NEW YORK STATE-FEDERAL JUDICIAL COUNCIL AND ITS ADVISORY GROUP

Appellate Practice in State and Federal Courts: Practical Considerations and Ethical Concerns

Eastern District of New York, Brooklyn, NY, April 24, 2018

Western District of New York, Buffalo, NY, May 23, 2018

Program Co-Chairs:

Jeffrey A. Wadsworth, Harter Secrest & Emery LLP and James M. Wicks, Farrell Fritz, P.C.

Table of Contents

Practical Differences in State and Federal Appellate Practice

Materials prepared by Samantha A. Maurer and Joanna Lima[1]

A. Preservation of Issues

i. Second Circuit:

- Generally, "a federal appellate court cannot consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

- **Rule for Preserving the Record:** Preserving the trial court record requires:

  (1) raising an issue with enough clarity and (2) at the proper time (3) such that the opposing party can respond to the argument.

  - *See U.S. v. Tonawanda Coke Corp.,* 636 F. App'x 24 (2d Cir. 2016); *Amalgamated Clothing and Textile Workers Union v. Wal-mart Stores Inc.,* 54 F.3d 69, 73 (2d Cir. 1995).

- **Frequently Cited Preservation Rules**:
  1. Fed. R. Civ. P. 51 (error in instructions to the jury)[2]
  2. Fed. R. Evid. (FRE) 103(a) (objections to evidentiary rulings)[3]

- In the context of challenging jury instructions, to preserve a legal issue for appellate review:

  - Counsel must propose an instruction accurately, stating the relevant legal principle along with its supporting authority; and
  - Object at the time the trial court decides that it will not provide the requested instruction. *See United States v. Al-Moayad,* 545 F.3d 139, 177 (2d Cir. 2008).

- For criminal cases, the Second Circuit has stated that errors must be preserved unless the following three factors establishing "plain error" are shown:

  - 1. There has been an "error," or deviation from a legal rule;
  - 2. The error is "plain" or "clear under current law"; and

[1] The presenters would like to thank Samantha A. Maurer, *Associate* at Harter Secrest & Emery LLP, and Joanna Lima, *Law Clerk* at Farrell Fritz, P.C. for their assistance in drafting these CLE materials.

[2] *See* Attachment No. 1.

[3] *See* Attachment No. 2.

- 3. The plain error must "affect [the appellant's] substantial rights." *United States v. Santiago*, 238 F.3d 213, 215 (2d Cir. 2001).

- **Exceptions to Preservation:** Generally, a federal appellate court cannot consider an argument that was not heard by the trial court. However, the Second Circuit has occasionally reviewed unpreserved arguments on appeal, provided that no further fact-finding has been required to assess the legal question. *See Vintero Corp. v. Corporacion Venezolana De Fomento*, 675 F.2d 513, 515 (2d Cir. 1982).

- In addition, the Second Circuit will sometimes consider an unpreserved issue that fits into one of the following two narrow categories:

  a. "To avoid manifest injustice": This exception is applicable where there has been a clear legal error, and, because of that error, the verdict or trial court decision is deemed invalid. *See Booking,* 254 F.3d at 419 (holding that an unpreserved choice of law issue should be considered on appeal because the failure to address the purely legal question would likely lead to a substantial injustice); *see also Magi XXI, Inc. v. Stato della Cita del Vaticano*, 714 F.3d 714, 2013 WL 1799485, at * 6 (2d Cir. 2013).

  . Extraordinary or compelling circumstances/need: This exception is sometimes applied to "a claim of illegal incarceration, a jurisdictional challenge, a claim of sovereign immunity, a serious issue of public policy, a change in law, or for error that works manifest injustice." Essentially, this exception is invoked where there is uncertainty in the appellate court regarding the unpreserved question; and the appellate court can now offer needed clarity on the issue without additional fact-finding. *See* 19 Moore's Federal Practice, note 3, § 205.05(2), at 205-58.

ii. <u>New York State:</u>

- **General Requirement:** To preserve the record for an appeal, the appellant must:

  (1) raise a timely objection, and
  (2) clearly articulate its argument with sufficient specificity such that there is an unambiguous ruling by the trial court over the question.

  - A general objection is insufficient under the preservation rule. Rather, a party must state the grounds for the objection clearly "to give the court and the opposing party the opportunity to correct an error in the conduct of the

trial." *Delaney v. Philhern Realty Holding Corp.*, 280 N.Y. 461, 467 (1939); *see People v. Luperon*, 85 N.Y.2d 71, 78 (1995) (stating that the objection must be clear for the trial court to "avert reversible error").

- **Examples of "Timely Objections"**:

  - Objection to the jury selection process: The objection must be made immediately and prior to the seating of jury. *See People v. Ross*, 34 A.D.3d 1124 (3d Dep't 2006); *Brooks v. City of Mount Vernon*, 280 A.D.2d 631 (2d Dep't 2001).

  - Objection to an adversary's inappropriate comment: If an adversary's inappropriate comment is made during opening or summation, you must object. If the court requests that you refrain from objecting, you must make a record of your challenge. *See People v. Wilson*, 108 A.D.3d 1011 (4th Dep't 2013); *Alston v. Sunharbor Manor, LLC*, 48 A.D.3d 600 (2d Dep't 2008).

  - Objection to the evidence: Objections to evidence must be made when the evidence is proffered; otherwise, it is presumed unobjectionable. *See Niagara Mohawk Power Corp. v. City of Cohoes Bd. of Assessors*, 280 A.D.2d 724 (3d Dep't 2001); *Iorizzo v. Dyker Emergency Physicians, P.C.*, 278 A.D.2d 280 (2d Dep't 2000).

  - Objection to an inconsistent verdict: If there is an inconsistent verdict, an objection must be raised before the jury is discharged and the objectant must state the particular inconsistency. *See City of Binghamton v. Serafini*, 8 A.D.3d 835 (3d Dep't 2004); *Venancio v. Clifton Wholesale Florist, Inc.*, 1 A.D.3d 505 (2d Dep't 2003).

For each category, if the trial court judge does not permit you to make a statement concerning your grounds for the objection, the court should state so on the record.

- **Requirement of a "Clear Articulate[d] Argument":**

  - To preserve errors for appellate review, arguments must appear in the trial transcript. However, if anything raised on appeal went unrecorded in the trial court, the appellant, within 10 days after taking the appeal, can prepare and serve upon the respondent a statement of the proceedings from the best available sources, including his or her own recollection, for use instead of a trial transcript. The respondent may then serve upon the appellant objections or proposed amendments to the statement within 10 days after service. The statement, with objections or proposed amendments, will then be submitted to the trial judge for review and approval. *See* CPLR 5525(d).

- **The Differences in Appellate Division and Court of Appeals review**

    - The Court of Appeals' power to review lower court rulings made on motions, applications, and points of evidence is, in part, limited by statutes and case law requiring that appropriate objections be registered below as a prerequisite to appellate review. *See* CPLR 4017, 4110-b and 5501(a)(3) and (4). The Court of Appeals will, on its own, determine whether an issue has properly been preserved below, even if the parties do not raise the question of preservation in their submissions. *See Halloran v. Virginia Chems*., 41 N.Y.2d 386, 393 (1977). Counsel bears the responsibility of showing the Court where each issue raised has been preserved in the record.

    - The Court of Appeals is vested with a limited amount of discretion in deciding whether a party's trial court objection sufficiently preserved an issue for review. *Compare People v. Chestnut*, 19 N.Y.3d 606 (2012) (determining that the party's objection was sufficient because the defense had repeatedly made the trial court aware of the issue, therefore providing the court with the opportunity to avert error); *with People v. Roth*, 549 N.Y.2d 682 (1990) (holding that the party's objection was insufficient where the objection was based on the incorrect grounds).

    - Generally, the Court of Appeals may only review questions of law and, therefore, may not review unpreserved error.

        - Under limited circumstances, however, the Court of Appeals may entertain new legal arguments and theories raised on appeal. Those very limited circumstances include: (1) new arguments based on a change in statutory law while the appeal is pending (*see Post v. 120 East End Ave. Corp.,* 62 N.Y.2d 19, 28-29 (1984)); (2) where the new argument could not have been obviated or cured by factual showings or legal counter-steps had the arguments been tendered below (*see People ex rel. Roides v. Smith,* 67 N.Y.2d 899, 901 (1986)); and (3) questions of pure statutory interpretation (*see Matter of Richardson v. Fiedler Roofing*, 67 N.Y.2d 246, 250 (1986)). These "exceptions" are narrowly construed.

- **The Appellate Divisions**

    - Unlike the Court of Appeals, the Appellate Divisions may reach questions of trial error, even if unpreserved, in an exercise of its "interest of justice" jurisdiction. *See Martin v. City of Cohoes*, 37 N.Y.2d 162 (1975).

    - The case law does not clearly define what is "in the interest of justice" or how stringent the analysis should be to determine whether such an interest

exists. *See People v. Williams*, 145 A.D.3d 100, 107 (1st Dep't 2016) (reasoning that the "discretionary act to vacate a conviction in the interest of justice is to be exercised sparingly and only in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations").

- Essentially, the Appellate Division focuses on whether the unprotested error implicates a constitutional or fundamental right, and thus, materially affects the outcome of the proceedings and deprives the appellant of a fair trial.

- Notably, where the Appellate Division exercises its "interests of justice" jurisdiction, the Court of Appeals has no power to review either the Appellate Division's choice to reach the unpreserved issue, or the underlying issue itself. *See Elezaj v. Carlin Constr. Co.*, 89 N.Y.2d 992, 994-995 (1997); *Brown v. City of New York*, 60 N.Y.2d 893 (1983); *Feinberg v. Saks & Co.*, 56 N.Y.2d 206, 210-211 (1982).

B. Finality/Interlocutory Appeals:

i. Second Circuit:

- **Applicable Rule:** 28 USC § 1292

- Generally, an appeal can only be taken from a final order and/or judgment of the District Court.

- **Exception:** Interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions" and certain orders in receivership and admiralty proceedings are appealable as of right. *See* 28 USC § 1292(a).

- **Interlocutory Appeal Standards:** A non-final order may be appealable upon certification of the District Court that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* 28 USC § 1292(b); *Chappel v. Levinsky,* 961 F.2d 372, 373 (2d Cir. 1992).
  - However, even when the District Court certifies the order, the Circuit Court can exercise its discretion and decline to hear the appeal. *See* 28 USC § 1292(b).

- **Rule 54(b):** Ordinarily, a party in a case involving multiple claims or multiple parties cannot appeal an order until the case is finally resolved on all claims and against all

parties. Yet, under FRCP 54(b), the District Court can authorize an appeal by entering final judgment as to that party and expressly finding that there is no reason for delay.

- **Collateral Order Doctrine:** The collateral order doctrine is an exception to the final judgment rule that permits a party to appeal an interlocutory order immediately without final determination of the underlying case. The issue involved must be independent from the merits of the case, and unless reviewed immediately, would be effectively unreviewable at a later point in the litigation. *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). Examples: claims of double jeopardy or immunity from suit.

ii. New York State:

- **Applicable Rules:** CPLR 5701, CPLR 5501(a)(1)

- **Court of Appeals**

- In civil cases, the New York Constitution mandates that only "final orders" are appealable to the Court of Appeals with very limited exceptions.

    - In general, a final order is one that disposes of all the causes of action between the parties and leaves nothing for further judicial intervention apart from mere ministerial matters. *See Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995).

    - Some orders leave nothing pending in the litigation and yet are still deemed nonfinal for purposes of Court of Appeals jurisdiction. To understand this apparent anomaly, one must understand that the critical question for determining finality is whether the order finally determines an action or proceeding, not whether the order leaves further litigation pending. Thus, finality should be viewed as a point along the continuum of litigation.

        - There are orders which clearly come too early along that continuum, such as those administering the course of litigation or disposing of motions for temporary or provisional relief. *See Caceras v. Zorbas, lv dismissed* 69 N.Y.2d 899 (1987) (discovery from party in a pending action); *People ex rel. Dunaway v. Warden, lv dismissed* 87 N.Y.2d 918 (1996) (order denying poor person relief); *Auer v. Power Auth. Of State of New York, lv dismissed* 62 N.Y.2d 688 (1984) (order granting change of venue), *Matter of Terrence K., lv dismissed* 70 N.Y.2d 951 (1988) (order denying request for a preliminary injunction and a stay); *Key Bank of New York v. Burgess*, *lv dismissed* 88 N.Y.2d 1064 (1996) (order denying a motion to intervene).

- Likewise, there are orders which come too late along the continuum, such as those seeking enforcement of a previously rendered final order or those denying reargument or leave to appeal to the Court of Appeals.[4] *See New York State Assn. of Counties v. Axelrod, lv dismissed* 87 N.Y.2d 918 (1996) (Appellate Division order denying a motion to enforce the judgment entered in the proceeding); *Furey v. Furey, lv dismissed* 89 N.Y.2d 916 (1996) (motion for a money judgment to enforce a provision of the judgment); *Cherchio v. Alley, lv dismissed* 66 N.Y.2d 604 (1985) (Appellate Division order denying reargument or leave to appeal to the Court of Appeals).

- **The Appellate Divisions**

- Unlike federal practice or at the Court of Appeals, litigants are permitted to take interlocutory appeals, as of right, to the Appellate Division from almost every type of nonfinal order in an action originating in Supreme Court or County Court.

- **Requirements:** To appeal an interlocutory order at the Appellate Division, the order must either "involve[] some part of the merits" or "affect[] a substantial right." CPLR 5701(a)(2)(iv-v).

- CPLR article 57 has been interpreted broadly and can include many trial court orders. The most common interlocutory appeal is a denial of a CPLR 3212 motion for summary judgment or a CPLR 3211 motion to dismiss.

- The right of direct appeal from an intermediate order terminates with the entry of judgment in the action. However, where the order "necessarily affects the final judgment," it remains reviewable on an appeal from the final judgment, despite not being separately appealed when made. *See Kimmel v. State of New York*, 49 A.D.3d 1210, 1210 (4th Dep't 2008); *Il Classico Restaurant, Inc. v. Colin*, 254 A.D.2d 418 (2d Dep't 1998); *Bellido v. Mauro*, 275 A.D.2d 434 (2d Dep't 2000); CPLR 5501(a)(1).

    - **Relevant Case:**
        - *Kimmel v. State of New York*, 49 A.D.3d 1210, 1210-11 (4th Dep't 2008): Plaintiff, a former State Trooper, brought an action alleging she was subjected to sexual discrimination and a hostile work environment. On appeal from a judgment awarding plaintiff damages after a jury trial, defendants-appellants contended that Supreme Court erred in denying that part of their motion pursuant to CPLR 3211(a)(5) seeking dismissal of the complaint as time-barred. As a preliminary matter, the Appellate Division noted that

[4] *See* "The New York Court of Appeals Civil Jurisdiction and Practice Outline," accessed on May 4, 2018, available at: https://www.nycourts.gov/ctapps/forms/civiloutline.pdf

defendants' appeal from the final judgment brought up for review their contention with respect to the earlier interlocutory order denying that part of their motion to dismiss the complaint.

