceedings may be "appealed," in effect, by application for prohibition pursuant to CPLR Article 78. These rare instances usually, but do not necessarily, involve applications by prosecutors. Prohibition may be available when a trial court exceeds its jurisdiction or its authorized powers in a manner impacting on the entire proceeding,

especially where direct appeal would not be available (*Matter of Holtzman v Goldman*, 71 NY2d 564 [1988].

There is a special rule for double jeopardy claims. Application for prohibition pursuant to CPLR Article 78 is available, prior to trial, as a means of raising a claim of previous prosecution (*Wiley v Altman*, 52 NY2d 410 [1981]). Similarly, another rare instance in which prohibition is available is where a defendant claims to have immunity from further prosecution (*Rush v Mordue*, 68 NY2d 348 [1986]).

4. **Non-parties**

Finally, there is some authority for the proposition that a nonparty to a criminal case, that is, a person other than the People and a defendant, may appeal from an order entered in the criminal proceeding which adversely affects the nonparty's interests. Some examples include a reluctant witness seeking to quash a subpoena (*Cunningham v Nadjari*, 39 NY2d 314 [1976]) and a financially aggrieved bail surety (*People v Schonfeld*, 74 NY2d 324 [1989]); such appeals are generally deemed civil in nature even though closely related to criminal proceedings.

## III. TAKING AND PERFECTING AN APPEAL

### A. Preliminary Procedures

Unless appellate counsel was also involved with the case at the trial court level, chances are that by the time appellate counsel enters the case the "taking" of the appeal (*i.e.*, the filing of the notice of appeal) and other preliminary steps have already been accomplished by trial counsel, or by the defendant himself or herself. Nevertheless, this is not always the case, and these steps



may have to be accomplished by appellate counsel. Furthermore, even when these steps have already been completed, appellate counsel may have to take additional or follow-up actions to preserve the defendant's right to appeal.

1. **Notice of Appeal**

a. **Mechanics**

A notice of appeal is a simple statement that a particular party appeals to a particular court from a particular (dated) judgment or order; there is no appeal from a "decision" not embodied in a judgment or order. A notice of appeal has no prescribed form, and failure to accurately describe the judgment or order appealed from may be overlooked in the interest of justice (CPL 460.10[6]), although a total failure to file a notice of appeal from a particular judgment or order may not be excused under that provision (*People v Duggan*, 69 NY2d 931 [1987]). In all cases where an appeal is taken as of right (unlike appeals by permission), filing and service of a notice of appeal is all that is necessary to "take," or begin, an appeal.

There is a special two-step procedure for "taking" an appeal to an intermediate appellate court by permission. First, the defendant has 30 days, running from service upon him or her of the order to be appealed, to apply for a certificate granting leave to the intermediate appellate court. Second, once the certificate is issued, the defendant has another 15 days to file that certificate along with a notice of appeal (CPL 460.10[4], 460.15). The term "taking" an appeal is distinguished from the term "perfecting" an appeal, which means filing the record (including the transcript and court file), *and* filing the appellant's brief.

The notice of appeal is *not* filed with the appellate Court. Instead, it is filed in duplicate with the Clerk of the Court whose judgment or order is being appealed, and the Clerk endorses the filing date on one of the copies and sends it to the appellate court (CPL 460.10[1][a],[e]). There are special procedures to be followed with respect to certain local courts outside New York City where there is no Clerk, or where a stenographer did not record the proceedings (CPL 460.10[2],[3]).

The notice of appeal must be served on the prosecutor, in a defendant's appeal, or on the defendant personally or the defendant's attorney, in a People's appeal (CPL 460.10[b],[c]). No particular type of service is prescribed. If a notice of appeal is timely filed, but, through inadvertence, is not timely served, late service may be permitted (CPL 460.10[6]).

b. **Time Limitations**

The time limit for serving and filing a notice of appeal is 30 days. The first question is when the 30 day period begins to run. The typical appeal is, of course, the defendant's appeal from a judgment of conviction. The 30 days runs from the date of *sentence* (CPL 460.10[1][a]). Resentencing gives a defendant a new 30 days in which to appeal from the resentence itself, but does not give the defendant any more time to appeal from the underlying judgment of conviction (CPL 450.30[3]).

The controlling date is the *imposition* of sentence, and not the *execution* of sentence, if that occurs later. Therefore, if a defendant is found to have absconded and is sentenced in absentia, the 30 days runs from the date of sentence and not from the date sentence is executed as a result of the defendant's surrender or apprehension (*People v Torres*, 179 AD2d 358 [1st Dept 1992]). Accordingly, it



would behoove trial counsel representing an "empty chair" defendant to protect the client's interests by filing a timely notice of appeal.

The atypical appeal is an appeal from an order. These are usually People's appeals, but also include the situation where a defendant seeks permission to appeal from an order denying a motion made under CPL Article 440. The 30 days to file a notice of appeal (or apply for leave to appeal) from an order not included in a judgment runs from the date of service of the order. In many cases there is no "service" of the order; for example, the court may simply furnish all parties with copies of its order. Nevertheless, it has been held that in such a case only service upon the People by the defendant can make the People's 30 days start running and the lack of such service extends the People's right to appeal indefinitely (*People v Mullins*, 103 AD2d 994 [3d Dept 1984]).

When a Court grants a motion to reargue and adheres to its original order, the 30 days runs from service of the new order, that is, the one adhering to the original order (*People v Singleton*, 72 NY2d 845 [1988]). It should be noted that if, after a jury verdict, the trial court dismisses or reduces one or more counts and imposes sentence, that is included in the judgment and the People's time to appeal from the order of dismissal and/or reduction runs from the sentence date (*People v Coaye*, 68 NY2d 857 [1986]).

(i) Extensions of Time

Once it has been established that the 30 days for taking an appeal (or, where applicable, applying for leave to appeal) have expired, the next question is what to do about it. While the People forfeit their appellate rights, the CPL affords a defendant a fairly liberal escape clause, which replaced the old "*Montgomery*"

procedure (*People v Montgomery*, 24 NY2d 130 [1969]) whereby defendants were resentenced for the purpose of reviving their appellate rights.

Under CPL 460.30, a defendant gets up to an extra year (added to the original 30 days) in which to make, with due diligence, a motion for an extension of time to take an appeal.

The basis for such a motion is that failure to take a timely appeal resulted from any of the following circumstances:

> (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to the defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant

(CPL 460.30[1]).

"Improper conduct" by an attorney includes failure to advise the client of the right to appeal (*People v Corso*, 40 NY2d 578 [1976]). This is seldom a problem when the appellate rights are administered automatically as part of the sentencing process. A more common basis for an application for leave to appeal is a defendant's claim that counsel failed to carry out the defendant's request that a notice of appeal be filed, or some variation on that



theme. The standard for granting such an application is largely within the discretion of the appellate court. CPL 460.30(2) through (6) set forth the procedure for determining these applications, which may involve fact finding hearings and the possibility of review by the Court of Appeals. On the typical application, the Appellate Division, First Department generally does not require much more than a broad reading of the defendant's (usually *pro se*) application.

In very unusual circumstances, as where the defendant's failure to appeal is attributable to the fault of the People, the one year limit may not apply (*People v Thomas*, 47 NY2d 37 [1979]). In some cases there is confusion (or clerical error by the defendant, counsel, the trial court, or the appellate court) as to whether a particular piece of paper, especially one filed by a *pro se* defendant, constituted a notice of appeal, or as to whether it was in fact timely filed, or whether it included all the judgments that the defendant wishes to appeal (such as in the case where a defendant is simultaneously sentenced on multiple indictments with separate indictment numbers). In such cases it may be important for counsel to make an appropriate motion to amend the notice of appeal or other documents or to "deem" a notice of appeal timely filed or for similar relief.

This type of motion may be particularly important where the notice of appeal fails to list the indictment numbers of one or more "companion cases." In some situations, a meritorious argument may be made that an error with respect to one judgment requires reversal or modification of not only that judgment but of one or more other judgments, as where a guilty plea was conditioned upon a promise of concurrent sentences (*see*, *People v Clark*, 45 NY2d 432, 440 [1978]). Such an argument will be unavailing if the appellate court lacks jurisdiction to review each judgment.

2. **Poor Person Relief and Assignment of Counsel**

An indigent defendant is entitled to the assignment of free counsel and "poor person relief" (CPLR 1101, 1102; CPL 460.70[1],[3]), consisting of the preparation of a free transcript upon which the appeal is heard, dispensing with all printing requirements, and exemption from fees. This application is usually, but not necessarily, made by the defendant *pro se*. Unlike the notice of appeal, which is filed with the trial court, the application for poor person relief and assignment of counsel is made to the appellate court. The defendant is required to submit an affidavit (*not* an unsworn letter) attesting to his or her indigency, and setting forth the amount and sources of income and value of property owned (CPLR 1101).

The affidavit of an incarcerated defendant usually recites that he or she has no income or property at all, and if the defendant had also been treated as an indigent by the trial court, qualifying as an indigent for appellate purposes will usually be a simple matter. However, there are a few factors which may trigger opposition by the People and/or close scrutiny by the appellate court. Where a defendant was represented by retained counsel in the trial court, or posted a substantial amount of bail, the appellate court may require information about the source of those funds (and disposition of any exonerated bail), and an explanation of the defendant's current financial status. Where a defendant stands convicted (and is no longer presumed innocent) of lucrative criminal activity such as large-scale drug trafficking, this may also be a factor warranting close scrutiny of a claim of indigency (*People v Yui Kong Yu*, 158 AD2d 370 [1st Dept 1990]). In its discretion, the appellate court may request further documentation such as tax returns, retainer agreements with counsel, and previous sources of income. However, it has been held unconstitutional for a State to treat the



funds of a defendant's friends or relatives, over which the defendant has no control, as assets of a defendant, even if the friends or relatives have voluntarily advanced some costs of the defense (*Fullan v Commr. of Corrections*, 891 F2d 1007 [2d Cir 1989], *cert denied* 496 US 942 [1990]).

Assignment of counsel and poor person relief are almost invariably applied for together, except, of course, where a defendant does not want counsel and intends to proceed exclusively *pro se*, but still wants poor person relief. In rare instances, the appellate court may entertain an application for poor person relief by a defendant who has retained appellate counsel. Naturally, such an application is disfavored and would receive close scrutiny, since a court would not be overly sympathetic where a defendant has chosen an appellate attorney whose bill has rendered his or her client suddenly indigent. However, such an application might be granted for good cause, as where appellate counsel's fee has been paid gratuitously by friends or relatives who cannot or will not advance the other expenses of the appeal.

3. **Bail Pending Appeal**

While only a defendant convicted of a class A felony is statutorily or automatically ineligible to be released pending appeal (CPL 530.50), as a practical matter it is difficult to obtain such release after a felony conviction. In some cases an appeal is rendered moot by the fact that the sentence is served and the defendant is released before the appeal is heard. Nevertheless, this concern is frequently found to be outweighed by the public interest in the incarceration of persons who have lost the presumption of innocence.

The concept of a "stay of judgment" or "stay of execution of

sentence" is directly linked to a convicted defendant's request for release on bail or recognizance (CPL 460.50[1]). Thus, for example, there is no authority for a "stay of execution" for the purpose of keeping a defendant in a local jail instead of a State prison.

On a People's appeal the prosecution is not eligible to apply for a stay pending appeal of an order dismissing an indictment (*People v Moquin*, 77 NY2d 449, 455-456 [1991]). However, they are entitled to an automatic stay of an order reducing a count or counts of an indictment or directing filing of a prosecutor's information (CPL 460.40[2]; 210.20[1-a]; 450.20[1-a]).

An application for a stay of execution of judgment and bail or recognizance pending appeal (or "bail pending appeal," for short) may not be made until the defendant is sentenced and files a notice of appeal (CPL 460.50[1]). However, there is a provision (CPL 530.45) which covers the situation where a defendant who was at liberty pending trial is jailed upon conviction (*i.e.*, verdict or plea of guilty). A defendant in that situation (unless convicted of a class A felony) may make one application for bail, on notice to the People, to a single Justice of the Appellate Division (or to certain other Judges in the case of a local criminal court conviction). This provision has two interesting aspects: First, if this application is successful, the defendant does *not* have to make another application for bail pending appeal once sentence has been imposed, so long as a notice of appeal is timely filed, and the appeal is timely perfected and argued; a defendant who needs more time must apply to the appellate court for a further stay, and absent such a stay the defendant must surrender (CPL 530.45[4],[5]). Second, if this application is unsuccessful, there is nothing in CPL 460.50 which prevents the defendant from taking another "bite of the apple" by



applying for bail pending appeal once sentence has been imposed. This latter aspect is particularly unusual, because the CPL is otherwise quite strict in limiting a defendant to a single application for bail pending appeal. In connection with the "single-bite-of-the-apple" rule, it should also be noted that a bail application made *after* sentencing but *before* the filing of a notice of appeal is a nullity which does not prevent the defendant from making another, valid application after filing the notice of appeal *(Matter of Morgenthau v Rosenberger*, 86 NY2d 826 [1995]).

The procedure for applying for post-sentence bail pending appeal is set forth in CPL 460.50. Although the application may be oral, it must afford the People reasonable notice and opportunity to be heard (CPL 460.50[3]). While the application is usually made as soon as possible after sentencing, the statute provides no time limitation.

CPL 460.50(2) lists the various kinds of Judges or Justices to which this application may be made. Naturally, the Judge must sit in the appropriate department, judicial district, or county, as the case may be. If the appeal is from the Supreme Court, the application may be made to an Appellate Division Justice *or* a Supreme Court Justice. If the appeal is from the County Court, there are *three* choices: an Appellate Division Justice, a Supreme Court Justice, or a County Court Judge. There are special rules for appeals from the various kinds of local criminal courts.

When the application is made to a Judge of the court of conviction, in practice that usually means the same Judge who presided at trial. However, the statute imposes no such restriction, and at least one court has held that a defendant has the right to make the application to a different Judge of the court of conviction

(*People v Meredith*, 152 Misc 2d 387 [Sup Ct, Kings County 1991]).

Since only one application can be made, the very limited right of "judge-shopping" provided by the statute must be exercised with great care. For example, if the main thrust of an argument for bail pending appeal is a claim of egregious reversible errors committed by the Trial Judge, then the Trial Judge might be the last Judge counsel would want to go to, whereas an Appellate Division Judge might be more receptive to this argument. On the other hand, if the defendant is genuinely a docile, sympathetic figure who appears punctually in court and presents no risk of flight or of getting into trouble, then the Trial Judge's day-to-day familiarity with the defendant may work to the defendant's favor.

CPL 460.50(4) provides that a defendant who is out on bail pending appeal must surrender himself or herself to the court of conviction if the appeal has not been *completed* (perfected *and* argued or submitted) within 120 days of the order granting bail. This is separate from any time limit for completing an appeal which is imposed by the rules of the particular appellate court (CPL 460.70[1]). The appellate court (not a single Justice thereof) may extend the time for completion of the appeal, but extending the time does not necessarily continue bail pending appeal. Instead, the defendant must also apply for continuation of bail, and the appellate court must determine that application. This distinction is significant, especially in situations where bail pending appeal was granted by a trial court. For the first 120 days, the appellate court has no power to overrule that determination. However, after 120 days has expired, the appellate court is free to decide that the time to appeal should be extended, but that the defendant should be imprisoned forthwith.



CPL 460.50(5) provides that if a defendant is out on bail pending appeal, and the conviction is affirmed, the appellate court must remit the case to the court of conviction. That court, in turn, must give the defendant (along with his or her attorney and surety) at least two days notice, directing defendant to surrender.

CPL 460.60 governs bail pending appeal from an intermediate appellate court to the Court of Appeals. The procedure is virtually the same as for first-level appeals, except as follows: The application for bail pending appeal to the Court of Appeals must be made to the same Judge (of either the intermediate appellate court or the Court of Appeals) who granted leave to appeal. Since there may be a time lag between the decision of the intermediate appellate court and the determination of the application for leave to appeal, there is a provision for interim bail pending the *application* for leave to appeal. The application for interim bail is made to the same Judge to whom the application for leave to appeal is made.

CPL 510.30(2) discusses the criteria for bail, a determination that is always a matter of discretion. Bail pending appeal involves all the usual criteria governing bail pending trial, such as the defendant's character and criminal record and so forth, along with the added, and potentially controlling, factor of the merits of the appeal. A determination that the appeal is without merit justifies, but does not require, denial of the application (CPL 510.30[2][b]). Bail pending appeal also differs from bail pending trial in that a denial of bail pending trial may be attacked, by way of habeas corpus, as an unconstitutional abuse of discretion, but there is no procedure available for review of a denial of bail pending appeal.

## B. Record On Appeal

The appellant's responsibility to put together a record is a stage in the appellate process which is dominated by logistics and rules of specific courts rather than principles of law. Nevertheless, in order to make sure that all the necessary minutes and documents are included in the record on appeal, it is essential to find out what events took place, at all stages of the proceedings, that might raise worthwhile appellate issues. As discussed below, issues may crop up which require the record to include minutes or documents other than the usual material.

The first task of an appellate attorney who has had no prior involvement with the case is to find out what it is about. The sooner this is done the better, and the two best sources of information about the case, prior to receipt of the minutes, are trial counsel and the defendant. Appellate counsel should get in touch with trial counsel, and with the client, by whatever means are most practical, and stay in touch throughout the appeal. In particular, regular communication between appellate counsel and the client is essential.