- However, CPLR 5701(b) lists three kinds of interlocutory orders that are not separately appealable as of right to the Appellate Division:

    - (1) an order made in an Article 78 proceeding;
    - (2) one that requires or refuses to require a more definite statement in a pleading; and
    - (3) one that orders or refuses to order that scandalous or prejudicial matter be stricken from a pleading.

        - Even in these cases, a party may seek permission to appeal under CPLR 5701(c) from the judge who made the order or from a justice of the Appellate Division in the department to which the appeal could be taken, upon refusal by the judge who made the order, or upon direct application.

C. Oral Argument:

i. Time Limits:

- **Second Circuit**

    - The Court generally allocates time to the parties in advance of oral argument. Ten minutes per side is a typical amount, sometimes more (perhaps 15 minutes) if the appeal appears to be particularly complex, sometimes less (5 or 7 minutes) if the appeal seems insubstantial. The parties can request additional time by letter to the Court but must present substantial reasons why additional time is required.

- **New York State:**

    - **Court of Appeals**

        - Like the Second Circuit, the Court generally allocates time to the parties in advance of oral argument. Ten to fifteen minutes per side is a typical amount.

        - In addition, the Clerk of the Court of Appeals can initiate and try to invoke Rule 500.11 Review -- the Alternative Procedure For Selected Appeals

- This is sometimes referred to as the Court's "Sua Sponte Merits" review or "SSM" review; essentially, it is the presentation of an appeal to the full Court without oral argument.
- The criteria for SSM review is found in 22 NYCRR 500.11(b), which provides:
  - "Appeals may be selected by the Court for alternative review on the basis of (1) the presence of lower courts' nonreviewable discretion, mixed questions of law and fact or affirmed findings of fact, all of which are subject to a limited scope of review; (2) clear recent controlling precedent; (3) narrow issues of law not of overriding or Statewide importance; (4) unpreserved issues; (5) a party's request for such review; or (6) other appropriate factors.

- Countering misconceptions about the SSM Procedure:
  - Alternative review is not used only when the Court decides to affirm.
  - Rule 500.11 appeals are decided by the full Court. A Rule 500.11 appeal receives the same attention as a "normal course" appeal.
  - Benefit: It saves time for the Court and the parties. "SSM" appeals reach disposition in almost one-half the time taken to dispose of appeals heard on full briefs and oral arguments.

- **The Third Department**
  - Unless otherwise ordered, each side is allowed not more than 30 minutes for argument on appeals from judgments, in actions on submitted facts, and in special proceedings transferred to or instituted in the Appellate Division and 15 minutes on appeals from nonfinal orders.

- **The Fourth Department**
  - As a matter of the Court's discretion, arguments usually range from 5 to 20 minutes for each party, depending on the complexity of the appeal. No matter the length of argument, only one person may be heard on behalf of a party, absent leave of the court. The rule applies even where multiple parties submit a joint brief. N.Y. Ct. R. 1000.11(a).

- The Appellate Divisions hear oral argument during monthly terms, with each term generally consisting of approximately 10 days.

- **Practice Rules of the Appellate Division Part 1250.15(2)**[5]: Under the Uniform Practice Rules of the Appellate Division, which will be implemented in all departments as of September 2018:

    - **(1) A party may seek "oral argument by permission."** Specifically, "[a] party will be able to seek leave of the court, even where oral argument is proscribed by rule, "within 7 days of the filing of the respondent's main brief. The application or motion shall specify the reasons why oral argument is appropriate and the amount of time requested."

    - **(2) A party's** "**failure to request oral argument" will be deemed a waiver of oral argument.** Specifically, "[i]n the event that a party's main brief fails to set forth the appropriate notations indicating that the cause is to be argued and the time required for argument, the cause will be deemed to have been submitted without oral argument by that party."

ii. <u>Rebuttal</u>:

- **<u>Second Circuit</u>**

    - Rebuttal is permitted by request in the Second Circuit and is generally allowed. The time for rebuttal must be reserved from the total time granted for argument.

- **<u>New York State Courts</u>**

    - In the **Court of Appeals,** rebuttal is permitted for the appellant if requested at the beginning of oral argument.

    - Similarly, rebuttal is permitted in the **Third Department** if requested at the beginning of argument. The **Fourth Department** does not permit rebuttal.

- **Practice Rules of the Appellate Division Part 1250.15(5):** As of September 15, 2018, the Uniform Rules will allow an appellant to "orally request permission to reserve a specific number of minutes for rebuttal in the **First and Third Judicial Departments.** The time reserved shall be subtracted from the total time assigned to the appellant. The respondent may not request permission to reserve time for sur-rebuttal."[6]

    - The **Fourth Department** will continue to not permit rebuttal.

---

[5] *See* Attachment No. 3. The Practice Rules of the Appellate Division Part 1250 were approved on December 12, 2017 and are to be implemented in all departments as of September 15, 2018.

[6] *See* Attachment No. 3.

- Rebuttal will not be permitted in the **Second Department** unless it is addressed to raising an issue of factual error that was made during respondent's argument.

D. Timing of Appeals:

i. Filing:

- **Second Circuit**:
  - **Applicable Rules:** 28 USC § 1291(a)

  - In civil cases, to appeal a District Court's final decision or an interlocutory order specified under 28 USC §1292(a), one must file a Notice of Appeal in the District Court within 30 days after the entry of the judgment or order being appealed. When the other party is the United States or its officer or agency, the notice of appeal must be filed within 60 days after the entry of the judgment or order being appealed.

  - If a party files one of the following motions in District Court, the time to file an appeal runs from the entry of the order determining the last of the motions:

    - for judgment under Fed. R. Civ. P. 50(b);
    - to amend or make additional factual findings under Fed. R. Civ. P. 52(b);
    - for attorneys' fees under Fed. R. Civ. P. 54 if the district court extends the time to appeal under Fed. R. Civ. P. 58;
    - to alter or amend the judgment under Fed. R. Civ. P. 59;
    - for a new trial under Fed. R. Civ. P. 59; and
    - for relief under Fed. R. Civ. P. 60 if the motion is filed no more than 28 days after the judgment is entered.

- **New York State**:

  - **Court of Appeals**

    - **Criminal Leave Applications**
    - Except in cases involving the death penalty, no appeal as of right lies to the Court of Appeals from an order or judgment entered in a criminal proceeding. An application for leave to appeal in a criminal proceeding must comply with section 500.20 of the Court of Appeals Rules of Practice. **A 30-day statutory time limit** applies to such applications, and a request to extend that time limit must be made by motion to the Court. *See* CPL 460.10(5); CPL 460.30.

- **Civil Appeals as of Right**
- In a civil case, an appeal as of right is taken by serving a copy of the notice of appeal on an adversary and filing the original notice of appeal in the office where the order of the court of original instance is entered. *See* CPLR 5515(1).
- An appeal to the Court of Appeals by service and filing of a notice of appeal lies only if the order or judgment appealed is one for which CPLR 5601 permits an appeal as of right. If no ground exists under CPLR 5601 for an appeal as of right, a motion for leave to appeal under CPLR 5602 can be made.
- **A 30-day statutory time limit** for taking a civil appeal in the Court of Appeals runs from the date of service of the judgment or order sought to be appealed from, with written notice of its entry. *See* CPLR 5513(a).

- **Motion for Leave to Appeal**
- A civil motion for leave to appeal must comply with sections 500.21 and 500.22 of the Court of Appeals Rules of Practice. The motion papers must include argument in support of the motion, a copy of the order or judgment and decision the movant seeks to appeal, and a copy of any order or decision that was reviewed by the Appellate Division.
- The movant must serve a copy of the motion papers upon the respondent and file with the Court an affidavit or other proof of the date of such service.
- Finally, the movant must establish that the motion is timely. *See* CPLR 5513; 5514.
    - **The 30-day statutory time limit** for the motion seeking leave to appeal begins when the order is served with notice of entry.
    - If the order and notice are served by ordinary mail, CPLR 2103(b)(2) provides that the **30-day period begins five days from the date of the mailing**.
    - If the order and notice are served by an overnight delivery service, CPLR 2103(b)(6) provides that the **30-day period begins one business day** after the order and notice were given to the carrier.
    - If a motion for leave to appeal that has been denied by the Appellate Division is eligible for a new motion to the Court of Appeals, the 30-day period for seeking leave from the Court of Appeals is measured from the time the Appellate Division order denying the motion is served with notice of entry.

- **The Appellate Divisions (Fourth Department)**
  - **Applicable Rules:** CPLR 5513, CPLR 2103(e); 22 NYCRR §§ 130-1.1a, 202.5(a)

  - "An appeal as of right is taken by serving a notice of appeal on the adverse party and filing it in the office where the judgment or order of the original court is entered. In a civil case pending in the Supreme Court or Surrogate's Court, a notice of appeal must be served and filed in the office of the clerk of the court of original instance **within 30 days after service** upon the appellant of a copy of the order or judgment to be appealed with written notice of its entry, or, if the appellant has served the order or judgment with notice of its entry, **within 30 days of that service**." *See* CPLR 5513(a).

    - The time limits for taking an appeal are jurisdictional. Failure to comply with them results in the dismissal of the appeal. *See AXA Equitable Life Ins. Co. v. Kalina*, 956 N.Y.S.2d 743, 745 (4th Dep't 2012).

    - A notice of appeal to the Fourth Department must contain: (1) a caption; (2) basic information about the appeal; (3) a signature block; (4) a copy of the paper appealed from and any supporting decision or opinion; and (5) proof of service. *See* CPLR 2101, 5515; 22 NYCRR §§ 130-1.1a, 202.5(a).

    - An appellant in the New York courts must serve the notice of appeal on all the other parties itself, unless the court orders otherwise. CPLR 2103(e), 5515(1). This differs from federal practice, in which the district court clerk services the notice of appeal.

      - A motion for permission to appeal must be made within the same time and, if permission to appeal has already been denied by order of the court whose determination is sought to be reviewed, within 30 days after service of that order and notice of its entry. *See* CPLR 5513(b).

- **E-Filing in New York State Appellate Courts**[7]

- Chief Judge DiFiore announced that, as of March 1, 2018, all four Departments of the New York State Appellate Division would commence electronic filing in certain appellate matters and original proceedings. The cases subject to electronic filing as of this date in the Third and Fourth Department are:

  - **Third Department**: All appeals in civil actions commenced by summons and complaint in Supreme Court originating in the Third Judicial District.

[7] *See* "Electronic Filing Rules of the Appellate Division, accessed on May 4, 2018, available at: http://www.nycourts.gov/RULES/jointappellate/22NYCRRPart1245-03-01-2018A.pdf

- **Fourth Department**: All appeals in matters originating in, or transferred to, the Commercial Division of Supreme Court in the Fourth Judicial Department.

- **Practice Rules of the Appellate Division Part 1250.1 (c)(1) (effective as of September 15, 2018):** Under the proposed Uniform Rules, filing will be available by means of hard copy filing and electronic filing.

    - "(i) Electronic filing. For the purpose of meeting deadlines imposed by court rule, order, or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions filed electronically will be deemed filed as of the time copies of submissions are transmitted to the NYSCEF site. The filing of additional hard copies of such electronic filings pursuant to court rules shall not affect the timeliness of filing."[8]

ii. "Perfecting" an appeal:

- **Second Circuit:**
    - **Applicable Rules:** FRAP 3, FRAP 12

    - A federal appeal is perfected once the notice of appeal is filed with the District Court. Once filed, the District Court clerk must send the notice of appeal to the Circuit Court clerk. The appeals court clerk is responsible for docketing the appeal in the appellate court. *See* FRAP 3(d); FRAP 12(a); FRAP 3(a)(2).

    - **Procedure:**

1. File the Notice of Appeal and pay the applicable fee.

    0. After filing, you will receive a Pacer alert with an assigned docket number once the notice of appeal is docketed.

    NOTE: Attorneys must be aware of the need for subsequent filings such as the Acknowledgement and Notice of Appearance form, Forms C and D, as well as a scheduling notification before perfecting an appeal. The Second Circuit's website provides sample forms.

- **New York State**

    - **Court of Appeals**
        - **Rule 500.9 Preliminary Appeal Statement**
        - Within 10 days after the appellant files the notice of appeal or after leave to appeal is granted in a civil case or a certificate granting leave to appeal

[8] *See* Attachment No. 3.

is issued in a criminal case, the appellant must file with the Clerk of the Court two copies of a Preliminary Appeal Statement, with proof of service of one copy on each other party (see Rule 500.9). The Preliminary Appeal Statement must be filed in both civil and criminal appeals.

- Where a party asserts that a statute is unconstitutional, appellant shall give written notice to the Attorney General before filing the preliminary appeal statement, and a copy of the notification shall be attached to the preliminary appeal statement. The notification and a copy of the preliminary appeal statement shall be sent to the Solicitor General,
- Department of Law, The Capitol, Albany, New York 12224.

- After review of the preliminary appeal statement, the Clerk of the Court will notify the parties either that "SSM Review" shall commence or that the appeal shall proceed in the normal course.

- **Fourth Department**
  - **Applicable Rules:** 22 NYCRR § 1000.2; 22 NYCRR § 1000.3; 22 NYCRR § 1000.12(a)

  - Unless otherwise provided by statute, rule or order of the Appellate Division or Justice of the Appellate Division, all appeals shall be perfected pursuant to 22 NYCRR § 1000.3 within 60 days of service on the opposing party of the notice of appeal.

  - An appeal not perfected within the 60-day period is subject to dismissal on motion pursuant to 22 NYCRR § 1000.12(a). An appeal or cross appeal not perfected within nine months of service of the notice of appeal is subject to dismissal without motion pursuant to 22 NYCRR § 1000.12(b).

  - **Practice Rules of the Appellate Division Part 1250.5 (effective as of September 15, 2018):** "Unless the court directs that a cause be perfected in a particular manner, an appellant may elect to perfect a cause by the reproduced full record method (CPLR 5528 [a] [5]); by the appendix method (CPLR 5528 [a] [5]); by the agreed statement in lieu of record method (CPLR 5527); or, where authorized by statute or this Part or order of the court, by the original record method."[9]

  - "Perfecting" an appeal must occur after an appeal is taken by filing a notice of appeal or obtaining leave to appeal. Perfecting an appeal means doing all the acts necessary to place the case on the court's calendar. *See* 22 NYCRR § 1000.3.

[9] *See* Attachment No. 3.

- **Overview of Fourth Department Procedure:**

    1. File the Notice of Appeal with the court of original instance (the court clerk will then transmit to the Appellate Division) within 30 days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry.