Trial counsel and the client may have copies of motion papers and decisions which may be of valuable assistance in determining what goes into the record on appeal. Naturally, no final strategic decisions need be made at this early stage, but input by trial counsel and the client may be helpful or even essential to ensure that a complete record is prepared.

### 1. Obtaining and Assembling Record

Procedures for preparing the record vary slightly among the four departments. Therefore, it is essential to consult the applicable rules, and, where necessary, to seek help from clerks of the trial



and/or appellate courts, appellate printing companies, and knowledgeable practitioners.

The process of obtaining and preparing the record takes one of two basic tracks, depending on whether or not the defendant has been granted poor person relief. Poor person relief not only eliminates the cost of printing, but also cuts out some of the mechanical steps in assembling the record.

When a defendant is granted poor person relief by an appellate court, that court's order will direct the court reporter to prepare two copies of the minutes, one of which will be loaned to appellate counsel, to be returned to the appellate court when the appellant's brief is filed. The clerk of the trial court also prepares, certifies, and sends to the appellate court a collection of documents from the original file, including a copy of the indictment with a sheet of "endorsements" showing various proceedings, any motions and decisions, and any commitment papers. While the clerk will forward any *court* exhibits, *parties'* exhibits are retained by the respective parties and may be offered by the parties for the perusal of the appellate court, or requested by the appellate court itself, before or during oral argument.

With poor person relief, the appeal is heard on the "original record." This means that no printing of the record is necessary. The non-indigent defendant, however, must choose either the "full record" or "appendix" method, as provided by CPLR 5526 and 5528, as affected by the various court rules.

A non-indigent defendant must obtain the minutes for printing by purchasing them from the court reporter or reporters who took them. In one situation, the defendant may already own

some of the minutes. This is where the defendant has purchased "daily copy," or minutes on any other basis, of parts of the hearings and/or trial. Daily copy is usually limited to testimony, and seldom contains such matters as the summations and charge. (Where daily copy, or any other kind of minutes, is provided to an indigent defendant free of charge, those minutes are *not* the defendant's property, and should be returned by trial counsel to the court immediately upon sentencing.)

Counsel also has the burden of obtaining the necessary documents from the trial court file from the clerk of the trial court. It may be necessary to photocopy them for inclusion in a printed record, or to issue a subpoena duces tecum directing the trial court clerk to deliver the file to the appellate court. This, once again, varies with court rules and with the method of appeal.

It is the responsibility of the appellant to make sure that the record on appeal includes all minutes and documents necessary for appellate review of the legal issues raised by the appeal (*People v Olivo*, 52 NY2d 309, 320 [1981]). In many cases this is a simple task. Usually, there is a set of minutes of a plea or trial and sentencing, plus the motion papers and minutes that go with any pre-trial hearings. Nevertheless, counsel must be alert to the possibility that something necessary to resolve a legal issue may be missing.

Some common examples are as follows: On the day before a trial, the court hears arguments and/or makes a ruling on a legal issue such as admissibility of evidence, request for a continuance, substitution of counsel, or the like. Since this occurred on a day which may or may not be counted as part of the trial, there is no guarantee that such minutes will be included in trial minutes.



Another example is where the court reserves decision on a pre-trial motion and renders its decision at another calendar appearance whose minutes have not been transcribed. Whenever any matter is taken up by the court on a piecemeal basis over different court dates, or even different "calls" of the case on the same date, this may complicate the process of assembling the record on appeal. Furthermore, each time a different court reporter records another part of the case, more problems may result.

Depending on the legal issues, minutes or documents from any stage of the case may belong in the record on appeal. It is not always enough to know whether or not the court granted an application; it may be essential to know what was argued by counsel and what findings or conclusions were made by the court.

Because of their confidentiality, presentence "probation reports" present a special logistical situation. Appellate counsel has the statutory right to inspect the probation report and place it before the appellate court (CPL 390.50[2]), and the report may contain important information relevant to an excessive sentence claim. However, the report will *not* be part of the court file, and counsel will have to contact the probation department to find out the procedure for obtaining the report and making it available to the appellate court.

### 2. Remedies for Delayed, Incomplete or Unavailable Minutes

The first problem counsel may face in obtaining minutes is delay. As stated previously, an indigent defendant who has obtained poor person relief theoretically has nothing further to do in order to obtain a free set of minutes. However, as a practical matter there may be a great deal for appellate counsel to do.

Appellate counsel may have to stay in direct contact with the court reporter or reporters. If there is still a serious delay, it may be necessary to make a motion before the appellate court for summary reversal of the judgment of conviction, or for a contempt order against the court reporter. Naturally, the appellate court is not going to grant summary reversal (unless the minutes are hopelessly lost and incapable of being reconstructed, as discussed below), nor will it hold a reporter in contempt except as a last resort; instead, the normal object and result of these motions is an order that directs the reporter to complete the minutes expeditiously and enlarges time to perfect the appeal. Hopefully, that will suffice.

When counsel obtains the minutes and discovers that something is missing, it may suffice to merely get in touch with the reporter. However, in one of the situations described above where counsel discovers a legitimate issue which requires inclusion of extra minutes or documents not normally included in a record on appeal, it may be necessary to make a motion to "expand the record" or "enlarge the judgment roll." Such an application may be granted where the appellate court is satisfied that counsel has a legitimate issue and is not on a "fishing expedition," and that the missing item or items were actually part of the record before the trial court. This type of motion normally seeks to expand the record on appeal to include additional matters which where already part of the record before the trial court; it is not a device to escape the rule that an appellate court may not consider anything dehors the record below, with rare exceptions such as matters suitable for judicial notice (*see, e.g., Hunter v New York, O & W R.R. Co.*, 116 NY 615, 623-624 [1889]).

If all or part of the necessary minutes are irretrievably lost, counsel may move for summary reversal, but that drastic remedy



will only be granted as a last resort (*People v Glass*, 43 NY2d 283 [1977]; *People v Rivera*, 39 NY2d 519 [1976]). Instead, the preferred remedy is to order a reconstruction hearing before the Judge who presided over the proceeding at issue.

In rare cases a sufficiently serious dispute as to the correctness of one or more portions of the minutes will require a resettlement hearing, which is similar to a reconstruction hearing. A court reporter may mishear words, neglect to record events, or make errors in recording and transcription. In the vast majority of cases these errors are inconsequential, but in some cases they are critical, and the parties are not necessarily bound by the reporter's version of the proceedings. An appellate court may order a resettlement hearing and hold the appeal in abeyance (*People v Laracuente*, 125 AD2d 705 [2d Dept 1986], *upon resettlement* 136 AD2d 742 [2d Dept 1988]).

The provisions of CPLR 5525 governing settlement of a transcript, proposed amendments, and the like (discussed in other parts of this book), are generally not used in criminal appeals. Instead, the respondent (usually the prosecutor) may see the minutes for the first time when the appellant's brief is filed and the minutes are forwarded to the respondent.

## IV. CALENDAR PRACTICE

Motion practice before the appellate court has already been mentioned in Part II of this book. A significant portion of criminal appellate motion practice deals with the subject of time. Counsel may routinely need to utilize motion practice and other devices in order to extend the time needed to fulfill counsel's appellate obligations. For example, counsel may need to make a motion for

the amendment or late filing of a notice of appeal, for enlargement of the judgment roll, for summary reversal, and the like. Motion practice may also be necessary for the purpose of terminating appeals which, for certain specific reasons, cannot or should not be completed. Motion practice is regulated by the rules (and unwritten policies) of the particular appellate courts, and, in general, by the CPLR (*see, Part I, Motion Practice, supra*).

## A. Time Limitations and Extensions

Except for special rules relating to appeals to a county court or appellate term (CPL 460.70[2]), the subject of time limits for serving and filing records and briefs and time of argument is relegated to the rules of the particular appellate courts (CPL 460.70[1],[3]). These time limits may have little relationship to practical realities.

A common reason for delay is the slow transcription of minutes. Therefore, counsel is commonly required to move for an enlargement of time to perfect the appeal. When counsel obtains the minutes, but finds that a motion to "expand the record" or "enlarge the judgment roll" is necessary in order to obtain transcription of other minutes, as discussed above, this motion should be accompanied by a motion for enlargement of time.

Counsel should set forth all the circumstances explaining the delay and indicate which term of the appellate court would be a realistic target. Counsel should, of course, find out the last day upon which to perfect an appeal for a particular term. Enlargements of time are often freely given, but careful attention must be paid to the rules and practices of the particular appellate court.

Depending on the rules or unwritten policies of the court, time



may also be enlarged by stipulation. The court may, for example restrict the number of times this can be done, may require a letter explaining the delay, or may require the stipulation to be "so ordered."

The time in which the respondent (usually the prosecutor) must file its brief is also regulated by court rule. Respondents may also apply for extensions of time (often called "adjournments" instead of enlargements), in whatever manner the court permits.

When representing a client who is out on bail or recognizance pending appeal, counsel must keep CPL 460.50(4) in mind. The stay automatically terminates if the appeal is not completed (including argument or submission) within 120 days of the order granting bail, even if an enlargement of time has been granted, unless the appellate court also extends the stay. Therefore, a motion for an enlargement of time must also include an application to continue the stay. Furthermore, the period of 120 days from the date of the *stay* to the date of the *argument* may be shorter than, and may be calculated differently from, the time limit contained in the court's own rule. The 120 days may expire *before* it would otherwise be necessary to move for enlargement of time, depending on the rules of the court. Therefore, counsel representing a defendant on bail must be careful to obtain all necessary extensions and re-extensions of the stay.

## B. Dismissals

When the time limit for perfecting the appeal has expired, opposing counsel may, of course, move to dismiss the appeal. The court will most likely grant a conditional order of dismissal requiring that the appeal be perfected for a particular term, and may, if necessary, entertain further motions.

In cases of extreme delay, the court may act *sua sponte*. It may, for example, send cautionary letters to counsel, demand explanations for delay, or set up its own "dismissal calendar." Excessive delay in perfecting a defendant's appeal is a serious matter, especially where the defendant is incarcerated, and may lead to disciplinary action against counsel.

Somewhat related to the subject of dismissal of an appeal for excessive delay is the question of whether a defendant, and especially an incarcerated defendant, has a right to a "speedy appeal." The Court of Appeals has held that while no such right can be derived from the Sixth Amendment of the New York State Constitution nor from the statutory right to a speedy trial (CPL 30.20, 30.30), such a right is contained in the State due process requirement of a prompt prosecution (*People v Cousart*, 58 NY2d 62 [1982]). The Court held, however, that in order to obtain a dismissal for appellate delay, a defendant would be required to show specific, actual prejudice, which would be difficult to establish in the appellate context, because the problems of loss of memory by, or disappearance of, witnesses would be ameliorated by the availability of the trial record.

In addition to delay in perfecting an appeal, other situations which may result in dismissal are where a defendant dies, disappears, or "discontinues" the appeal. Death of the defendant not only results in dismissal of the appeal, but also requires that the accusatory instrument be dismissed and all proceedings abated from the inception of the prosecution (*People v Matteson*, 75 NY2d 745 [1989]). This rule, which returns the case to the position in which it would be had there been no prosecution, appears to apply regardless of its collateral consequences, such as its effects on related civil litigation. In the event of the defendant's death, counsel



should move for dismissal and abatement.

An absconding defendant is considered unavailable to obey the mandate of the court in the event of an affirmance, and therefore forfeits, or is deemed to have abandoned, his or her right to appeal (*People v Burger*, 70 NY2d 828 [1987]). "Absconding" may take several forms. This rule applies whenever a defendant "disappears" during the pendency of his or her appeal after being free on bail or recognizance pending appeal, or where a defendant has completed any incarceratory portion of his or her sentence.

This rule does not require proof that a defendant is a fugitive or has "fled the jurisdiction," nor does it require the type of exhaustive search that might be necessary to justify the *trial* of an absent defendant. It is sufficient that he or she cannot be located. For example, a defendant on parole or probation who fails to maintain contact with the authorities may be considered unavailable under this rule (*People v Quick*, 182 AD2d 842 [2d Dept 1992]).

It is appropriate for either the People or defense counsel to move to dismiss a defendant's appeal upon the discovery that the defendant can no longer be located. If an appeal is dismissed because of a defendant's disappearance, and the defendant reappears and wishes to pursue his or her appeal, the appellate court has the power to reinstate the appeal, although it is not clear under what circumstances it has the *duty* to do so (*People v Sullivan*, 29 NY2d 552 [1971]).

Some appeals are dismissed on motion of a defendant who wishes to withdraw or discontinue the appeal. This is a matter of strategy requiring careful consultation between attorney and client. There are cases, for example, in which a successful appeal might be

viewed as placing the defendant in a worse position than an affirmance. This most commonly occurs where a defendant has pleaded guilty to something less than the entire accusatory instrument or instruments. In some circumstances, reversal would result in reinstatement of the full charges, and exposure to a more severe sentence in the event of a subsequent conviction. Pursuing an appeal in this situation may be especially unwise where the defendant has already been, or is about to be, released on parole, or has otherwise completed any incarceratory portion of the sentence. A "successful" appeal in such a case could even lead to immediate re-incarceration, depending on the trial court's ruling as to bail pending trial on the reinstated charges.

In contrast, withdrawal of a defendant's appeal solely on the ground that there are no non-frivolous issues to be raised is a matter to be approached with great caution. The normal procedure where counsel determines that there are no non-frivolous issues is the "*Anders* brief," to be discussed below. The appellate court may refuse to accept a motion to "withdraw" or "discontinue" an appeal on this ground, and such a motion, despite an affidavit of consent by the defendant, may leave counsel open to a subsequent allegation by the defendant of undue influence or inadequate advice.

## V. APPELLATE STRATEGY

Now that this part of the book has outlined the subject of *what* can be appealed in a criminal case, and gone into the subject of *how* to pursue an appeal, it is ready to discuss *whether* to appeal, and, if so, on what issues. For the most part, this discussion assumes that the defendant is the appellant.



It may seem strange that the subject of whether or not to appeal comes up well into the discussion of how to do it. The explanation is a simple one. "Taking" an appeal, that is, the filing of a notice of appeal, is not an irrevocable decision to actually seek a reversal. Instead, it is an indispensable device to preserve an appellant's right to appeal. The decision to actually file a brief which seeks reversal of the conviction can only be made after searching the record to see if there is at least one non-frivolous issue. Therefore, it is generally impossible to make this decision until after the record has been assembled, and this is why many of the preliminary mechanical steps have to come first.

Counsel has the ethical obligation to use professional judgment in deciding whether or not an issue is frivolous, and, where there are several non-frivolous issues, in making the strategic choice of which issues are strong enough to be included in a brief. Notwithstanding counsel's decisions, the defendant has certain limited opportunities to raise issues of his or her own choosing.

Underlying appellate strategy is the vast difference, discussed later in this book, between a conviction after trial and a conviction upon a guilty plea, in terms of the types of non-frivolous issues that are likely to be found. Where there has been a trial, there is a fairly good chance of finding some kind of non-frivolous issue (to raise at the intermediate appellate court level), but after a negotiated plea, that chance is rather slim.

### A. Frivolous Issues

What makes an issue "frivolous" or "non-frivolous" is not always clear. A claim that is absolutely foreclosed by some fact in the case or some clear rule of law is obviously frivolous. A claim that is not absolutely foreclosed, but which has virtually no chance

of success, may also be viewed as frivolous.

For example, a claim that a sentence is harsh and excessive, and should be reduced by the Appellate Division in the exercise of its discretionary interest of justice powers, is obviously frivolous if the defendant has already received the minimum allowed by statute. In such case there is no authority for a reduction (CPL 470.20[6]) except in the extraordinary case where the court finds that the sentence violated the constitutional prohibition against cruel and unusual punishment (*see*, *People v Thompson*, 83 NY2d 477 [1994]). But even if there is authority for a reduction, the claim is frivolous if no rational argument can be made in support of a reduction. In two cases *People v Basic* (82 AD2d 730 [1st Dept 1981]) and *People v Santiago* (81 AD2d 560 [1st Dept 1981], *lv denied* 53 NY2d 946 [1981]), in which the defendants, after guilty pleas to serious crimes, received negotiated sentences which, although more than the statutory minimum, were very lenient and ran concurrently with other sentences, the Appellate Division, First Department criticized counsel for raising excessive sentence claims. In each case, the Court could find no rational argument that could be made for a reduction of sentence, accused counsel of imputing to the Court a high degree of naivete and credulity, and suggested that counsel seek to withdraw if no more worthy argument could be made.

1. ***Anders* Briefs**

This brings us to a discussion of the "*Anders*" procedure, named for *Anders v California* (386 US 738 [1967]), whereby counsel requests permission to withdraw on the grounds that there are no non-frivolous issues to be raised. The *Anders* procedure (*see also*, *People v Gonzalez*, 47 NY2d 606 [1979]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]) is not necessarily a simple



one, and, in some cases, especially where there has been a conviction after trial, an *Anders* brief may be more complicated than an ordinary brief that seeks reversal.

An *Anders* brief is, most certainly, still a *brief*, not merely an application. An appeal is perfected in the normal manner, by assembling the record, filing a brief, and placing the case on the calendar in compliance with all the usual rules of the particular appellate court. In the brief, counsel is required to summarize the facts in a useful manner, that is, one which highlights any weaknesses in the case and relates the facts to any potential legal issues. Counsel must then highlight and analyze everything in the case that could arguably be raised on appeal and explain why such issues would be frivolous.