    2. Upon receipt of the Notice of Appeal, the court clerk will provide service of notice to the appellant indicating such date of notice and that they are in receipt of the lower court file. You then have 60 days to perfect the appeal.

iii. Briefing Schedule:

- **Second Circuit:**
    - **Applicable Rules:** LR 31.2, LR 27.1

    - The Second Circuit permits parties to choose their own due dates for their briefs, within generous limits. The appellant must select a due date that is within 91 days after the ready date—generally when the transcript is ready or when the appellant files the Second Circuit form indicating that the transcript is not necessary or has already been prepared. The appellee must notify the Court in writing of the date by which the appellee's brief will be filed within 14 days of filing of the appellant's brief or the last appellant's brief in a multi-defendant appeal. Unless the case involves a voluminous transcript, the appellee must select a filing date that is within 91 days of filing of the last appellant's brief. The parties' proposed filing dates will be so-ordered unless the Court determines that the selected filing date is unacceptable. *See* LR 31.2(a)(2).

    - In a counseled civil appeal, when the Court orders an appellee's briefing deadline pursuant to a scheduling notification, the order will specify that the appeal will proceed to a merits panel for determination forthwith if the brief is not filed by the due date. The appellee will be required to file a motion for permission to file the brief and to appear at oral argument. A motion to extend the time to file the brief or to seek other relief will not toll the previously-ordered filing date. *See* LR 27.1(f)(1).

    - **Relevant Case:** *RLI Insurance Co. v. JDJ Marine, Inc.,* 716 F.3d 41 (2d Cir. 2013)

      Summary: Court discusses within its opinion its struggle to alter the previous culture, where extensions of time to file briefs were routinely granted and automatically extended until convenient for counsel to file.

Here, the Court's order provided that the appeal would be dismissed unless the deadline was met, and that the filing of a motion for extension would not extend the deadline. Appellant's counsel ignored those provisions and made a last-minute motion for a further extension of time. The Court found the extension request inadequate because appellant did not demonstrate an "extraordinary circumstance." The appellant also violated a local rule by waiting until the last minute to file for an extension. The extension was therefore denied, and the appeal dismissed.

- **New York State:**
  - **Applicable Rules:** 22 NYCRR § 1000.2(b), 1000.12(a), 1000.16(a).

  - **Court of Appeals**

    - Generally, in an appeal tracked for normal course treatment, the Clerk of the Court issues a **scheduling letter** after the filing of the preliminary appeal statement. The scheduling letter sets the filing dates for record material and briefs.

    - **Appellant's initial filing.** In addition to submitting a copy of the record material and briefs in digital format, on or before the date specified in the scheduling letter, the appellant shall serve and file an original and nine copies of a brief, with proof of service of three copies on each other party. If no scheduling letter is issued, appellant's papers shall be served and filed within 60 days after appellant took the appeal.

    - **Respondent's filing.** In addition to the submission in digital format, on or before the date specified in the scheduling letter, respondent shall serve and file an original and nine copies of a brief and an original and nine copies of a supplementary appendix, if any, with proof of service of three copies on each other party. If no scheduling letter is issued, respondent's papers shall be filed within 45 days after service of appellant's brief.

    - **Reply briefs.** A reply brief is not required but may be served and filed by appellant on or before the date specified in the scheduling letter. If no scheduling letter is issued, a reply brief may be served and filed within 15 days after service of respondent's brief.

- **Fourth Department**

  - As stated above, an appellant has 60 days to perfect its appeal after service on the opposing party of the notice of appeal. *See* 22 N.Y.C.R.R. § 1000.12(a).

  - Unless otherwise provided by order of the Court or Justice of the Court, the respondent must then serve and file an answering brief within 30 days after service of the appellant's brief. The appellant may serve and file a reply brief within 10 days after service of the respondent's answering brief. *See* 22 NYCRR § 1000.16(a).

- **Practice Rules of Appellate Division Part 1250.13(c) (effective as of September 15, 2018):** Briefing for original special proceedings will depend on whether the proceeding involves any of the following: (i) Eminent Domain Procedure Law § 207; (ii) Public Service Law §§ 128 or 170; Labor Law §§ 220 or 220-b; Public Officers Law § 36; and Real Property Tax Law § 1218.[10]

E. Record preparation and brief requirements:

i. Record Preparation Requirements

- **Second Circuit:**
  - **Applicable Rules:** FRAP 10, FRAP 11, LR 11.1

  - "The record on appeal consists of all of the lower court documents including transcripts. For counseled civil appeals the Court of Appeals generally requests that only the index of the record be filed; the documents that constitute the record remain in the district court until needed."[11]

  - The appellant must do whatever is necessary to enable the district court clerk to assemble and forward the index of the record to the Court of Appeals within 14 days of filing of the notice of appeal. The appellant's counsel must ensure that the district court has a complete index. Receipt from the district court of a certified copy of the index will satisfy the requirement to file the record unless the Court of Appeals directs otherwise. *See* FRAP 10, FRAP 11, LR 11.1,

---

[10] *See* Attachment No. 3.

[11] *How to Appeal a Civil Case to the United States Court of Appeals for the Second Circuit,* ca2.uscouts.gov, (Sept. 2016),http://www.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/pdf/How%20to%20Appeal%20a%20Civil%20Case.pdf

- As a practical matter, the record is now transmitted electronically from the District Court to the Court of Appeals, and there is little, if anything, that appellant's counsel needs to do.

- If the Court of Appeals requires the entire record or any portion thereof, counsel must timely prepare the record so that it can be transmitted to the Court. *See* FRAP 10, FRAP 11, LR 11.1.

- In pro se cases, the district court will prepare and forward the record. The Court of Appeals ordinarily does not grant a motion to extend time to file the record.

- The appellant must also prepare and file an "appendix" to the brief. The "appendix" is the federal equivalent of the "Record" in a state appeal. The appendix must include (1) the relevant docket entries from the proceeding below; (2) the relevant portions of the pleadings, charge, findings, or opinion; (3) the underlying judgment, order, or decision; and (4) any other parts of the record to which the appellant wishes to direct the court's attention. Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. If the appendix, exclusive of the orders, opinions, and judgments being appealed, exceeds 300 pages, the appellant must file a "special appendix," which may be an addendum at the end of the brief or a separately bound volume. The special appendix should include the opinions, orders or judgments being appealed, and the text of any statute or rule of significance to the appeal. *See* FRAP 30(a)(1), FRAP 30(a)(2), LR 32.1.

- **New York State**

  - **Court of Appeals**

  - **An appendix** must conform to the requirements of CPLR 5528 and 5529 and must be sufficient by itself to permit the Court to review the issues raised on appeal without resort to the original file or reproduced record used at the court below. The Clerk's Office encourages the filing of any appendix as a separately bound submission. The appendix shall include the following:

    - the notice of appeal or order or certificate granting leave to appeal;
    - the order, judgment or determination appealed from to the Court;

- any order, judgment or determination which is the subject of the order appealed from, or which is otherwise brought up for review;
- any decision or opinion relating to the order being appealed; and
- the testimony, affidavits, jury charge and written or photographic exhibits useful to the determination of the questions raised on appeal or cited in the brief of the party filing the appendix.

- **Respondent's appendix.** A respondent may file a supplementary appendix. The Clerk's Office encourages the filing of any supplementary appendix as a separately bound submission.

- **Fourth Department**

  - Reproduced full records shall comply with the requirements of CPLR 5528, 5529, and CPLR 5526. The reproduced full record shall be bound separately from the brief.

  - Records and appendices shall be consecutively paginated and shall include accurate reproductions of the submissions made to the court of original instance, formatted in accordance with the practice in that court. Reproductions may be slightly reduced in size to fit the page and to accommodate the page headings required by CPLR 5529(c), provided, however, that such reduction does not significantly impair readability.

  - Despite motions to enlarge the record on appeal, the Appellate Divisions severely condemn inclusion of documents that are not properly part of the record in the record on appeal.

  - However, the Appellate Divisions may take judicial notice of undisputed documents. The Courts have recognized a "narrow exception" to include undisputed and reliable documents but have stated that they "may not take judicial notice of a 'fact' which is controverted. 'The mere presence of a document in a court file does not mean that judicial notice can properly be taken of any factual material asserted' therein." *Walker ex rel. Velilla v. City of New York,* 46 A.D.3d 278 (1st Dep't 2007); *see Matter of Khatibi v. Weill,* 8 A.D.3d 485 (2d Dep't 2004).[12]

[12] *See* Elliott Scheinberg, *The Breadth of Judicial Notice on Appeal, Dehors-the-Record Data,* NYLJ, Mar. 30, 2018.

ii. Brief Requirements

- **Second Circuit:**
  - **Applicable Rules:** FRAP 28, FRAP 29, FRAP 32, LR 24.1, LR 25.1, LR 31.1 and LR 32.1

    - The brief sets forth the legal argument of the case and must comply with FRAP 28, 29, and 32, and LRs 25.1, 31.1, and 32.1, as each rule may be applicable.

  - A principal brief must not exceed 14,000 words, or, if monospaced typeface is used, it must not exceed 1,300 lines of text. Monospaced typeface, such as "Courier," must not contain more than $10^{1}/_{2}$ characters per inch.

  - Proportionally spaced typeface such as "Times New Roman" must be 14-point or larger, and this applies to both text and footnotes. Text and footnotes in a pamphlet brief must be in 12-point or larger type with 2 points or more leading between the lines: printers should be familiar with these standards. *See* FRAP 32.

  - A reply brief must not exceed 15 pages, or half the type-volume (i.e., numbered words or lines) permitted in a principal brief. Headings, footnotes, and quotations count toward word and line limitations.

  - The corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations; and any certificates of compliance do not count toward the word limits or type-volume limitation. *See* FRAP 32.

  - The appellant's brief must also contain the requirements set forth in FRAP 28 such as a table of contents with page references, and an alphabetically arranged table of cases, statutes, and other authorities cited with references to pages in the brief.

  - The following colors for brief covers must be used:
    - Appellant- Blue
    - Appellee- Red
    - Reply- Gray
    - Intervenor or Amicus- Green
    - Supplemental- Tan

  - The caption on the covers of the briefs and appendices must conform to the Court's "official caption." If the Court's official caption is erroneous,

counsel must alert the Court promptly in writing but no later than 7 days prior to the due date for the appellant's brief.

- A motion for leave to file an oversized brief must, in the absence of extraordinary circumstances, be made at least 14 days before the brief's due date. A motion for leave to extend the time to file a brief is only granted if there are extraordinary circumstances. The motion must be made as soon as practicable. *See* Local Rule 24.1.

- **New York State:**

  - **Court of Appeals**

    - For normal course appeals, the principal brief of an appellant or respondent may not exceed 14,000 words, and a reply brief, amicus brief, or brief in response to an amicus brief may not exceed 7,000 words. *See* Rule 500.13(c)(1).

    - A party may apply for permission to file an oversized brief by submitting a letter to the Clerk of the Court. *See* Rule 500.13(c)(4).

    - For appeals selected for consideration pursuant to Rule 500.11 ("SSM Review"), submissions may not exceed 7,000 words. *See* Rule 500.11(m).
    - For briefs that are handwritten or prepared on a typewriter, the principal briefs shall not exceed 35 pages; reply briefs, amicus briefs, and briefs in response to amicus briefs shall not exceed 20 pages. *See* Rule 500.13(c)(2).

    - All briefs must contain a table of contents, a table of cases and authorities, questions presented, point headings, and, if necessary, a disclosure statement. The appellant's brief must also include a statement showing that the Court has jurisdiction to entertain the appeal and to review the questions raised, with citations to the pages of the record or appendix where such questions have been preserved for the Court's review. The original of each brief must be signed and dated, must have the affidavit of service affixed to the inside of the back cover and must be identified on the front cover as the original. Each brief must also indicate the status of any related litigation as of the date the brief is completed.

  - **The Appellate Divisions**
    - **Applicable Rules:** CPLR 5528

    - **Practice Rules of the Appellate Division Part 1250.8 (effective as of September 15, 2018):** The Uniform Rules will provide the form and

contents required of briefs, whether computer-generated, typewritten, or handwritten.[13] The following recites certain relevant sections of the Rules:

- ***Computer-generated briefs*:** "Briefs prepared on a computer shall be printed in either a serif, proportionally spaced typeface such as Times Roman, or a serif, monospaced typeface such as Courier. Narrow or condensed typefaces and/or condensed font spacing may not be used. Except in headings and in quotations of language that appears in such type in the original source, words may not be in bold type or type consisting of all capital letters."

    - ***Length*:** "Computer-generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum" containing statutes, rules, regulations, etc.[14]

- ***Typewritten briefs*:** "Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch." The ribbon typescript of the brief shall be signed and filed as one of the number of copies required by section 670.8 of 13 this Part. Typewritten appellants' and respondents' briefs shall not exceed 70 pages and reply briefs and amicus curiae briefs shall not exceed 35 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc.

- The appellant's brief shall include, in the following order, (1) a table of contents; (2) a table of cases, statutes, and other authorities; (3) a concise statement, not exceeding two pages, of the questions involved; (4) a concise statement of the nature of the case; (5) the argument for the appellant; and (6) a statement certifying compliance with the printing requirements outlined in the Practice Rules.

- Absent leave of the court, sur-reply briefs are not permitted.

---

[13] *See* Attachment No. 3.

[14] Currently, the Fourth Department does not permit footnotes in briefs. *See* "Rules of the Appellate Division Fourth Department," accessed on May 4, 2018, available at: https://www.nycourts.gov/courts/ad4/clerk/AD4-RuleBook-web.pdf. However, under the Practice Rules of the Appellate Division Part 1250.8, footnotes are permitted in parties' briefs if they follow certain typeface requirements. Thus, it is unclear whether the Fourth Department's rule against footnotes will continue after September 15, 2018.

F. Injunctive relief/stays pending appeal:

i. Second Circuit:

- **Applicable Rule:** FRAP 8

- The procedure for filing a stay or injunction pending appeal in the Second Circuit is governed by Rule 8 of the Federal Rules of Appellate Procedure.

    - *In re World Trade Ctr. Disaster Site Litig.,* 503 F.3d 167 (2d Cir. 2007)
      Summary: The court stated that the four factors considered in issuing a stay pending appeal are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

- To obtain a stay, generally, a party must first file a motion in the district court. To move for a stay in the Second Circuit, the party must show that moving in the district court would be impracticable or state that a motion has been made to the district court and that the district court either denied it or failed to afford it the relief requested. *See* FRAP 8.

- It is necessary to state any reasons that the district court gave for its decision. The motion must also include the reasons that the Second Circuit should grant the relief requested, the facts relied on, originals or copies of affidavits or other sworn statements supporting disputed facts, and the pertinent parts of the record.

- The party filing the motion for a stay must provide reasonable notice of the motion to all parties and file it with the Circuit Clerk. The motion is normally considered by a panel of the Second Circuit.

- In exceptional cases, in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. The Circuit Court may condition the relief on a party's filing a bond or other appropriate security in the district court.

ii. New York State:

- **Applicable Rules:** CPLR 2201, CPLR 5519

- Under CPLR 2201, stays of all proceedings in civil appeals may be granted by "the court in which an action in pending," also known as the court of original instance. *See Schwartz v. New York City Hous. Auth.*, 219 A.D.2d 47, 48 (2d Dep't 1996); *Rhodes v. Mosher*, 115 A.D.2d 351 (4th Dep't 1985).

- Automatic stays must be met in accordance with CPLR 5519(a) and are available to any state or political subdivision. Automatic stays are also available to any party under CPLR 5519(a)(2)-(7) upon compliance with certain conditions, generally the giving of an undertaking. Other requirements for undertaking must be complied with pursuant to CPLR article 25. Insurers can only secure a stay to the limit of the policy pursuant to CPLR 5519(b).

- If the matter does not fall within one of the automatic categories of CPLR 5519(a), the one will have to seek a stay by motion pursuant to CPLR 5519(c).

- An applicant for a discretionary stay at the Appellate Division must have affirmatively opposed the relief requested before the trial court that was ultimately awarded in the final judgment or order. *See Caruana v. Klipfel*, 135 A.D.2d 1146 (4th Dep't 1987) (denying a discretionary stay because the movant failed to oppose the relief requested by its adversary before the lower court which was then awarded in the final judgment).

- If a stay pending appeal is granted and the judgment or order thereafter is affirmed or modified, the respondent should serve the Appellate Division order on the appellant, with notice of its entry, as soon as possible. CPLR 5519(c) provides that the stay automatically continues for five days after such service upon the appellant. If the appellant takes an appeal (i.e., files a notice of appeal) or moves for permission to appeal to the Court of Appeals, the stay will continue automatically only if the appeal is taken or leave to appeal is sought before the expiration of the five-day period. Even when the appellant promptly so acts, CPLR 5519(c) permits the respondent to move in the Court of Appeals for an order vacating the stay.

Ethical Considerations of Appellate Practice

Materials by Joanna Lima, Daniel J. Thomson, and Peter G. Vizcarrondo[10]

A. Filing Frivolous Appeals: Topic Overview

- The filing of a frivolous appeal potentially violates two provisions of the New York Rules of Professional Conduct:

    - **Rule 3.1 (a)-(b)**: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous," which includes a "good faith argument for an extension, modification or reversal of existing law. . . ."

    - **Rule 3.1 (b)(2)-(3)**: "A lawyer's conduct is 'frivolous' for the purposes of this Rule if the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of delaying or prolonging the litigation, or serves merely to harass or maliciously injure another; or the lawyer knowingly asserts material factual statements that are false."

Filing Frivolous Appeals: Topic Overview, cont.

- In both state and federal courts, the filing of an appeal can additionally lead to attorneys' fees awards and sanctions:

    - **22 N.Y. Rules and Regulations Part 130-1.1**: "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . . In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct . . . ."

    - **Federal Rule of Appellate Procedure 38**: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

    - **28 U.S.C. § 1912**: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

[10] The presenters would like to thank Joanna Lima, *Law Clerk* at Farrell Fritz, P.C.; Daniel J. Thomson, *Law Clerk* at Davis Polk & Wardwell LLP; and Peter G. Vizcarrondo, *Associate* at Paul, Weiss, Rifkind, Wharton & Garrison LLP for their assistance in drafting these CLE materials.

Filing Frivolous Appeals: Topic Overview, cont.

- When is an appeal frivolous?
    - As previously mentioned, Rule 3.1(b) explains that "[a] lawyer's conduct is frivolous for purposes of this Rule if:
        - (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law; [or]
        - (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; . . . ."
    - Under 22 N.Y.C.R.R. 130-1.1, subsection (c) advises, in relevant part, that "conduct is frivolous if:
        - (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; [or]
        - (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; . . . ."
    - Under Fed. R. App. Proc. 38, the Second Circuit asks whether an appeal is "patently frivolous," and results in "vexatious litigation." *Gallop v. Cheney*, 642 F.3d 364, 370 (2d Cir. 2011).

Filing Frivolous Appeals: Topic Overview, cont.

- Ultimately, the question of whether an appeal is frivolous comes down to a totality-of-the-circumstances analysis. However, the court's focus is often not only on the particular litigant and their counsel, but also on general systemic goals of the court system. As explained by the First Department in the context of 22 N.Y.C.R.R. 130-1.1 sanctions:
    - "We also consider that sanctions serve to deter future frivolous conduct not only by the particular parties, but also by the Bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics." *Boye v. Rubin & Bailin, LLP*, 152 A.D.3d 1, 11, 56 N.Y.S.3d 57, 65 (1st Dep't 2017).
- It is an open question among many state and federal appellate courts whether bad faith is

required for the filing of an appeal to be truly frivolous. In other words: is "frivolous" subject to an objective or a subjective standard?

- The Second Circuit generally *does* require bad faith. *See, e.g., Star Mark Mgt., Inc. v. Koon Chun Hung Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170 (2d Cir. 2012).

- New York state courts, on the other hand, may not. *See Bell v. State*, 96 N.Y.2d 811, 812, 751 N.E.2d 456, 457 (2001) (finding an appeal to be frivolous without question of subjective intent).

Filing Frivolous Appeals: Case Study 1

Boye v. Rubin & Bailin, LLP, 152 A.D.3d 1, 56 N.Y.S.3d 57 (1st Dep't 2017)

- **Facts**: This case concerns allegations of legal malpractice made against Rubin & Bailin, LLP in connection with certain claims voluntarily withdrawn by the plaintiffs in the underlying lawsuit. However, Rubin & Bailin LLP asserted—and the Supreme Court agreed—that they were not the law firm responsible for withdrawing those claims. In fact, they had withdrawn from the underlying case more than a year prior to that conduct by plaintiff's successor counsel. Accordingly, the Supreme Court dismissed the claims. The plaintiff then appealed.

- **Outcome**: The First Department affirmed the trial court's ruling, and additionally imposed sanctions pursuant to 22 NYCRR 130-1.1 for the filing of a frivolous appeal. The court explained:
  - "After a careful review of the appellate record and the parties' briefs, we draw the only conclusion such record permits—the bases for the legal malpractice claim have been without merit in law or fact since their inception. More concerning, however, is that despite it having been apparent from the record that successor counsel was the one who withdrew the conversion and breach of contract claims in the federal action and not defendants, and despite being alerted to this fact by the record of this case and Supreme Court on multiple occasions, counsel persists in repeating a materially false claim to this Court.

    There can be no good faith basis for the repetition of this materially false claim on appeal, and we find that counsel's behavior would satisfy any of the criteria necessary to deem conduct frivolous. In fact, the only fair conclusion is that the prosecution of this appeal and knowing pursuit of a materially false and meritless claim was meant to delay or prolong the litigation or to harass respondents."

- **Key Takeaways**: As the First Department explained in its opinion, "[a]mong the factors we are directed to consider is whether the conduct was continued when it became apparent, or should have been apparent, that the conduct was frivolous, or when such was brought to the attention of the parties or to counsel." Here, the Supreme Court's repeated warnings to

plaintiffs of the meritless nature of their claims—even without the imposition of sanctions there—should have been warning enough to forego further litigation.

Filing Frivolous Appeals: Case Study 2

Cardinal Holdings, Ltd. v. Indotronix Int'l Corp., 73 A.D.3d 960, 902 N.Y.S.2d 123 (2d Dep't 2010)

- **Facts**: After a foreign money judgment against Chandre Corp. ("Chandre") was entered in favor of Cardinal Holdings, Ltd. ("Cardinal"), Chandre filed for bankruptcy. Cardinal then sought to enforce the judgment against Indotronix Int'l Corp. ("Indotronix") on an alter ego theory in federal district court. However, the federal district court dismissed the case on the basis that only the bankruptcy Trustee had standing to assert that claim. The Trustee subsequently did exactly that, and reached a settlement agreement releasing the claim.

  After settlement had been finalized, Cardinal *again* brought suit against Indotronix seeking to enforce the original money judgment—this time in New York Supreme Court. The Supreme Court dismissed the claim, and found that the course of litigation leading to the filing made clear that the suit reflected frivolous conduct, and imposed sanctions. Cardinal then appealed.

- **Outcome**: The Appellate Division for the Second Department affirmed the Supreme Court's decision on the merits, and additionally found that "[t]he continuation of the same meritless arguments on appeal would appear to constitute frivolous conduct" as well, and directed "counsel for the parties to show cause why additional sanctions and/or costs should or should not be imposed."

- **Key Takeaways**: Doubling down on a frivolous conduct sanction can be a significant risk. *See also Caplan v. Tofel*, 65 A.D.3d 1180, 1181, 886 N.Y.S.2d 182, 183 (2d Dep't 2009) (also finding an appeal to be sanctionably frivolous in the context of a suit resulting in frivolity sanctions at the trial court level); *Curet v. DeKalb Realty, LLC*, 127 A.D.3d 914, 916, 8 N.Y.S.3d 340, 342 (2d Dep't 2015) (same).

B. False Statements: Topic Overview

- Making false statements potentially violates a provision of the New York Rules of Professional Conduct:
  - **Rule 3.3(a)(1)**: "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

    - The comment to Rule 3.3 further explains:
      - "Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not

> vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false."

- "A knowing, false, and material statement of fact or law to a tribunal is an affront to the legal profession and the justice system . . . ." *In re Brizinova*, 565 B.R. 488, 500 (Bankr. E.D.N.Y. 2017).

- Misstatements vs. Zealous Advocacy: One common ethical concern in legal writing involves overly aggressive or dramatic assertions of law or fact. The overuse—or careless use—of adverbs in legal writing may contribute to this ethical risk.

    - Citation to the record or to legal authority *may* cover a lawyer's bases by providing up-front the neutral background material for such persuasive assertions. However, consistent citations are probably more valuable as a tool for lawyers to ensure they are in fact accurately representing the facts and the law throughout their briefs and other court submissions.

False Statements: Case Study 1

In re Aviles, 152 AD3d 27 (1st Dep't 2017)

- **Facts:** Respondent made a "materially false statement to the court by making arguments against the production of the witness' iPhone 4s and then agreeing to produce such when the respondent knew it was lost and that his conduct rose 'to the level of a fraud on the Court."

- **Outcome:** The court had directed the respondent to pay $54,421.03 in sanctions, which the Respondent timely paid. The First Department reasoned, **"**As to his misrepresentation to the court, the Panel was deeply troubled by respondent's initial failure to disclose to the bankruptcy court that the witness had lost her iPhone4s. Indeed, the Panel noted, the respondent presented a vigorous Fourth Amendment argument against the production of the iPhone 4s during a subsequent motion to compel hearing. The Panel found this conduct 'dishonest and deceitful.' In addition, the Panel found that respondent's material misrepresentations to the court served to delay the bankruptcy process and wasted the resources of the trustee and the bankruptcy court." Considering the Court had already found the respondent guilty of professional misconduct, public censorship was also appropriate as a result of respondent's misrepresentation to the court and unauthorized practice of law.

- **Key Takeaway:** A lawyer must not offer known false testimony or other evidence as to an issue of fact. Additionally, if a lawyer comes to later know of its falsity, the lawyer must provide reasonable measures, including immediate disclosure.

C. Duty to Disclose Authority: Topic Overview

- **Rule 3.3(a)(2):** "A lawyer shall not knowingly fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel or offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Duty to Disclose Authority: Case Study 1

Cicio v. City of New York, 98 A.D.2d 38, 469 N.Y.S.2d 467 (2d Dep't 1983)

- **Facts:** After a city sanitation employee was injured in the line of duty, his attorney filed a notice of injury claim with the city one day late. The city then appealed a Special Term ruling granting leave for late service of the claim. The city argued that leave should not have been granted because no excuse was given for the delay. However, the First Department identified a wealth of case law that "emphatically rejected such arguments, holding that the [statute at issue is] to be liberally construed and that the absence of an acceptable excuse is not necessarily fatal."

- **Outcome**: The court granted costs to the plaintiffs, explaining:
  - "None of these cases are cited in the city's brief submitted to this court. This is most disturbing and clearly inexcusable because the city was a party in [two of the cases they failed to cite]. Had even a modicum of thought and research been given to this case, it would have been self-evident to the city that its position was untenable and this court and the taxpayers would have been spared the costs of a frivolous appeal."

- **Key Takeaway**: "The function of an appellate brief is to assist, not mislead, the court. Counsel have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration. The process of deciding cases on appeal involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state."

Duty to Disclose Authority: Case Study 2

Perez v. Platinum Plaza 400 Cleaners, Inc., No. 12 CIV. 9353 (PAC), 2015 WL 13402755 (S.D.N.Y. June 16, 2015)

- A federal district court decision, but with principles that apply equally well to appellate

briefing.

- **Facts:** The case involved, *inter alia*, a claim that defendants had not provided employees with accurate wage statements, both at the time of hire as well as annually, in violation of New York law. Such violations entitle employees to $100 per work week in damages. Plaintiffs failed to cite, however, clear case law indicating that the relevant New York law "confers a private right of action upon those who do not receive their notice at the time of hiring, but not upon those who do not receive it on or before February first of any subsequent year."

- **Outcome**: While not imposing any sanctions, the court noted that "Plaintiffs failed to bring the Court's attention to this body of case law, in likely violation of New York Rule of Professional Conduct 3.3(a) (2), which requires attorneys to disclose adverse legal authority in the relevant jurisdiction which is not disclosed by opposing counsel. Defendants' counsel argued the point but included no case law to support the argument."

- **Key Takeaway**: You can't always rely on your opponent to make their best case; and risking an ethical violation if they don't is likely not worth it.

D. "Cheating" on Word Limits: Topic Overview

- Intentionally exceeding word limits or attempting to circumvent page-limit rules by manipulating font-size or margins can be a violation of ethical rules.

    - **Rule 3.4**: A lawyer may not "knowingly engage in other illegal conduct or conduct contrary to these Rules."

    - **Rule 8.4(b):** "A lawyer or law firm shall not engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

        - The Comment to Rule 8.4 further explains:
            - "As set forth in Rule 3.4(c), a lawyer may not disregard a specific ruling or standing rule of a tribunal, but can take appropriate steps to test the validity of such a rule or ruling [if there is a reasonable good-faith belief that no valid obligation exists]."

    - **The Federal Rules of Appellate Procedure** not only limit the length of briefs, but also indicate the type size, typeface, and line spacing that may be used. Fed. R. App. P. 34.

    - **The C.P.L.R.** allows appellate courts to prescribe the size of margins and type of briefs and appendices and the line spacing and the length of briefs. N.Y. C.P.L.R. 5529 (3).

"Cheating" on Word Limits: Topic Overview

- **Commercial Division Rule 17** provides that "(i) briefs shall be limited to 25 pages each; (ii) reply memoranda shall be no more than 15 pages...; (iii) affidavits and affirmations shall be limited to 25 pages each." However, the Advisory Council proposal intends to "substitute word limits in place of the page limits," such that the new limitations would be 7,000 words in briefs, memoranda of law, affidavits and affirmations and 4,200 words in a reply memoranda.

    - *Domingo v. Bidkind, LLC,* 2018 NY Slip Op 30141(U) (Sup. Ct. NY Cty 2018) (Hon. Scarpulla decided that the defendants "failed to adhere to the page limits provided in Commercial Rule 17 within motion and in another related action").