However, if the client specifically requests that one or more issues be raised, and counsel finds such issue or issues frivolous, counsel should make no comment. Counsel should not disparage any claim which the client wishes to be raised. Instead, in accordance with procedures to be discussed below, counsel should explain to the client why the claim is frivolous and advise the client of the right to nevertheless raise the claim in a *pro se* brief, and advise the court of the client's intentions. When an *Anders* brief has been filed by counsel, the defendant has a *right* to file a *pro se* brief. This is unlike the usual situation, to be discussed below, where the court may, in its discretion, permit a represented defendant to file a *pro se* brief. Counsel (who should, of course, have been in consultation with the client all along), must send the client a copy of the *Anders* brief and advise the client of his or her right to file a *pro se* brief.

Although it is fairly unusual for a court to reject an *Anders*

brief, it is not unheard of. Where the brief fails to comply with the above-discussed standards, the court will either direct the filing of a new brief, or arrange for new counsel, and may deny compensation to the first assigned counsel. Even if the brief is in acceptable form, the court will make its own examination of the record. If it agrees that there are no non-frivolous issues, it will grant counsel's request to withdraw, and affirm the conviction. On the other hand, if the court finds one or more non-frivolous issues, whether mentioned in the *Anders* brief, or in a *pro se* supplemental brief, or uncovered by the court on its own initiative, its responsibility is to grant counsel's application to withdraw, and arrange for new counsel to file a new brief (*People v Casiano*, 67 NY2d 906 [1986]).

**B. Choice of Issues and Client Relations**

Let us assume that counsel has decided that there is at least one non-frivolous issue to be raised, and intends to file a regular (non-*Anders*) brief urging reversal or modification of the judgment. If there are several non-frivolous issues, the next strategic decision involves choosing which issue or issues are strong enough to raise in the brief.

Counsel has no duty to raise every non-frivolous issue, even at the client's request; on the contrary, counsel has the duty to use professional skill to carefully seek out the most promising issues and omit the rest (*Jones v Barnes*, 463 US 745 [1983]; *People v White*, 73 NY2d 468, 477-479 [1989], *cert denied* 493 US 859 [1989]). An overlong brief, a "shotgun" approach, or a "laundry list" of unimportant issues may undermine, rather than enhance the prospects of success on appeal. On the other hand, in some cases it is appropriate to argue that the cumulative effect of a long string of improprieties deprived the defendant of a fair trial.



Counsel's discretion to omit issues is not absolute or unreviewable. Failure to raise an important issue may constitute ineffective assistance of appellate counsel, which may be redressed through a traditional coram nobis motion filed by the defendant in the appellate court (*People v Bachert*, 69 NY2d 593 [1987]).

The defendant's views on what issues to raise may differ from those of counsel. Counsel and client should be in close communication (by mail, at least) at all stages of the appeal, but especially when counsel is about to draft, or has drafted, the brief. The client may have valuable insight as to the legal issues in the case. Sometimes the client, even if not particularly knowledgeable about the law, has a helpful grasp of the facts. In either case, a good working relationship is essential. The client should feel that he or she is taking an important part in his or her own appeal. At the very minimum, the client should know what is going into counsel's brief.

What if attorney and client cannot agree on what belongs in the brief? The client has neither the right to force counsel to raise an issue, nor the absolute right to raise such issue in a *pro se* brief (*People v Barber*, 74 NY2d 653 [1989]). The client may, however, ask the appellate court for permission to file a *pro se* brief, and counsel may not disparage the client's claims. Instead, counsel should follow the procedure outlined in *People v Vasquez*, 70 NY2d 1 [1987]). Counsel should explain to the client why such claims are not being included in counsel's brief, and advise the client of his or her right to seek permission to file a *pro se* brief. In counsel's brief there should be no disparaging comments about the client's claims, except that counsel should notify the court of the client's desire to file a *pro se* brief.

## C. Reversible Error Evaluation

Both the strategic choice of issues to raise and the effective briefing of those issues require careful analysis of what makes an error reversible. Whether an error will lead to reversal depends on a number of factors. Surrounding facts and circumstances may be anywhere from crucial to irrelevant, depending on the type of error.

It is impossible to evaluate a particular error without considering such factors as whether the preservation requirement was met, whether interest of justice review or effectiveness of counsel analysis may be appropriate, and the applicability of the harmless error doctrine. Thus, at the appellate level, many layers of analysis are added to the basic question of whether or not something was "error." This part of this book is obviously not intended to cover these layers of analysis with respect to the entire range of criminal law issues. Instead, it is intended as an overview of considerations which must be looked into in order to decide whether an issue is worth raising.

It is imperative to look at the case law concerning preservation, waiver, harmless error analysis, and the like for each particular issue. It is not a model of consistency. For example, what seems to be a very serious violation of a defendant's constitutional rights may be deemed unpreserved because trial counsel failed to make the precisely correct argument, and may also be subjected to harmless error analysis. On the other hand, what may seem to be a mere "technicality" may turn out to be exempt from any preservation requirement, unwaivable, and immune from harmless error analysis.



# VI. PRESERVATION

The general requirement of preservation is spelled out in CPL 470.05(2), as follows:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

Some fundamental considerations which go to the question of whether an issue was adequately preserved are whether the protest

specifically asserted the same grounds raised on appeal (*People v West*, 56 NY2d 662 [1982]) and whether it was specific as to the relief or remedy requested (*People v Rogelio*, 79 NY2d 843 [1992]). The protest must give the opposing party, whether the prosecution or defense, fair notice and opportunity to meet the assertion (*People v Tutt*, 38 NY2d 1011 [1976]). The protest must come at a time when the court can still repair the defect; for example, in a jury trial a claim that verdicts were "inconsistent" or "repugnant" must be made prior to the discharge of the jury, because up to that moment the court can still reject the verdicts and resubmit the case to the jury with further instructions (*People v Satloff*, 56 NY2d 745 [1982]). On the other hand, a post-verdict motion is insufficient to preserve issues that should have been raised during the trial or at earlier stages (*People v Padro*, 75 NY2d 820 [1990]). When an issue has been deferred by the court to a later stage of the proceedings or otherwise left open, and counsel fails to reiterate it, an appellate court may conclude that the issue was abandoned (*People v Graves*, 85 NY2d 1024, 1027 [1995]). However, where the court actually makes a ruling, repeated protests of the same (or essentially the same) rulings are not required, and counsel is permitted to attempt to salvage a situation by seeking alternative relief upon constraint of an adverse ruling (*People v Rosen*, 81 NY2d 237, 245 [1993]). Where the protest results in some form of relief, it is necessary to specifically assert the inadequacy or inappropriateness of such relief (*People v Santiago*, 52 NY2d 865 [1981]). A protest made by a co-defendant is insufficient unless the defendant specifically joins in such protest (*People v Buckley*, 75 NY2d 843 [1990]).

Once again, these are only general principles. Every specific kind of issue may have its own special preservation requirement, which must be found in the applicable case law.



Some issues need not be preserved. Furthermore, some errors may be reviewed as a matter of law despite express waiver. Preservation and waiver are separate, but often intertwined concepts. Errors which do not require preservation and, which, as a general rule, are deemed unwaivable, are sometimes described as "those that would affect the organization of the court or the mode of proceedings prescribed by law," and are at other times described as "nonwaivable jurisdictional defects," but neither phrase has a precise meaning. A catalog of examples of this type of error is found in *People v Ahmed* (66 NY2d 307, 310 [1985]). This category of errors is extremely narrow and is limited to errors going to the essential validity of the proceedings and irreparably tainting the entire trial (*People v Agramonte*, 87 NY2d 765, 769-771 [1996]).

The classification of certain errors as nonwaivable or immune from the preservation requirement may seem confusing, haphazard, or arbitrary. Once again, it is necessary to resort to specific case law. For example, the question of which kinds of defects in an indictment or other accusatory instrument should be considered "nonwaivable jurisdictional defects" is a highly technical subject (*see*, *People v Iannone*, 45 NY2d 589 [1978]; *see also*, *People v Zanghi*, 79 NY2d 815 [1991]; *People v Ford*, 62 NY2d 275 [1984]).

A common misconception is that a claim of deprivation of a "fundamental constitutional right" need not be preserved. On the contrary, as a general rule, constitutional issues must be preserved with specificity (*People v Ianelli*, 69 NY2d 684 [1986], *cert denied* 482 US 914 [1987]), including specific reference, where applicable, to *State* constitutional law (*People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]; *People v Hamlin*, 71 NY2d

750, 762 [1988]). A few narrow exceptions exist involving such matters as the right to counsel and the prosecution's burden of proof, and the case law should be consulted to determine their potential applicability.