    - *Matter of Aish Hatorah N.Y. Inc. v. Fetman,* 2014 NY Slip Op 51430(U) (Sup. Ct. Kings Cty. 2015) (Hon. Demarest, in her decision, only "consider[ed] the first 25 pages of respondent's memorandum. The remaining pages [were disregarded]").

    - *Herve Larren, Bidkind LLC v. Domingo,* 2018 N.Y. Slip Op. 30162(U) (Sup. Ct. NY Cty 2018) (Hon. Scheinkman, in his decision, "direct[ed] Defendants to submit to an opening brief limited to 25 pages. The original 41 page brief [was not] considered by the Court").

- Courts commonly punish litigants that use footnotes to deliberately disobey word limits.

- Courts have taken a variety of actions for violations of page or word limits, including imposing sanctions, declining to award costs to successful parties, and even in rare instances dismissing the case.

- Counsel should thus carefully consider whether decision making is for strategic or stylistic reasons or is a deliberate effort to disobey the page or word limit restrictions.

"Cheating" on Word Limits: Case Study 1
Varda, Inc. v. Ins. Co. of N. Am., 45 F.3d 634 (2d Cir. 1995)

- **Facts:** Varda, Inc., a clothing store, sued its insurer for breach of contract for failing to pay losses from a burglary and prevailed at both the trial court and on appeal. Varda's appellate brief, however, only fit within the fifty-page limit because it was "pocked with fifty-eight footnotes, many over a page long and containing crucial parts of Varda's arguments." What is more, "approximately 75% of Varda's statement of facts and argument appear[ed] in

footnotes."

- **Outcome:** Even though Varda was successful on appeal, the court found that it had "brazenly used textual footnotes to evade page limits" and declined to award it costs. The court noted that even though "[c]osts on appeal are routinely awarded to a successful party, 'unless otherwise ordered, Varda's brief in this case is a textbook example of where it should be otherwise ordered."

- **Key Takeaway**: Don't cheat on word limits! The court in *Varda* slyly noted that Varda's attorneys were fortunate that they had not practiced law four hundred years earlier when an English court imprisoned a party who had submitted a 120 page brief, and forced him to wear the brief around his neck and be paraded through Westminster Hall. The court wistfully concluded that "Varda's brief stirs nostalgia for the rigors of the common law."

"Cheating" on Word Limits: Case Study 2
Slater v. Gallman, 377 N.Y.S.2d 448 (1975)

- **Facts:** Appellant's counsel, challenging an assessment made by the State Tax Commission, filed a 284 appeal page brief and 35 page reply brief "on issues which were neither novel nor complex." At this time there were no explicit word or page limits for appellate briefs.

- **Outcome:** The court found the brief to be "an extreme example" of a "poorly written and excessively long brief [], replete with . . . irrelevant [] and immaterial matter," noting that the "argument wanders aimlessly through myriad irrelevant matters of administrative and constitutional law, pausing only briefly to discuss the issues raised by this appeal." Even though the brief had not violated any court rules, the court imposed costs against the appellant.

- **Key Takeaway:** Even if there are no explicit word limits, counsel should always aim to keep briefs as concise and structured as possible. Courts will not appreciate unnecessarily lengthy briefs that raise irrelevant issues and might, in some instances, impose sanctions.

"Cheating" on Word Limits: Case Study 3
Weeki Wachee Springs, LLC v Southwest Florida Water Mgt., 900 So 2d 594 (Fla Dist Ct App 2004)

- **Facts:** Attorney repeated noncompliance with formatting guidelines for appellate filings by cheating on font size and line-spacing to squeeze his arguments within the page limit of 50 pages. The attorney used 1.5- and .7-spacing to satisfy the page requirement.

- **Outcome:** The District Court of Appeal warranted sanction of attorney fees in the amount of $500.00. Faced with these facts and prior violations, the court found that the attorney's use

of such reduction techniques were committed intentionally to fit the page limit.

- **Key Takeaway**: Don't cheat on word limits! Courts will not appreciate a pattern of technical requirement violations and are forced to address the violation where an attorney "does not appear to appreciate the significance of their actions."

E. Incivility Toward Counsel and the Court: Topic Overview

- There are a number of New York Rules of Professional Conduct relating to civility:
    - **Rule 3.3(f) (2):** In appearing as a lawyer before a tribunal, a lawyer shall not engage in undignified or discourteous conduct.
    - **Rule 3.3(f) (4):** In appearing as a lawyer before a tribunal, a lawyer shall not engage in conduct intended to disrupt the tribunal.
    - **Rule 3.4(d)(4):** A lawyer shall not ask any question that the lawyer has no reasonable basis to believe is relevant to the case and is intended to degrade a witness or other person.
    - **Rule 4.4(a):** A lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such individual when representing a client.
    - **Rule 8.2:** A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.
    - **Rule 8.4(d):** A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

Incivility Toward Counsel and the Court: Topic Overview, cont.

- Appellate courts have their own rules for civility. For example, the First and Second Departments have rules on the "Importance of decorum in court." 22 NYCRR §§ 604.1(b), 700.2.
- Sanctions for violating rules can include private reprimand, public censure, suspension, and disbarment.

- Justice Sandra Day O'Connor has said that "[i]ncivility disserves the client because it wastes time and energy – time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent. According to an English proverb, 'the robes of lawyers are lined with the obstinacy of clients.' In our experience, the obstinacy of one lawyer lines the pockets of another; and the escalating fees are matched by escalating tensions. I suspect that, if opposing lawyers were to calculate for their clients how much they could save by foregoing what has been called 'Rambo-style' litigation (in money and frustration), many clients, although not all, would pass in the pyrotechnics and happily pocket the difference." Sandra Day O'Connor, *Professionalism*, 76 WASH U.L.Q. 5 (1998).

Incivility Toward Counsel and the Court: Case Study 1

In re Delio, 290 A.D.2d 61 (1st Dep't 2001)

- **Facts:** An attorney told a housing court judge who had dismissed his case, "You're so pompous on the bench. It's ridiculous. You should remember what your jobs are … I don't have to respect you…. " After the case was dismissed, the attorney moved to restore the case to the calendar and wrote in an affirmation that "the Court defends these rules with pomposity and arrogance rather than logic or substantive meaning … irrational behavior is not justice or jurisprudence. The Court, when it suits it political temperament is quick to create standards that are unsupported in the law and are thereafter defended …."

- **Outcome:** The court found that the attorney had engaged in conduct that was prejudicial to the administration of justice, engaged in undignified and discourteous conduct which was degrading to a tribunal, and engaged in conduct which adversely reflected on his fitness to practice law. As a result, the attorney was publicly censured. The court decided against a three-month bar because the attorney expressed remorse, cooperated with the disciplinary proceedings, and had a previously unblemished record.

- **Key Takeaway:** Appellate practitioners might feel a desire to impugn a judge that ruled against them below. This is unwise, especially when done in court papers, which may invite a harsher punishment than spontaneous outbursts in a courtroom. Courts, however, will look to mitigating factors such as remorse, cooperation, and past behavior before imposing sanctions.

Incivility Toward Counsel and the Court: Case Study 2

Principe v. Assay Partners, 586 N.Y.S.2d 182 (Sup. Ct. 1992)

- **Facts:** During a deposition, one attorney called another attorney "little lady," "little mouse," "young girl" and "little girl," which "were accompanied by disparaging gestures" such as "dismissively flicking his fingers and waving a back hand."

- **Outcome:** This court opined that the remarks were "a paradigm of rudeness, and condescend, disparage, and degrade a colleague upon the basis that she is female." The court focused on the seriousness of gender bias, which "cannot be permitted to find a safe haven in the practice of law or in the workings of the courts and the judiciary." The court ultimately sanctioned the attorney $1,000.

- **Key Takeaway:** Although rude behavior between counsels might be more common at the trial court level, appellate practitioners should also avoid acting uncourteously toward other lawyers. Courts are particularly likely to impose sanctions when attorneys make disparaging comments about the gender, race, or ethnicity of another attorney. *See also In re Monaghan*, 295 A.D.2d 38, 39, 743 N.Y.S.2d 519, 520 (2d Dep't 2002) (publicly censuring attorney for race-related "harangue of [opposing counsel] for her alleged mispronunciation of [certain] words").

F. Duty of Competence: Topic Overview

- The duty of competence can be in violation of a rule of the New York Rules of Professional Conduct.

    - **Rule 1.1(a):** "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

    - **Rule 1.1(b):** "A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle it."

- One common recent issue is a lawyer's duty of technological competence. New York is one of the states that adopted the ABA's amendments to Model Rule 1.1 in 2015.

    - Accordingly, the ABA's Model Rules were modified to address technological issues by requiring the duty of competence to require keeping "abreast of changes in the law and its practice," of which further includes knowing "the benefits and risks associated with relevant technology."

    - However, the version adopted by the NYSBA differs by providing that a lawyer shall "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."

    - The most common areas where technological competence is reasonably necessary

are: (1) data security and safeguarding client's information, (2) electronic discovery, (3) technology used by lawyers to run their practices such as electronic research, electronic calendars, emails, etc., (4) technology used by client to design an manufacture products that they sell or use and attorneys defend, and (5) technology used to present information in a courtroom.

- Another common issue regarding the duty of competence is neglecting client matters and ineffective or incompetent representation.

Duty of Competence: Case Study 1
Cajamarca v. Regal Entmt. Grp., 2012 WL 3782437 (EDNY 2012)

- **Facts:** Defendant files motion for sanctions and attorneys' fees. Plaintiff claimed to have PTSD from a sexual abusive co-worker and further claimed that she was in a "bedridden" and "vegetative state," which gave rise to the sexual harassment lawsuit. However, her Facebook page revealed, "an extraordinarily active travel and social life" and also consisted of "sexual banter with friends."

- **Outcome:** Court granted defendant's motion, sanctioning the plaintiff's counsel in the amount of $3,000 for, among other things, failing to investigate a client's social media. Specifically, the Court stated that the attorney "did an extraordinarily poor job of client intake in not learning highly material information about his client, and setting up an expert psychiatric interview where the psychiatrist, charged with diagnosing a claim of PTSD solely as a result of an alleged five minute instance of exhibitionism, had no idea that plaintiff was a former prostitute."

- **Key Takeaway:** An attorney who lacks knowledge and competence pertaining to the various social media platforms, should look to professionals in the field of electronic discovery for assistance in dealing with social media.

Duty of Competence: Case Study 2
In re Einhorn, 428 Fed. Appx. 26 (2nd Cir. 2011)

- **Facts:** Court referred attorney to the Committee for investigation of certain matters. Attorney frequently failed to meet the Court's filing deadlines of briefs or other documents as well as extensions of time, resulting in dismissals of four criminal appeals of which were later reinstated.

- **Outcome:** Attorney was publicly reprimanded and found to have neglected legal matters entrusted to him. Furthermore, attorney's conduct was mitigated by factors such as evident remorse, lack of a selfish motive and good-faith willingness to cooperate with the

Committee as well as the Court.

- **Key Takeaway:** An attorney should carry out the obligations he/she has assumed to his/her client and not consciously disregard the responsibility owed to the client. Despite not having a corrupt motive or moral turpitude, indifference and a consistent failure to carry out its obligations may be deemed neglect.

G. Ghost Writing: Topic Overview

- Ghostwriting may pertain to two rules of the New York Rules of Professional Conduct:
    - **Rule 1.2(c):** "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent...."
    - **Rule 6.1:** Lawyers "should aspire to provide at least 50 hours of pro bono legal services each year to poor persons...."
- Within the professional responsibility ethics opinions, the trend appears to be toward approving ghostwriting. Furthermore, The New York County Lawyers Association has been more liberal in opining that such disclosure need only be made "when necessary."
- The Second Circuit amended its local rules in 2012 to require pro se litigants to affirmatively disclose attorney assistance, as specifically stated in Local Rule 32.2:
    - "A pro se party who submits a paper that an attorney has drafted in whole or substantial part must state at the beginning of the paper, 'This document was drafted in whole, or substantial part, by an attorney." Unless the Court orders otherwise, the attorney's identity and address need not be disclosed.

Ghost Writing: Topic Overview, cont.

- Considering there has been a lack of direction from the courts pertaining to ghostwriting, there are several ethics opinions that offer guidance. The relevant New York opinions pertaining to ghost writing are as follows:
    - **NYC Bar Op. 1987-2**: This opinion rejected ghostwriting without disclosure and proposed that the lawyer endorse pleadings with a statement that they were "prepared by counsel." Furthermore, the opinion emphasized that pro se pleadings are treated more liberally and that nondisclosure would be disadvantageous to adversary and the court. Therefore, under the NYC's Bar Opinion, nondisclosure can

be deemed a misrepresentation to the court and adversary "where assistance is active and substantial or includes the drafting of pleadings."

- **NYSBA Op. 613 (1990)** - Similarly to the NYC Bar's formal opinion, NYSBA Committee concluded that a lawyer's role should be disclosed. It emphasized the importance of pro bono legal work and that "the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession." However, it found that "the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's name." Significantly, the NYSBA committee parted company with the NYC Bar on the degree of disclosure, 'concluding that the lawyer must disclose his name on the pleading simply indicating that a lawyer assisted with its preparation is not enough.'

- **NYCLA Op. 742 (April 16, 2010)** - The most recent opinion of which concluded that it is ethically permissible for a lawyer to prepare litigation materials for a client without disclosing the attorney's participation.

Ghost Writing: Case Study 1

In re Fengling Liu, 109 A.D.3d 284 (1st Dep't 2013)

- **Facts:** Immigration attorney was involved in pro se petitions and undisclosed ghostwriting. Attorney claims to have been unaware of any general obligation to disclose her participation to the Court.

- **Outcome:** The Court concluded that ghostwriting did not constitute misconduct and therefore public censure was the appropriate discipline. The First Department explained:
  - '[i]n light of this Court's lack of any rule or precedent governing attorney ghostwriting, and the various authorities that permit that practice, we conclude that [respondent] could not have been aware of any general obligation to disclose her participation to this Court. We also conclude that there is no evidence suggesting that [respondent] knew, or should have known, that she was withholding material information from the Court or that she otherwise acted in bad faith. The petitions for review now at issue were fairly simple and unlikely to have caused any confusion or prejudice. Additionally, there is no indication that [respondent] sought, or was aware that she might obtain, any unfair advantage through her ghostwriting. Finally, [respondent's] motive in preparing the petitions—to preserve the petitioners' right of review by satisfying the thirty-day jurisdictional deadline—demonstrated concern for her clients rather than a desire to mislead this Court or opposing parties. Under these circumstances, we conclude that [respondent's] ghostwriting did not constitute misconduct and therefore does not warrant the imposition of discipline'. On the issue of sanction, the Court opined, in pertinent part: '[a]lthough we have found that [respondent's] ghostwriting did not constitute misconduct, we conclude

that her other misconduct was sufficiently serious to warrant a public, rather than private, reprimand.'

- **Key Takeaway:** The safest course of action is to follow the NYSBA Opinion and be over inclusive to avoid potential violations. Therefore, a lawyer should disclose his/her assistance and identity while also ensuring that his/her limited scope agreement with the client complies with Rule 1.2.

Attachment No. 1

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) REQUESTS.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) INSTRUCTIONS. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) OBJECTIONS.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) ASSIGNING ERROR; PLAIN ERROR.

(1) *Assigning Error*. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) *Plain Error*. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007.)

Attachment No. 2

Rule 103 – Rulings on Evidence

(a) **Preserving a Claim of Error**. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) **Not Needing to Renew an Objection or Offer of Proof**. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) **Court's Statement About the Ruling; Directing an Offer of Proof**. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) **Preventing the Jury from Hearing Inadmissible Evidence**. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) **Taking Notice of Plain Error**. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Attachment No. 3

Practice Rules of the Appellate Division

Approved by Joint Order of the Departments of the New York State
Supreme Court, Appellate Division
December 12, 2017

Part 1250

1250.1 General Provisions and Definitions

(a) Unless the context requires otherwise, as used in this Part:

(1) The word "cause" or "matter" includes an appeal, a special proceeding transferred to the Appellate Division pursuant to CPLR 7804 (g), a special proceeding initiated in the Appellate Division, and an action submitted to the Appellate Division pursuant to CPLR 3222 on a case containing an agreed statement of facts upon which the controversy depends.

(2) Any reference to the "court" or the "Appellate Division" means the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over the cause or matter; any reference to a "justice" means a justice of that court; any reference to the "clerk" means the clerk of that court or a designee, unless the context of usage indicates the clerk of another court.

(3) Wherever reference is made to a "judgment," "order" or "determination," it shall also be deemed to include a sentence.

(4) The word "consolidation" refers to the combining of two or more causes arising out of the same action or proceeding in one record or appendix and one brief.

(5) The phrase "cross appeal" refers to an appeal taken by a party whose interests are adverse to a party who previously appealed from the same order or judgment as relates to that appeal and cross appeal.

(6) The word "concurrent," when used to describe appeals, shall refer to those appeals which have been taken separately from the same order or judgment by parties whose interests are not adverse to one another as relates to those appeals.

(7) The word "appellant" shall refer to the party required to file the initial brief to the court in a cause or matter, including an appellant, a petitioner, an appellant-respondent and similar parties.

(8) The term "NYSCEF" shall mean the New York State Courts Electronic Filing System and the "NYSCEF site" shall mean the New York State Courts Electronic Filing System website located at www.nycourts.gov/efile.

(9) The phrase "filed electronically," when used to describe submissions to a court, shall refer to documents that have been filed by electronic means through the NYSCEF site.

(10) The phrase "electronic means" shall mean any method of transmission of information between computers or other machines, other than facsimile machines.

(11) The phrase "hard copy" shall mean a document in paper format.

(12) The phrase "digital copy" shall mean a document in text-searchable portable document format and otherwise compliant with the technical requirements established by the court.

(b) Number of Justices. When a cause is argued or submitted to the court with four justices present, it shall, whenever necessary, be deemed submitted also to any other duly qualified justice of the court, unless objection is noted at the time of argument or submission.

(c) Filing and Service; Weekends and Holidays.

(1) Filing

(i) Electronic filing. For the purpose of meeting deadlines imposed by court rule, order, or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions filed electronically will be deemed filed as of the time copies of the submissions are transmitted to the NYSCEF site. The filing of additional hard copies of such electronic filings pursuant to court rules shall not affect the timeliness of the filing.

(ii) Hard copy filing. For the purpose of meeting deadlines imposed by court rule, order or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions not filed electronically will be deemed filed as of the time hard copies of the submissions are received and stamped by the office of the clerk.

(iii) A document deemed filed for purposes of timeliness under this rule may thereafter be reviewed and rejected by the clerk for failure to comply with any applicable statute, rule or order.

(2) Proof of Service. All hard copy filings shall be accompanied by proof of service upon all necessary parties pursuant to CPLR 2103.

(3) Service by Mail and Overnight Mail. If a period of time prescribed by this Part is measured from the service of a record, brief or other submission and service is by mail, five days shall be added to the prescribed period. If service is by overnight delivery, one day shall be added to the prescribed period.

(4)Service by Electronic Mail Upon Consent. Unless otherwise directed by the court, parties in matters not subject to e-filing may agree, in writing, to service of submissions by electronic mail. A copy of any such agreement shall be filed with the court with the affidavit of service.

(5)Weekends and Holidays. If a period of time prescribed by this Part for the performance of an act ends on a Saturday, Sunday or court holiday, the act will be deemed timely if performed before the close of business on the next business day.

(d)Signing of documents. The original of every hard copy document submitted for filing in the office of the clerk of the court shall be signed in ink in accordance with the provisions of section 130-1.1-a (a) of this Title. Copies of the signed original shall be served upon all parties to the matter and shall be filed in the office of the clerk whenever multiple copies of a submission are required to be served and filed in accordance with the provisions of this Part. Documents filed electronically shall be signed in accordance with the provisions of the Appellate Division Rules for Electronic Filing.

(e)Confidentiality and Sealing.

(1)Records, briefs and other submissions filed in matters deemed confidential by law shall not be available to the public except as provided by statute or rule.

(2)Appeals and proceedings that are confidential by law include, but are not limited to:

(i) Matters arising pursuant to the Family Court Act (Family Court Act § 166).

(ii) Matrimonial actions and proceedings (Domestic Relations Law § 235; CPLR 105 [p]).

(iii) Adoption proceedings (Domestic Relations Law § 114).

(iv) Youthful offender adjudications (CPL 720.35 [2]; 725.15).

(v) Proceedings pursuant to article 6 of the Social Services Law (Social Services Law § 422 [4] [a]).

(vi) In criminal matters not otherwise confidential, records of grand jury proceedings (CPL 190.25 [4]), grand jury reports (CPL 190.85) and presentence reports and memoranda (CPL 390.50).

(vii) Proceedings pursuant to Civil Rights Law § 50-b.

(viii) Proceedings pursuant to Judiciary Law § 90 (10).

(3)Applications for sealing and unsealing court records shall be made by motion, upon good cause shown.

(4)In a civil cause, documents that are subject to an existing sealing order from another court shall remain subject to such order, except as otherwise ordered by the Appellate Division.

(f) Appellate Division Numbers. All documents filed with the court shall prominently display the name of the court of original instance, the index number or indictment number of the case in such court, if any, and any number assigned by the Appellate Division.

(g)Rejection for Noncompliance. The clerk may reject any submission that does not comply with this Part, is incomplete, is untimely, is not legible, or fails to comply with any applicable statute, rule or order. The court may waive compliance by any party with any provision of this Part.

(h)Sanctions. An attorney or party who fails to comply with a rule or order of the court or who engages in frivolous conduct shall be subject to such sanction as the court may impose. The imposition of sanctions and costs may be made upon motion or upon the court's own initiative, after a reasonable opportunity to be heard. The court may impose sanctions and/or costs upon a written decision setting forth the conduct on which the imposition is made.

Settlement or Withdrawal of Motion, Appeal or Proceeding; Notice of Change in Circumstances

(a) Withdrawal of Motion. A moving party may file a written request to withdraw a motion at any time prior to its determination.

(b)Withdrawal or Discontinuance of Appeal or Proceeding.

(1) Unperfected appeals, or proceedings where issue has not been joined, may be withdrawn and discontinued by letter application to the court, with service on all parties.

(2) An appeal that has been perfected or a proceeding where issue has been joined may be withdrawn and discontinued by leave of the court upon the filing with the court of a written stipulation of discontinuance signed by the parties or their attorneys and, in criminal appeals, by the appellant personally. Absent such a stipulation, an appellant may move for pennission to withdraw such an appeal or proceeding.

(c)Notice of Change of Circumstances. The parties or their attorneys shall immediately notify the court when there is a settlement of a matter or any issue therein or when a matter or any issue therein has been rendered moot. The parties or their attorneys shall likewise immediately notify the court if the cause should not be calendared because of the death of a party, bankruptcy or other appropriate event. Any such notification shall be followed by an application for

appropriate relief. Any party or attorney who, without good cause shown, fails to comply with the requirements of this subdivision may be subject to the imposition of sanctions.

Initial Filings; Active Management of Causes; Settlement or Mediation Program

(a) Initial Filings. Unless the court shall direct otherwise, in all civil matters counsel for the appellant or the petitioner shall file with the clerk of the court of original instance and serve on all parties, together with the notice of appeal or transfer order and the order or judgment appealed from, an initial informational statement on a form approved by the court and in such number as the court may direct. The clerk of the court from which the appeal is taken shall promptly transmit to the Appellate Division the informational statement and a copy of the notice of appeal or order granting leave or transferal and the order or judgment appealed from.

(b)Active Management. The court may direct that any matter be actively managed and may set forth a scheduling order specifying the time and manner of expedited briefing.

(c)Settlement or Mediation Program.

(1) The court may issue a notice in any settlement or mediation program directing the attorneys for the parties, the parties themselves (unless the court excuses a party's personal presence), and such additional parties in interest as the court may direct to attend a conference before such person as it may designate to consider settlement, the limitation of issues and any other matter that such person determines may aid in the disposition of the appeal or resolution of the action or proceeding. Attorneys and representatives who appear must be fully familiar with the action or proceeding, and must be authorized to make binding stipulations or commitments on behalf of the party represented.

(2) Counsel to any party may apply to the court by letter at any time requesting such a conference. The application shall include a brief statement indicating why a conference would be appropriate.

(3) Upon the failure of any party, representative or counsel to appear for or participate in a settlement or mediation conference, or to comply with the terms of a stipulation or order entered following such a conference, the party or counsel may be subject to sanctions.

Motions

(a) General.

(1) Day and time returnable. Unless otherwise required by statute, rule or order of the court or any justice thereof, every motion and every proceeding initiated in the court shall be made returnable at 10:00 a.m. on any Monday (or, if Monday is a legal holiday, the first business day of the week), and on such other days as the court may direct.

(2) Commencement; filing. All motions initiated by notice of motion shall be filed with the clerk at least one week before the return date. The originals of all such submissions shall be filed, together with proof of service upon all parties entitled to notice. Motions by any other method shall be as directed by the court or a justice thereof.

(3) The submissions in supp01i of every motion made before the appeal is detennined shall include a copy of the order, judgment or determination sought to be reviewed, the decision, if any, and the notice of appeal or other document which first invoked the jurisdiction of the court, with proof of filing.

(4) Notice and service of documents. Unless otherwise directed by the court, a motion shall be served with sufficient notice to all parties as set forth in CPLR 2103. In computing the notice period, the date upon which service is made shall not be included.

(5) Answering and reply documents, if any, shall be served within the time prescribed by CPLR 2214 (b) or directed by a justice of the court. The originals thereof with proof of service shall be filed by 4:00 p.m. of the business day preceding the day on which the motion is returnable, unless, for good cause shown, they are permitted to be filed at a later time.

(6) Cross motions. Cross motions shall be made returnable on the same date as the original motion. A cross motion shall be served, either personally, by overnight delivery service or by electronic means, and filed at least three business days before the return date.

(7) Motions shall be deemed submitted on the return date, and no further documents shall be accepted for filing without leave of the court upon written application.

(8) Oral argument. Oral argument of motions is not permitted.

(9) One adjournment, for a period of 7 orl 4 days, shall be permitted upon written consent of the parties to the appeal, filed no later than 10:00 a.m. on the return date.

(b) Motions or Applications Which Include Requests for Interim Relief.

(1) An application or order to show cause presented for signature that includes a request for a temporary stay or other interim relief pending determination of a motion, or an application pursuant to CPLR 5704, shall be presented in person unless the court excuses such appearance, and shall state, among other things:

(i) the nature of the motion or proceeding;

(ii) the specific relief sought; and

(iii) the names, addresses, telephone numbers and (where known) email addresses of the attorneys and counsel for all parties in support of and in opposition to the motion or proceeding.

(2)Notice. The party seeking relief as provided in this subdivision shall give reasonable notice to his or her adversary of the day and time when, and the location where, the application or order to show cause will be presented and the relief (including interim relief) being requested. The application or order to show cause shall be accompanied by an affidavit or affirmation stating the time, place and manner of such notification; by whom such notification was given; if applicable, reasons for the non-appearance of any party; and, to the extent known, the position taken by the opposing party.

(3)Response. Unless otherwise ordered by the court, all submissions in opposition to any motion or proceeding initiated by an application or order to show cause shall be filed with the clerk at or before 10:00 a.m. on the return date, and shall be served by a method calculated to place the movant and other parties to the motion in receipt thereof on or before that time. The originals of all such submissions shall be filed with the court. On the return date the motion or proceeding will be deemed submitted to the court without oral argument.

(4)Reply. Reply submissions shall be permitted only by leave of the court.

(c) Pern1ission to Appeal to the Appellate Division in a Civil Matter.

(1) When Addressed to a Justice.

(i) An application to a justice of the court for permission to appeal pursuant to CPLR 5701 (c) shall be made within the time prescribed by CPLR 5513.

(ix) The submissions upon which such an application is made shall state whether any previous application has been made and, if so, to whom and the reason given, if any, for any denial of leave or refusal to entertain the application.

(2) When Addressed to the Court.

(i) Where leave of the court is required for an appeal to be taken to it, the application for such leave shall be made in the manner and within the time prescribed by CPLR 5513 and 5516.

(ii) The submissions upon which an application for leave to appeal is made shall include a copy of the order or judgment and decision, 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.

(3)Motions for leave to appeal from an order of the Appellate Term.

(i) Where applicable, motions pursuant to CPLR 5703 for leave to appeal from an order of the Appellate Term shall be made only after a denial of a motion for leave to appeal made at the Appellate Tenn.

(ii) Such motions shall include a copy of the decisions, judgments, and orders of the lower courts, including: a copy of the Appellate Term order denying leave to appeal; a copy of the record in the Appellate Term if such record shall have been printed or otherwise reproduced; and a concise statement of the grounds of alleged error. If the

application is to review an Appellate Term order which either granted a new trial or affirmed the trial court's order granting a new trial, the application shall also include the applicant's stipulation consenting to the entry of judgment absolute against him or her in the event that the Appellate Division should affirm the order appealed from.

(d) Poor Person Relief.

(1) All matters. An affidavit in support of a motion for permission to proceed as a poor person, with or without a request for assignment of counsel, shall set forth the amount and sources of the movant's income; that the movant is unable to pay the costs, fees and expenses necessary to prosecute or respond in the matter; whether trial counsel was assigned or retained; 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; and such other information as the court may require.

(2) Civil Matters.

(i) In a civil appeal or special proceeding, an affidavit in support of a motion for permission to proceed as a poor person shall, in addition to meeting the requirements of section 1250.4(d)(1) of this Part, set forth sufficient facts so that the merit of the contentions can be ascertained (CPLR 1101 [a]). This subdivision has no application to appeals described in Family Court Act §1120(a), SCPA 407(1) and Judiciary Law § 35(1).