It is not necessary to preserve a claim that a sentence was substantively "unlawful" in that the court exceeded its sentencing powers (*People v David*, 65 NY2d 809 [1985]) or imposed a sentence that was unconstitutional (*People v Ingram*, 67 NY2d 897 [1986]). However, challenges to presentencing procedures, such as multiple felony offender adjudications, generally require preservation (*People v Proctor*, 79 NY2d 992 [1992]), and resort to specific case law is once again essential in order to determine whether a particular issue is exempt from preservation.

There is a special category of issues that are exempt from the preservation requirement because they involve rights that may not be waived without a defendant's personal consent. For example, issues concerning a defendant's right to be present at material stages of a trial, which have generated a great deal of litigation in recent years, do not, as a general rule, require preservation (*People v Mehmedi*, 69 NY2d 759 [1987]). Unlike the situation where a defect is unwaivable, a defendant may, of course, waive a personal right such as the right to be present; this is an area in which the concepts of preservation and waiver diverge. Whether or not a right of a defendant falls into this category, and what constitutes a valid waiver (a matter that varies from one right to another) depends on specific case law.



## VII. REVIEWABILITY

The concept of preservation should be distinguished from the concept of reviewability, although the Court of Appeals frequently uses the term "unreviewable" to refer to issues that are unpreserved and therefore beyond that Court's scope of review. An issue may, under some circumstances, be unreviewable at any appellate level, irrespective of whether it was preserved, or whether preservation was required.

As a general rule, appellate courts can only review errors appearing on the face of the record. Therefore, insufficiency of the record to establish a claim may be fatal (*People v Kinchen*, 60 NY2d 772 [1983]). However, in some cases an appellate court will order some type of hearing in order to resolve an ambiguity in the record (*see*, *People v Monclavo*, 87 NY2d 1029 [1996]). In other cases the claim may be established through a motion to vacate judgment made pursuant to CPL Article 440; careful attention should be paid to the procedural rules relating to such motions.

Some issues are deemed to be unreviewable pursuant to statute. Some examples are the unreviewability of a claim of insufficiency of Grand Jury evidence (CPL 210.30[6]) and the unreviewability of the denial of a defendant's challenge for cause of a juror where a defendant did not exhaust his or her peremptory challenges (and vice versa with respect to the grant of the People's challenge for cause) (CPL 270.20[2]). The rule that a guilty plea renders most issues unreviewable will be discussed separately.

### A. Review Despite Lack Of Preservation

If a reviewable issue which does require preservation has not been preserved in the manner required by law, all is not lost,

especially if the case is still before an intermediate appellate court. As discussed earlier in this part of the book, the intermediate appellate court, unlike the Court of Appeals, has the power to overlook the lack of preservation by the defendant and review the issue in the interest of justice (CPL 470.15[6][a]). It is questionable whether the People may be the beneficiary of interest of justice review *(see, People v Chavis*, 91 NY2d 500, 506 [1998]).

Reversal in the interest of justice is rare. Therefore, in briefing and arguing an issue at the intermediate appellate level, for which there is any kind of preservation problem, it is imperative that counsel demonstrate to the court why it should review the issue in the interest of justice. This usually involves showing that the verdict, even if based on legally sufficient evidence, and even if not against the weight of the evidence, was nevertheless based on such weak evidence that it could easily have gone the other way. Another common approach is to argue that unpreserved errors, taken together with preserved errors, had the cumulative effect of depriving the defendant of a fair trial. (In some cases, the unpreserved errors may turn out to be more egregious than the preserved errors).

Furthermore, appellate counsel may wish to argue that the failure of trial counsel to properly preserve one or more errors constituted ineffective assistance of counsel, especially when viewed in the light of other mistakes by trial counsel. However, isolated mistakes rarely result in appellate findings of ineffective assistance (*see, People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]). Moreover, a motion to vacate judgment pursuant to CPL Article 440 is usually the preferred means of raising an ineffective assistance claim, because such a proceeding can delve into whether counsel's actions or



inactions were strategic decisions or outright mistakes.

## VIII. HARMLESS ERROR

CPL 470.05(1) provides that "[a]n appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties." Read literally, this may be one of the more misleading statutes ever written. As will be seen, given the various rules regarding the applicability of harmless error analysis in the first place, and under the various standards for harmless error, that statute provides little guidance.

In the first place, many kinds of errors are deemed "per se reversible," or "immune from harmless error analysis." As with the requirement of preservation (a subject with which susceptibility to harmless error analysis overlaps somewhat), it is always necessary to look at the specific case law. A good example of the need to resort to specific case law is the subject of CPL 300.10(2), which requires the trial court to instruct the jury to draw no inference from the defendant's failure to testify, but only if such instruction is requested by the defense. Failure to give that charge, on request, is immune from harmless error analysis, but giving that charge, without a request, is *not* (*People v Vereen*, 45 NY2d 856 [1978]).

There are several broad categories of errors which are likely to be held immune from harmless error analysis. First of all, the type of error which does not require preservation is, generally, immune from harmless error analysis as well. Then there are errors which may have a direct effect on a verdict, but whose impact on a verdict is inherently difficult or impossible to assess; this category

includes many, but not all, charging errors, and resort to specific case law is essential. There is also a large category of errors which have little or no direct impact on a verdict, or may have nothing to do with a verdict at all, but nevertheless violate some right of a defendant or some public policy objective.

As will be seen below, there are very few types of issues that "survive" a guilty plea. One of these few issues is the denial of a motion to suppress evidence (summarily or after a hearing), unless waived as part of a plea bargain. A defendant who pleads guilty following an unsuccessful suppression motion is actually in a *better* position, as to harmless error analysis, than a defendant in the same situation who goes to trial. After a trial, denial of suppression is susceptible to harmless error analysis, but, after a plea, denial of suppression is generally immune from harmless error analysis because an appellate court will not speculate whether denial of suppression contributed to the defendant's decision to plead guilty (*People v Grant*, 45 NY2d 366 [1978]).

Assuming that harmless error analysis applies to a particular error, the next consideration is the standard of harmless error. The most important case on this subject is *People v Crimmins* (36 NY2d 230 [1975]), which distinguishes between *constitutional* and *nonconstitutional* error.

Constitutional error may only be found to be harmless if there is no *reasonable possibility* that the error might have contributed to the conviction, whereas *nonconstitutional* error may be found to be harmless if there is no *significant probability* that the jury would have acquitted the defendant had it not been for the error.

In both instances, harmlessness normally requires evaluation



of the strength of the case. The appellate court is usually called upon to decide if the evidence was strong enough to preclude a reasonable possibility, or significant probability, of harm, as the case may be. The usual issue is whether or not the evidence of guilt, or rather the evidence that was properly admitted, was "overwhelming," yet another term that eludes easy definition. Obviously, with respect to any error which may arguably be subject to harmless error analysis, it behooves counsel to discuss the strengths and weaknesses of the case and the potential effect of the error.

Whether an error is constitutional or nonconstitutional may present a difficult question. For example, a violation of the common-law hearsay rule may also violate the constitutional right of confrontation; in such a case, the harmless error rule to be applied may depend on whether or not trial counsel preserved the constitutional aspect of the claim (*People v Maher*, 89 NY2d 456, 462-463 [1997]).

The courts sometimes take a "functional" approach to harmlessness which has little or nothing to do with the strength of the case. "Harmlessness" or the similar, but not quite identical concept of "lack of prejudice," is sometimes found where an error (usually one of procedure) leaves the defendant in the same situation as if no error had occurred. Once again, this is a potentially confusing area which requires careful resort to case law.

## IX. GUILTY PLEAS

Much of the foregoing discussion of issue analysis is inapplicable to convictions upon pleas of guilty. Instead, the primary concern is whether or not the issue "survives" a guilty plea.

A guilty plea, in and of *itself*, is deemed to waive virtually every issue in the case, irrespective of whether there has also been a negotiated waiver of the right to *appeal*. A few issues survive a guilty plea.

Naturally, a defendant has the right to challenge the voluntariness of the plea itself, but that right is not without limits. Unless the defendant unsuccessfully moved to withdraw the plea, or unless the case is that rare one where the "plea allocution" calls into question the voluntariness of the plea, appellate review is generally unavailable (*People v Lopez*, 71 NY2d 662 [1988]).

In *People v Taylor* (65 NY2d 1 [1985]), the Court provided a handy catalog of miscellaneous issues that survive a guilty plea. These include the so-called "nonwaivable jurisdictional defects" discussed previously (such as *some*, but *not all* defects in accusatory instruments), the constitutional (but *not* statutory) right to a speedy trial, the constitutional (but not statutory) protection against double jeopardy, the unconstitutionality of a penal statute, the defendant's mental competency, and the claim that an accusatory instrument was knowingly based entirely on false evidence. A special rule exists with respect to constitutional double jeopardy issues, which are not automatically waived by a guilty plea, but which can be waived as an express condition of a guilty plea (*People v Allen*, 86 NY2d 599 [1995]). CPL 710.70(2) creates a major category of post-plea appeals, that is, appeals from orders *finally* (summarily or after hearings) denying motions to suppress evidence. A claim that a sentence exceeded statutory limits (as opposed to a claim that a sentence was imposed as a result of flawed presentencing procedures, as discussed previously with respect to preservation requirements) survives a guilty plea.