(ii) Applicants for poor person relief in civil matters shall comply with the service requirements of CPLR 1101(c).

(3) Family Court Matters

(i) In appeals pursuant to the Family Court Act, in lieu of a motion, an application for either permission to proceed as a poor person or for permission to proceed as a poor person and assignment of counsel may be made by trial counsel assigned pursuant to Family Court Act § 262 or the attorney for the child, as appropriate, by filing with the clerk a certification of continued indigency and continued eligibility for assignment of counsel pursuant to Family Court Act § 1118.

(iii)Counsel shall attach to the certification a copy of the order from which the appeal is taken, together with the decision, if any, and a copy of the notice of appeal with proof of service and filing.

(4) Criminal Matters. In a criminal appeal not otherwise addressed in section 1250.1 l (a) of this Part, an affidavit in support of a motion for permission to proceed on appeal as a poor person shall, in addition to meeting the requirements of section 1250.4(d)(1), set forth the following: the date and county of conviction; whether the defendant is at liberty or in custody; the name and address of trial counsel; whether trial counsel was appointed or retained and, if retained, the source of the funds for such retention and an explanation as to why similar funds are not available to retain appellate counsel; whether the defendant posted bail during the trial

proceedings; and, if bail was posted and the defendant is currently in custody, an explanation as to why the funds used to post such bail are not available to retain appellate counsel.

(e) Admission Pro Hae Vice. An attorney and counselor-at-law or the equivalent may apply for permission to appear pro hac vice with respect to a particular matter pending before the court pursuant to 22 NYCRR 520.11 by providing an affidavit stating that the applicant is a member in good standing in all the jurisdictions in which the applicant is admitted to practice and that the applicant is associated with a member in good standing of the New York bar, which member

shall be the attorney of record in the matter. The applicant shall attach to the affidavit an original certificate of good standing from the court or other body responsible for regulating admission to the practice of law in the state in which the applicant maintains his or her principal office for the practice of law. The New York attorney of record in the matter shall provide an affirmation in support of the application.

(f) Leave to File Amicus Curiae Brief. A person or entity who is not a party to an appeal or proceeding may make a motion to serve and file an amicus curiae brief. An affidavit or affirmation in support of the motion shall briefly set forth the issues to be briefed and the movant's interest in the issues, and shall include six copies of the proposed brief. The proposed brief may not duplicate arguments made by a party to the appeal or proceeding. Unless pennitted by the court, a person or entity granted permission to file an amicus curiae brief shall not be entitled to oral argument.

Methods of Perfecting Causes

(a) Unless the court directs that a cause be perfected in a particular manner, an appellant may elect to perfect a cause by the reproduced full record method (CPLR 5528 [a] [5]); by the appendix method (CPLR 5528 [a] [5]); by the agreed statement in lieu ofrecord method (CPLR 5527); or, where authorized by statute or this Part or order of the court, by the original record method.

(b) Reproduced Full Record Method. If the appellant elects to proceed on a reproduced full record on appeal, the record shall be printed or otherwise reproduced as provided in sections 1250.6 and 1250.7 of this Part.

(c) Appendix Method. Ifthe appellant elects to proceed by the appendix method, the appendix shall be printed or otherwise reproduced as provided in sections 1250.6 and 1250.7 of this Part.

(d) Agreed Statement in Lieu of Record Method. Ifthe appellant elects to proceed by the agreed statement method in lieu of record method, the statement shall be reproduced as a joint appendix as provided in sections 1250.6 and 1250.7 of this Part. The statement required by CPLR 5531 shall be appended.

(e) Original Record Method. The following causes may be perfected upon the original record, including a properly settled transcript of the trial or hearing, if any:

(1) appeals from the Family Court;

(2) appeals under the Election Law;

(3) appeals under the Human Rights Law (Executive Law § 298);

(4) proceedings transferred to the court pursuant to CPLR 7804 (g)

(5) appeals where the sole issue is compensation of a judicial appointee;

(6) appeals under Correction Law §§ 168-d (3) and 168-n (3);

(7) appeals of criminal causes;

(8) appeals from the Appellate Term, where the matter was perfected on an original record at the Appellate Term;

(9) other causes where an original record is authorized by statute; and

(10) causes where permission to proceed upon the original record has been authorized by the court.

Reproduction of Records, Appendices and Briefs

(a) Compliance with the CPLR. Briefs, appendices and reproduced full records shall comply with the requirements of CPLR 5528 and 5529, and reproduced full records shall, in addition, comply with the requirements of CPLR 5526.

(b) Method of Reproduction. Briefs, records and appendices shall be reproduced by any method that produces a pennanent, legible, black image on white paper or its digital equivalent. Use of recycled paper and reproduction on both sides of the paper is encouraged for hard copy filings and submissions.

(c) Paper Quality, Size and Binding. Paper shall be of a quality approved by the chief administrator of the courts and shall be opaque, unglazed, white in color and measure 11 inches along the bound edge by 8Y2 inches. Records, appendices and briefs shall be bound on the left side in a manner that shall keep all the pages securely together; however, binding by use of any metal fastener or similar hard material that protrudes or presents a bulky surface or sharp edge is prohibited. Records and appendices shall be divided into volumes not to exceed two inches in thickness.

(d) Designation of Parties. The parties to all appeals shall be designated in the record and briefs by adding the word "Appellant," "Respondent," etc., as the case may be, following the party's name, e.g., "Plaintiff-Respondent," "Defendant-Appellant," "Petitioner-Appellant," "Respondent Respondent," etc. Parties who have not appealed and against whom the appeal has

not been taken shall be listed separately and designated as they were in the trial court, e.g., "Plaintiff," "Defendant," "Petitioner," "Respondent." In appeals from the Surrogate's Court or from judgments on trust accountings, the caption shall contain the title used in the trial court including the name of the decedent or grantor, followed by a listing of all parties to the appeal, properly designated. In causes originating in the Appellate Division, the parties shall be designated "Petitioner" and "Respondent" or "Plaintiff ' and "Defendant."

(e) Docket Number. The cover of all records, briefs and appendices shall display the appellate division docket number assigned to the cause, or such other identifying number as the court shall direct, in the upper right-hand portion opposite the title.

Form and Content of Records and Appendices; Exhibits

(a) Format. Records and appendices shall be consecutively paginated and shall include accurate reproductions of the submissions made to the court of original instance, formatted in accordance with the practice in that court. Reproductions may be slightly reduced in size to fit the page and to accommodate the page headings required by CPLR 5529 (c), provided, however, that such reduction does not significantly impair readability.

(b) Reproduced Full Record. The reproduced full record shall be bound separately from the brief, shall include the items set forth in CPLR 5526, and shall include in the following order so much of the following items as shall be applicable to the particular cause:

(1)A cover which shall contain the title of the cause on the upper portion, and, on the lower portion, the names, addresses, telephone numbers and email addresses of the attorneys, the county clerk's index or file number, the docket or other identifying number or numbers used in the court from which the appeal is taken, and the superior court information or indictment number;

(2)The statement required by CPLR 5531;

(3)A table of contents which shall list and briefly describe each document included in the record. The part of the table relating to the transcript of testimony shall separately list each witness and the page at which direct, cross, redirect and re-cross examinations begin. The part of the table relating to exhibits shall concisely indicate the nature or contents of each exhibit and the page in the record where it is reproduced and where it is admitted into evidence;

(4)The notice of appeal or order of transfer, judgment or order appealed from, judgment roll, corrected transcript or statement in lieu thereof, exhibits, and any opinion or decision in the cause;

(5)An affirmation, certification, stipulation or order, settling the transcript pursuant to CPLR 5525;

(6)A stipulation or order dispensing with reproducing exhibits, as provided in subdivision (c).

(7) The appropriate certification, stipulation, or settlement order pursuant to subdivision (g).

(c) Exhibits. The parties may stipulate to dispense with reproduction of exhibits in the full reproduced record on grounds that (1) the exhibits are not relevant or necessary to the determination of an appeal, and will not be cited in the parties' submissions; or (2) the exhibits, though relevant and necessary, are of a bulky or dangerous nature, and will be kept in readiness and delivered to the court on telephone notice.

(d) Appendix.

(1) The appendix shall include those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent including, where applicable, at least the following:

(i) notice of appeal or order of transfer;

(ii) judgment, decree or order appealed from;

( ) decision and opinion of the court or agency, and report of a referee, if any;

(iii) pleadings, and in a criminal case, the indictment or superior court information;

(iv) material excerpts from.transcripts of testimony or from documents in connection with a motion. Such excerpts shall include all the testimony or avennents upon which the appellant relies and upon which it may be reasonably assumed the respondent will rely. Such excerpts shall not be misleading or unintelligible by reason of incompleteness or lack of surrounding context;

(v) copies ofrelevant exhibits, including photographs, to the extent practicable;

(i) if petiinent, a statement identifying bulky, oversized or dangerous exhibits relevant to the appeal, as well as identifying the party in custody and control of each exhibit; and

(ii) the appropriate certification, stipulation or settlement order pursuant to subdivision (g).

(2) The appendix shall have a cover complying with subdivision (b)(l) and shall include the statement required by CPLR 5531 and a table of contents.

(3) The court may require such other contents in an appendix in a criminal cause as it deems appropriate.

(4) If a settled transcript of the stenographic minutes, or an approved statement in lieu of such transcript, is not included in the submissions, the appellant shall cause a digital copy of such transcript or statement to be filed together with the brief.

(e) Condensed Format of Transcripts Prohibited. No record or appendix may include a transcript of testimony given at a trial, hearing or deposition that is reproduced in condensed format such that two or more pages of transcript in standard format appear on one page, unless the transcript was submitted in that format to the court from which the appeal is taken

(f) Settlement of Transcript or Statement. Regardless of the method used to prosecute any civil cause, if the record includes a transcript of the stenographic minutes of the proceedings or a statement in lieu of such transcript, such transcript or statement shall first be either stipulated as co1Tect by the parties or their attorneys or settled pursuant to CPLR 5525.

(g) Certification of Record or Appendix. A reproduced full record or an appendix shall be certified either by: (1) a certificate of the appellant's attorney pursuant to CPLR 2105; (2) a certificate of the proper clerk; or (3) a stipulation in lieu of certification pursuant to CPLR 5532 or, if the parties are unable to stipulate, an order settling the record. The reproduced copy containing the signed certification or stipulation shall be marked "Original." A party may move to waive certification pursuant to this rule for good cause shown, and shall include with the motion a copy of the proposed record or appendix.

Form and Content of Briefs

(a) Cover. The cover shall set forth the title of the action or proceeding. The upper right-hand section shall contain a notation stating: whether the cause is to be argued or submitted; if it is to be argued, the time actually required for the argument; and the name of the attorney who will argue. The lower right-hand section shall contain the name, address, telephone number and email address of the attorney filing the brief and shall indicate whom the attorney represents.

(b) Appellant's Brief. The appellant's brief shall include, in the following order:

(1) a table of contents, which shall include (i) a list of point headings and (ii) the contents of the appendix, if it is not bound separately, with references to the initial page of each document included and of the direct, cross and redirect examination of each witness;

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

(3) a concise statement, not exceeding two pages, of the questions involved, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;

(4) a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with appropriate citations to the reproduced record, appendix, original record or agreed statement in lieu of record;

(5) the argument for the appellant, which shall be divided into points by appropriate headings distinctively printed;

(6) a statement certifying compliance with printing requirements under this Part, on a form approved by the court, as set forth in subdivision (j).

(c) Respondent's Brief. The respondent's brief shall conform to the requirements of subdivision (b), except that a counterstatement of the questions involved or a counterstatement of the nature and facts of the case shall be included only if the respondent disagrees with the statement of the appellant.

(d) Reply Brief. Any reply brief of the appellant or cross appellant shall conform to the requirements of subdivision (b), without repetition. An appellant's reply in a cross appeal shall include the points of argument in response to the cross appeal.

(e) Sur-reply Brief. Absent leave of the court, sur-reply briefs shall not be pennitted.

(f) Computer-generated briefs.

(1) Briefs prepared on a computer shall be printed in either a serifed, propo1tionally spaced typeface such as Times Roman, or a serifed, monospaced typeface such as Courier. Narrow or condensed typefaces and/or condensed font spacing may not be used. Except in headings and in quotations of language that appears in such type in the original source, words may not be in bold type or type consisting of all capital letters.

(i) Briefs set in a proportionally spaced typeface. The body of a brief utilizing a proportionally spaced typeface shall be printed in 14-point type, but footnotes may be printed in type of no less than 12 points.

(ii) Briefs set in a monospaced typeface. The body of a brief utilizing a monospaced typeface shall be printed in 12-point type containing no more than 10\12 characters per inch, but footnotes may be printed in type of no less than 10 points.

(2) Computer-generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k).

(g) Typewritten briefs.

(1) Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch. The original of the brief shall be signed and filed as one of the number of copies required by section 1250.9 of this Part.

(2) Typewritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k).

(h) Margins, line spacing and page numbering of computer-generated and typewritten briefs. Computer-generated and typewritten briefs shall have margins of one inch on all sides of the page. Text shall be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Pages shall be numbered consecutively.

(i) Handwritten briefs.

(1)Self-represented litigants and persons filing pro se supplemental briefs may serve and file handwritten briefs. Such briefs shall be neatly prepared in cursive script or hand printing in black or blue ink.

(2)Handwritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance or any addendum authorized pursuant to subdivision (k). Pages shall be numbered consecutively. The submission of handwritten briefs is not encouraged. If illegible, handwritten briefs may be rejected for filing by the clerk.

G) Printing Specifications Statement. Every brief, except those that are handwritten, shall have at the end thereof a printing specifications statement, stating that the brief was prepared either on a typewriter, a computer or by some other specified means. Ifthe brief was typewritten, the statement shall further specify the size and pitch of the type and the line spacing used. Ifthe brief was prepared on a computer, the statement shall further specify the name of the typeface, point size, line spacing and word count. A party preparing the statement may rely on the word count of the processing system used to prepare the brief. The signing of the brief in accordance with section 130-1.1-a (a) of this Title shall also be deemed the signer's representation of the accuracy of the statement.

(k) Briefs may include an addendum composed of decisions, statutes, ordinances, rules, regulations, local laws, or other similar matter cited therein that were not published or that are not otherwise readily available.

Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Appellant's Filing. Except where the court has directed that an appeal be perfected by a particular time, an appellant shall file with the clerk within six months of the date of the notice of appeal or order granting leave to appeal:

(1) if employing the reproduced full record method, an original and five hard copies of a reproduced full record, an original and five hard copies of appellant's brief, and one digital copy of the record and brief, with proof of service of one hard copy of the record and brief upon each other party to the appeal; or

(2) if employing the appendix method, an original, five hard copies and one digital copy of appellant's brief and appendix, with proof of service of one hard copy of the brief and appendix upon each other party to the appeal, and either:

(i) in the First and Second Judicial Departments, proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division, or record.