# X. FEDERAL HABEAS CORPUS AND ISSUE SELECTION

Federal habeas corpus practice is beyond the scope of this book. However, the possibility of subsequent Federal habeas corpus review affects the choice of issues to be raised on a State appeal.

Any issue arising under the Federal Constitution may be raised by way of a petition for Federal habeas corpus, but only if the same issue has been fairly presented to the highest available State court (*Picard v Connor*, 404 US 270 [1971]). A practical consequence of this exhaustion requirement is that if, in counsel's judgment based on research of the applicable law, an argument has any reasonable chance of persuading a Federal court to grant habeas corpus relief, it must be included in the State appellate brief even if counsel concludes that the argument has little or no chance of persuading the State court. It is of particular note that an issue that is unpreserved for review by a State court as a matter of law, may, under certain circumstances that are beyond the scope of this book, be considered by a Federal habeas corpus court, provided that the exhaustion requirement has been met.

## A. Issue Analysis Checklist

[ ] What is the preservation rule for that issue?
[ ] Was the preservation requirement, if any, properly met?
[ ] If not, is interest of justice review appropriate?
    [ ] How strong was the case?
    [ ] Was the trial fair (considering errors cumulatively)?
    [ ] Did non-preservation result from tactics or mistake?
[ ] Was there an error?
[ ] Is the error reviewable?

[ ] Does it appear on the face of the record?

[ ] Does a particular procedural rule render the error unreviewable?

[ ] Is the error susceptible to harmless error analysis?

[ ] If so, was the error harmless?

[ ] Was it constitutional or nonconstitutional?

[ ] Was the properly admitted evidence overwhelming?

[ ] Was the error "functionally" harmless?

[ ] In guilty plea cases: Does the error "survive" the plea?

## XI. DISPOSITION OF APPEALS

Once the case has been argued or submitted before the intermediate appellate court, all that remains is to wait for a decision, and once that decision is rendered, to ascertain what precisely was decided and what happens next. The "winning" party must, of course, be prepared for any steps that might be taken by the "loser." In most cases the State appellate process is over. Reargument is rarely permitted, and there are many obstacles to Court of Appeals review.

### A. Intermediate Appellate Courts

An intermediate appellate court may affirm the judgment or order, hold it in abeyance (and remit it to the court below for some proceeding such as a specified type of hearing), reverse, or modify. The difference between a reversal and a modification is that a reversal vacates the judgment or order while a modification vacates a part thereof and affirms the remainder (CPL 470.10).

When reversing or modifying, the court may direct different corrective action for different counts. In some cases, errors



requiring reversal as to certain counts may also require reversal as to other counts found by the appellate court to be "factually related" (*People v Kelly*, 76 NY2d 1013 [1990]). As discussed previously with respect to the importance of filing a notice of appeal as to each judgment for which review is sought, reversal of one judgment may result in reversal of other judgments.

It is important to ascertain the particular relief available for a particular error. Strategic implications may be paramount; for example, in some situations a new trial would not be in a defendant's best interest. Furthermore, an appellant's brief should be specific as to the relief requested, although alternative forms of relief may be requested where appropriate. Although overlap is possible, arguments which, if accepted, would entitle the appellant to one form of relief should not be confused with arguments leading to another form of relief.

As a general rule, a reversal based on one or more trial errors results in a new trial, whereas a reversal based on the insufficiency of an accusatory instrument or of trial evidence results in a dismissal or reduction to a lesser included offense. However, where a defendant is convicted after trial of a lesser included offense and an appellate court finds reversible trial error, the indictment will be dismissed with leave to re-present the lesser included offense to a Grand Jury (*People v Mayo*, 48 NY2d 245 [1979]).

In guilty plea situations, a reversal based upon the involuntariness of the plea will result in restoration of the case to pre-plea status. A reversal based upon a suppression issue will generally result in suppression of certain evidence and remand for a new trial, or restoration to pre-plea status, as the case may be; in some cases the court may remand for further suppression

proceedings, or it may both suppress the evidence and dismiss the indictment where it is obvious that suppression leaves the prosecution bereft of evidence.

The court may order a new trial as to one or more counts (CPL 470.20[1]); it may dismiss one or more counts (CPL 470.15[2][b]; 470.20[3]); or it may reduce one or more counts, for which the evidence was not legally sufficient, to lesser included offenses for which the evidence *was* legally sufficient (CPL 470.15[2][a]). These corrective actions may also require corrective actions with respect to the sentence (CPL 470.20[3],[4]) which are distinct from the court's discretionary power to reduce a sentence for undue harshness, or its duty to vacate it for illegality.

CPL 470.25 sets forth certain requirements for the form and content of an intermediate appellate court's order disposing of an appeal. An affirmance need only state the word "affirmed." Among other things, an order of reversal or modification is required to specify whether the determination was on the law, on the facts, as a matter of discretion in the interest of justice, or based on a combination of those grounds. (The significance of these terms was discussed earlier, in the section on the jurisdiction of the Court of Appeals).

An intermediate appellate court may only consider and determine questions of law or issues of fact involving errors or defects in the proceedings below that adversely affected the appellant (CPL 470.15[1]). This provision, unique to criminal cases and to intermediate appellate courts, severely restricts the court's ability to affirm on a ground rejected or ignored by the court below, even though the ground had been argued in the lower court by the respondent (*People v LaFontaine*, 92 NY2d 470 [1998]).



## B. Court Of Appeals

The jurisdictional prerequisites for noncapital Court of Appeals review, including the limitation of review to issues of law and the effect of preservation requirements, were discussed above. Meeting those requirements does not, of course, ensure the availability of such review.

The losing party in the intermediate appellate court may apply for a certificate granting leave to appeal to the Court of Appeals. This application must be made within 30 days after service upon the appellant (i.e., the would-be appellant in the Court of Appeals) of a copy of the order sought to be appealed (CPL 460.10[5][a]). In appeals from the Appellate Division, the prospective appellant may apply to an Appellate Division Justice of the appellant's choosing (usually, for obvious tactical reasons, a Justice who dissented), or to the Court of Appeals, which will assign the case to a Judge. In appeals from other intermediate appellate courts, the application may only be made to the Court of Appeals.

CPL 460.20 and court rules, including those of the Court of Appeals, govern the procedure for this application. As with bail pending appeal, there is but one "bite of the apple."

Where the leave application is made to the Court of Appeals, it normally consists of a letter accompanied by all the briefs filed in the intermediate appellate court, including any *pro se* briefs. The letter should emphasize a single issue or a small number of issues and explain why the issue or issues are within the jurisdiction of the Court of Appeals and are of sufficient importance to warrant that Court's review; however, for purposes of Federal habeas corpus review, it is essential that the letter also ask the Court to consider *all* issues raised in the briefs.

If leave to appeal is granted, no notice of appeal is required (CPL 460.10[5][b]). However, the Rules of the Court of Appeals require that the appellant serve and file a jurisdictional statement, as provided by 22 NYCRR § 500.2, within 10 days of the issuance of the certificate granting leave to appeal. Bail pending appeal to the Court of Appeals has been discussed previously.

In preparing an appeal to the Court of Appeals, the rules of that Court must be followed carefully. It should especially be noted that the Court of Appeals has special procedures for expedited disposition. CPL 470.40 sets forth corrective actions that may be taken by the Court of Appeals.

## PART III

## BRIEF WRITING AND ORAL ARGUMENT

Appellate advocacy, whether written or oral, is an art which cannot be taught in the space of a few pages. The most important advice which can be given is to learn and follow the technical requirements and customs of the particular appellate court, with regard to both briefs and oral argument.

### A. Technical Requirements For Briefs

As with the printing of records, the CPLR and the rules of each appellate court will impose a host of technical requirements, which may concern page and type size, captions, headings, matters of style, length, organization, number of copies, service and filing, notes of issue, mechanics of placing the appeal on the calendar, reply briefs, and the like.



These various technical requirements are mandatory, not advisory, and result in a certain degree of uniformity of all briefs filed in the particular court. Compliance is not a daunting task because, as observed above, there are many sources of guidance on these requirements, including assistance from printing companies as well as the obvious device of examining typical briefs filed in the same court.

CPLR 5528 specifies the mandatory structure of a brief, such as the table of contents, the statement of questions involved, the statement of facts, and points. Special attention should be paid to the table of contents. Although it is not a specific requirement of the statute, it is desirable that the table of contents set forth the headings for the points of argument. A good table of contents is like a good opening statement at a trial; it should make a favorable impression with respect to the merits of the party's position. A point heading should not be so general as to be meaningless. On the other hand, it should not beg the question or excessively slant the issue. Instead, it should summarize the argument as convincingly as possible in a single headnote-like sentence that includes the most critical facts.

CPLR 5529 governs the form of briefs and appendices. There are strict requirements as to page size, margins, numbering, headings, type size, use of "A" for the appendix and the like. An important rule to remember is that New York decisions must be cited from the official report, if any, and that other decisions must be cited from both the official report, if any, and the National Reporter System. Make sure that all citations are to the proper reports as of the time your brief is filed. For example, citing a Court of Appeals or Appellate Division decision to a slip opinion or to the *New York Law Journal* when the case is obviously old

enough to have an official citation available gives the brief a sloppy appearance.

While CPLR 5530 deals with filing and service of records and briefs, it is necessary to consult the rules of the particular appellate court. Matters relating to time restrictions may become the subject of stipulations and/or motion practice, as discussed in the parts of this book dealing specifically with civil and criminal appeals.

CPLR 5531 requires the appellant to file a statement containing certain information set forth in a precise order. Court rules may require the CPLR 5531 statement to be contained in the appellant's brief.

## B. Research

Researching the law is a subject beyond the scope of this book. However, be aware that your research may become stale overnight. It is essential to stay up to date, especially as to cases which may not yet have appeared in the advance sheets of the reporters, and may only be accessible by computerized legal research. General cases and outdated cases may have no more value than yesterday's newspaper.

At the very least, it is essential to avoid the embarrassment of citing a case that has been reversed, expressly overruled, or rendered indisputably obsolete by later authority. When such a *faux pas* is committed, it may be appropriate for the opposing party to alert the court to that fact (subtly and politely, of course) in a respondent's or reply brief.



## C. Brief Writing

### 1. Facts

The basic division of any brief is that between facts and argument. While an argument necessarily makes reference to facts, the fact section of a brief should not contain argument.

The structure of a fact statement varies with the type and procedural posture of a case. The facts generally consist of the relevant procedural history along with the underlying incident or transaction, as it has been presented at the relevant stage or stages of litigation, such as pleadings, affidavits, depositions, trial testimony, or findings made below.

It may be advisable to begin a statement of facts with a short "overview" and/or "background" section. Sometimes this can be done effectively by discussing the case as if it were appearing in a newspaper article. This device, however, is no excuse for presenting allegations that are not supported by the record. Furthermore, it should go without saying that the *entire* statement of facts may not be presented in "news story" form; that may be acceptable for a preface, but the main statement of facts must always answer the question: "Says who?" The source of each "fact" must be clear; indeed, page references to the record or appendix are required by law (CPLR 5528[3]).

As a general rule, the only facts that should be included are facts that are at least arguably relevant to the issues presented on appeal. Facts that are clearly relevant to the resolution of the issues on appeal should be set forth in great detail while facts of marginal relevance should be summarized briefly. With great care, some irrelevant facts may be included for the purpose of giving the court

the "flavor" of the case. For example, in a personal injury case where the nature of the plaintiff's injuries have no legal relevance to any of the particular issues raised on appeal, it would still be advisable to give the court some limited background information on this subject.

Where testimony has been taken at a trial or other proceeding, simply summarizing the testimony of each witness separately may be the easiest way to compose the factual part of a brief, but this is not as effective as synthesizing testimony into a complete, chronological narrative. The standard structure for such a synthesis is to state a fact and to provide page references for each point in the record at which one or more witnesses testifies to that fact. (Obviously, material discrepancies between the testimony of different witnesses, or in the testimony of a single witness, must be set forth, regardless of whether such discrepancies are helpful to your argument).

The fact statement should not mix facts with arguments, opinions, and conclusions. An argument that an inference can be drawn from the record should normally be reserved for the argument portion of the brief. In the interest of brevity it may be acceptable to describe some facts in conclusory terms, but this should never be done with respect to facts upon which the issues may turn. In any event, there should always be a clear distinction between the actual contents of the record and the inferences to be drawn therefrom.

2. **Points of Argument**

As discussed above with respect to the table of contents, point headings should also be drafted carefully. A useful technique in formulating an issue with specificity is to imagine your issue as a



headnote and think of the precise language that would help future researchers instantly understand what your case was about.

Closely related points should be treated as subsections of the same point rather than separate points. The order in which points should be presented varies from case to case. In some cases, there is a logical sequence in which the points should be presented, as where one point should be a threshold question to be resolved prior to examination of another point. Other cases lend themselves to a chronological approach in which the points correspond to succeeding transactional or procedural events. In other cases, especially where there are many points, it is appropriate to put them in descending order of importance.

There are certain conventions in organizing the points of a criminal brief. While the general practice is to put points in descending order of importance, a point challenging the sufficiency and weight of the evidence usually comes first, and a point challenging the sentence usually comes last.

Every argument point should include at least a brief reference to each of the facts that you consider critical to the argument being made, with page references, regardless of how thoroughly the same facts were already set forth in the factual portion of the brief. Never assume that the reader has digested and remembered every detail in the factual part of the brief, especially if the legal significance of each detail is not readily apparent. Moreover, the reader may choose to skip back and forth in the brief or skim some parts. You may think that your brief "reads like a novel," but the reader may choose to read it like a reference book, especially in the case of a respondent's or reply brief. Accordingly, any argument that makes no sense unless the reader has been reading the brief in order should

be avoided; make effective use of cross-references where necessary.

The greater the candor a brief displays with respect to unfavorable facts and law, the greater the credibility the brief will have with the court. It does no good to ignore adverse facts and law, or to try to hide them in footnotes or offhand remarks tucked at the ends of points. It may be appropriate in a respondent's or reply brief to politely call the court's attention to your adversary's lack of candor with respect to certain facts or legal precedents; this may serve to underscore the significance of such facts and law. However, there is no place in a brief for personal attacks on anyone, or for any kind of intemperate language.

A brief should be "brief," and get to the point. Do not waste the court's time setting up and knocking down "straw man" arguments which have little to do with the case. Do not belabor the general rule, or trace its historical development, when the real issue is whether the particular facts come under an exception, or an "exception to an exception." Always bear in mind the standard of review applicable to a particular issue; for example, there is little to be gained by making arguments addressed to credibility of witnesses when you are in a procedural posture in which the appellate court may not consider credibility. Be mindful of whether or not the appellate court has the power to substitute its own factual findings or its own exercise of discretion for that of the court below.

An appellant's brief should anticipate, and refute or distinguish in advance, arguments and precedents that may be presented by the respondent's brief, and a respondent's brief should do the same with respect to an anticipated reply brief. A reply brief, if filed, should deal with that which was not anticipated, and should not repeat arguments made in the initial brief. The reply brief



should explain why the respondent's counter-arguments are wrong. If the only reason that you can come up with for attacking a counter-argument is that it runs counter to what you already argued, there is no need to say that in a reply brief.

## D. Oral Argument

Oral argument, as a general rule with certain exceptions varying from court to court, is available as a matter of right but *only on request* and upon compliance with all applicable rules of court. Careful attention should be paid to the rules of the particular appellate courts concerning requests for oral argument. The amount of time that should be requested depends on the nature of the case; as a rule of thumb, the length of the briefs may be a guide to the amount of argument time warranted by the issues.

The whole point of oral argument is not for counsel to make a speech but for the Judges to ask questions. Therefore, the key to preparation for oral argument is to be ready to answer questions of fact and law. While sometimes counsel are satisfied to work exclusively from the briefs (marked up appropriately) during argument, it is advisable to have some kind of set of notes, such as a loose-leaf book, with critical factual and legal references. Similarly, in preparing for oral argument there is little point in practicing a speech, since the speech will inevitably be broken up by questions from the bench. Instead, try to get another attorney to play the part of the court and practice answering the attorney's questions. Of course, the argument will not consist entirely of questions, so it is necessary to have an organized presentation, stressing critical facts and law, and to be prepared to go back to the presentation between questions.

In making oral argument, always bear in mind that it is up to

the members of the court, and not counsel, to decide what they would like to hear. There is no point in reading from notes, or summarizing the briefs either as to facts or argument, or arguing with the Judges about what is important or not important for them to know. Remember that Judges interrupt *you*, and you don't interrupt *them*. Once again, answering the Judges' questions is what oral argument is really all about.

Listen carefully to the Judges' questions. You may be able to detect when one or more Judges have developed an unfavorable or misimpression of something in the case, especially a critical and potentially dispositive fact. For example, you may not have realized that your adversary's brief has misstated a crucial fact, and that the misstatement has influenced one or more Judges' views of the case. You should then make every effort to correct such a misimpression, employing the proper factual or legal citations. This is an extremely important advantage of oral argument for both the court and counsel.



## TABLE OF CASES