(ii) in the Third and Fourth Judicial Departments, a digital copy of the complete

(3) if employing the agreed statement in lieu of record method, an original and five hard copies of the agreed statement in lieu ofrecord as provided in CPLR 5527, an original and five hard copies of appellant's brief, and one digital copy of the agreed statement and the brief, with proof of service of one hard copy of the agreed statement and brief upon each other party to the appeal; or

(4) if employing the original record method, an original and five hard copies and one digital copy of appellant's brief, with proof of service of one hard copy the brief upon each other party to the appeal and either:

(i) in the First and Second Judicial Departments, proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division, or record.

(ii) in the Third and Fourth Judicial Departments, a hard copy of the complete

(b) Extension of time to perfect appeal. Except where the court has directed that the appeal be perfected by a particular time, the parties may stipulate, or in the alternative an appellant may apply by letter, on notice to all parties, to extend the time to perfect an appeal up to 60 days. Any such stipulation shall be filed with the court. The appellant may thereafter apply by letter, on notice to all parties, to extend the time to perfect by up to an additional 30 days. Any further application for an extension of time to perfect the appeal shall be made by motion.

(c) Respondent's Filing. The respondent on an appeal shall file with the clerk within 30 days of the date of service of the appellant's submissions or, in the First Judicial Department, in accordance with the court's published terms calendar:

(1) under the full record method, the agreed statement in lieu of record method, or the original record method, an original and five hard copies and one digital copy of the respondent's brief, with proof of service of one hard copy of the brief upon each party to the appeal; or

(2) under the appendix method, an original and five hard copies and one digital copy of the respondent's brief and appendix, if any, with proof of service of one hard copy of the brief and appendix, if any, upon each party to the appeal.

(d) Appellant's Reply. The appellant shall file with the clerk an original, five hard copies and one digital copy of the appellant's reply brief, with proof of service of one hard copy of the brief upon each party to the matter, within 10 days of the date of service of the respondent's submissions or, in the First Judicial Department, in accordance with the court's published terms calendar.

(e) Pro se or unrepresented parties shall be exempt from the requirement of the filing of a digital copy of any brief or other document.

(f) Cross Appeals; Concurrent Appeals from Single Order or Judgment; Consolidation of Appeals from Multiple Orders or Judgments.

(1) Cross appeals. In a cross appeal:

(i) The appealing parties shall consult and make best efforts to stipulate to a briefing schedule. In the First Judicial Department, if the parties fail to stipulate to an alternative briefing schedule, the cause shall be perfected in accordance with the court's published terms calendar, and shall not be governed by the time parameters set forth in subsections (iv) through (vi).

(ii) The appealing parties shall file a joint record or joint appendix certified as provided in section 1250.?(g) of this Part and shall share equally the cost of that record or appendix;

(iii) The party that first perfects the appeal shall be denominated the appellant-respondent;

(iv) A respondent-appellant's answering brief shall include the points of argument on the cross appeal and, unless the parties have stipulated otherwise, shall be filed and served within 30 days after service of the first appeal brief;

(v) An appellant-respondent's reply brief shall include the points of argument in response to the cross-appeal and, unless the parties have stipulated otherwise, shall be filed and served within 30 days after service of the answering brief;

(vi) Unless the parties have stipulated otherwise, a respondent-appellant's reply brief, if any, shall be served within 10 days after service of appellant's reply brief

(2)Concurrent appeals from a single order or judgment. In concurrent appeals, the appellants shall perfect the appeals together, without motion, in the period measured from the date of the latest notice of appeal. The appellants shall file a joint record or joint appendix certified as provided in section 1250.7(g) of this Part and shall share equally the cost of that record or appendix.

(3)Appeals from multiple orders or judgments. When an appellant takes appeals from multiple orders and judgments arising out of the same action or proceeding, the appellant may perfect the appeals together, without motion and upon a single record or appendix, provided that each appeal is perfected in a timely manner pursuant to this Part.

(4)Absent an order of the court, appeals from orders or judgments in separate actions or proceedings cannot be consolidated but may, upon written request of a party, be scheduled by the court to be heard together on the same day.

(g) Extensions of Time to File and Serve Responsive Briefs. Except where the court has directed that answering or reply briefs be served and filed by a particular time, an extension of time to serve and file such briefs may be obtained as follows:

(1)By initial stipulation or application. The parties may stipulate or a party may apply by letter on notice to all parties to extend the time to file and serve an answering brief by up to 30 days, and to file a reply brief by up to 10 days. Not more than two such stipulations or applications shall be permitted. A stipulation shall not be effective unless promptly filed with the court. Any further application shall be made by motion. In the First Judicial Department, extensions by stipulation shall be filed by a date set forth in the court's published terms calendar, and shall put a matter over to any later term other than the June Term.

(2)By motion. A party may move to extend the time to file and serve a brief.

(h) Leave to File Oversized Brief. An application for permission to file an oversized brief shall be made to the clerk by letter stating the number of words or pages by which the brief exceeds the limits set forth in this section and the reasons why submission of an oversized brief is necessary. The letter shall be accompanied by a copy of the proposed brief and printing specifications statement.

(i) Constitutionality of State Statute. Where the constitutionality of a statute of the State is involved in a matter in which the State is not a party, the party raising the issue shall serve a copy of the brief upon the Attorney General of the State of New York, and file proof of service with the court. The Attorney General may thereupon intervene in the appeal.

Dismissal of a Matter

(a) Civil Matters. In the event that an appellant fails to perfect a civil matter within six months of the date of the notice of appeal, the order of transfer, or the order granting leave to appeal, as extended pursuant to section 1250.9(b) of this Part, the matter shall be deemed dismissed without further order.

(b) Criminal Matters. The court upon its own motion or the motion of a respondent may dismiss a criminal appeal pursuant to CPL 470.60.

(c) Motion to Vacate Dismissal. When an appeal or proceeding has been deemed dismissed pursuant to subdivision (a) or by order of the court for failure to perfect, a motion to vacate the dismissal may be made within one year of the date of the dismissal. In support of the motion, the movant shall submit an affidavit setting forth good cause for vacatur of the dismissal, an intent to perfect the appeal or proceeding within a reasonable time, and sufficient facts to demonstrate a meritorious appeal or proceeding.

1250.11 Additional Rules Relating to Criminal Appeals

(a) Poor Person Relief and Assigned Counsel.

(1) Continuation of eligibility for assigned counsel on appeal. Where a sentencing court has granted a defendant's application for poor person relief on appeal pursuant to CPL 380.55, the Appellate Division may, upon receipt of a properly filed notice of appeal and a copy of the order, assign appellate counsel or provide other relief without the need for further motion or application.

(2) Continuation of assigned counsel in People's appeal. Unless otherwise ordered by the court, a defendant represented in the superior court by assigned counsel shall continue to be represented by that counsel on an appeal taken by the People.

(b) Application for Certificate Granting Leave to Appeal in a Criminal Matter.

(1) An application for a certificate granting leave to appeal to the Appellate Division shall

(i) be made, in writing, within 30 days after service of the order upon the applicant;

(ii) provide 15 days' notice to the District Attorney;

(iii) be filed with proof of service; and

(iv) be submitted without oral argument.

(2) The moving papers for a certificate granting leave to appeal shall be addressed to the court for assignment to a justice, shall state that no prior application for such certificate has been made, and shall set forth:

(i) the return date;

(ii)the name and address of the party seeking leave to appeal and the name of the District Attorney;

(iii) the indictment number; and

(iii) the questions of law or fact which ought to be reviewed.

(3) The moving papers shall include:

(i) a copy of the order sought to be reviewed; and

(ii) a copy of the decision of the court below or a statement that there was none;

(iv) a copy of all submissions filed with the trial court.

(4) Answering submissions or a statement that there is no opposition to the application shall be served and filed not later than one business day before the return date stated in the application.

(c) Exhibits. If required by the court in a criminal appeal, in lieu of submitting original physical exhibits (e.g., weapons or contraband) to the court, the appellant may file a stipulation of the parties identifying the particular exhibits, identifying the party in custody and control of each exhibit and providing that each exhibit shall be made available to the court upon the request of the clerk.

(d) Briefs.

(1)There shall be included at the beginning of the main brief submitted by an appellant in any criminal cause a statement setting forth the order or judgment appealed from; the sentence imposed, if any; whether an application for a stay of execution of judgment pending determination of the appeal was made and, if so, the date of such application; whether an order issued pursuant to CPL 460.50 is outstanding, the date of such order, the name of the judge who issued it and whether the defendant is free on bail or on his or her own recognizance; and whether there were codefendants in the trial court, the disposition with respect to such codefendants, and the status of any appeals taken by such codefendants.

(2)Briefs in criminal appeals shall otherwise conform to the requirements of section

1250.8 of this Part.

(3)Assigned counsel shall file proof of mailing of a copy of briefs filed on behalf of a defendant to the defendant at his or her last known address.

(e) Expedited appeal of an order reducing an indictment or dismissing an indictment and directing the filing of a prosecutor's information.

(1) At the request of either party, the court shall give preference to the hearing of an appeal from an order reducing an indictment or dismissing an indictment and directing the filing of a prosecutor's information (CPL 210.20 (6) (c); 450.20 (1-a); 450.55), and shall detennine the appeal as expeditiously as possible.

(2) The appellant's brief in such an appeal shall include an appendix containing a copy of the notice of appeal, the indictment, the order appealed from and any underlying decision. The respondent's brief may also include an appendix, if necessary. The appellant shall file, separate from the appendix, one copy of the grand jury minutes under seal.

(f) Application for Withdrawal of Assigned Appellate Counsel Pursuant to Anders v California (386 US 738 [1967]). When assigned appellate counsel files a brief pursuant to Anders v California, counsel shall additionally either

(1) file proof that the following were mailed to the defendant at his or her last known address: (i) a copy of the brief, and (ii) a copy of a letter to the defendant advising that he or she may file a pro se supplemental brief and, if he or she wishes to file such a brief, that he or she must notify the court no later than 30 days after the date of mailing of counsel's letter of the intention to do so; or

(2) in the Fourth Judicial Department, move to be relieved as counsel pursuant to

People v. Crawford, 71 A.D.2d 38 (4th Dept. 1979).

(g) Pro Se Supplemental Briefs in Criminal Appeals Involving Assigned Counsel. When assigned appellate counsel does not file a brief pursuant to Anders v Cal{fornia, a defendant wishing to file a pro se supplemental brief shall

(1) in the First and Second Judicial Departments, move for permission to do so not later than 45 days after the date of mailing to the defendant of a copy of the brief filed by counsel; the affidavit in support of the motion shall briefly set forth the points that the defendant intends to raise in the supplemental brief; or

(2) in the Third and Fourth Judicial Departments, file the pro se supplemental brief not later than 45 days after the date of mailing to the defendant of a copy of the brief filed by counsel.

(h) Appeal from an Order Concerning a Grand Jury Report.

(1) The mode, time and manner for perfecting an appeal from an order accepting a report of a grand jury pursuant to CPL 190.85 (1) (a), or from an order sealing a report of a grand jury pursuant to CPL 190.85 (5), shall be in accordance with the provisions of this Part governing appeals in criminal cases.

(2)An appeal from such an order shall be a preferred cause.

(3)The record, briefs and other documents on such an appeal shall be sealed and not be available for public inspection except as permitted by CPL 190.85 (3).

Transferred Proceedings

(a) Transferred CPLR Article 78 Proceedings. A proceeding commenced pursuant to CPLR article 78 and transferred to the Appellate Division pursuant to CPLR 7804(g) shall be governed in the same manner as an appeal under this Part by the original record method, with the time to file the petitioner's brief measured from the date of the order of transfer.

(b) Transferred Human Rights Law Proceedings (Executive Law § 298).

(1) A proceeding under the Human Rights Law which is transferred to the Appellate Division for disposition shall be prosecuted upon the original record, which shall include:

(i) copies of all submissions filed in the Supreme Court;

(ii) the decision of the Supreme Court, or a statement that no decision was rendered;

(v) the order of transfer; and

(iii) the original record before the State Division of Human Rights, including a copy of the transcript of the public hearing.

(2) In all other respects every proceeding so transferred shall be governed by this Part in the same manner as an appeal, with the time to perfect measured from the date of the order of transfer.

(3) In the event that the original record that was before the State Division of Human Rights was not previously submitted to the Supreme Court, the Division shall file the original record with the Appellate Division within 45 days after entry of, or service upon it of a copy of the order of transfer.

Original Special Proceedings

(a) Return date. Unless otherwise required by statute or court directive, original special proceedings commenced in the Appellate Division, including original proceedings pursuant to CPLR article 78, shall be made returnable at 10:00 a.m. on any Monday or on such other days as the court may direct, with a return date not less than 20 days after service of the notice of verified petition and petition on each respondent.

(b) Necessary documents.

(1) A petitioner shall file the original and a digital copy of the notice of petition or order to show cause, the petition and the filing fee as required by CPLR 8022.

(2) Proof of service of a hard copy of the notice of petition (or order to show cause) and the petition on each respondent shall be filed not later than 15 days after the applicable statute of limitations has expired (see CPLR 306-b).

(3) Each respondent shall serve a hard copy, and shall file a hard copy and a digital copy, of an answer or other lawful response, the record before the respondent, the transcript of the hearing, if any, and the determination and findings of the respondent.

(c) Briefing and Original Record in Original Special Proceedings.

(1) In the following original special proceedings commenced in the First and Second Judicial Departments, the petitioner shall file an original, five copies and a digital copy of a brief, with proof of service of one hard copy of the brief upon each other party to the proceeding, within six months of the date of service of the answer:

(i) Eminent Domain Procedure Law § 207;

(ii) Public Service Law §§ 128 or 170;

(vi) Labor Law §§ 220 or 220-b;

(iii) Public Officers Law § 36; and

(iv) Real Property Tax Law § 1218.

In all other special proceedings commenced in the First and Second Judicial Departments, further briefing shall not be required, and the court shall determine the matter on the original submissions.

(2) In all original special proceedings filed in the Third and Fourth Judicial Departments, the petitioner shall file an original, five hard copies and one digital copy of the petitioner's brief, with proof of service of one hard copy of the brief upon each other party to the proceeding within six months of the date of service of the answer, or pursuant to such briefing schedule that the court may issue.

(3) In original special proceedings where briefing is required, the respondent to the petition shall file within 30 days of the date of service of the petitioner's brief, or, in the First Judicial Department, in accordance with the court's published terms calendar, an original, five hard copies and one digital copy of the respondent's brief, with proof of service of one hard copy of the brief upon each other party to the proceeding. Not more than ten days after service of the respondent's brief, or, in the First Judicial Department, in accordance with the court's published terms calendar, the petitioner may file an original, five hard copies and one digital copy of the petitioner's reply brief, if any.

(4)In original special proceedings where briefing is required, the period of time within which to file the petitioner's brief or respondent's brief may be extended in the manner provided for the extension of time to perfect and appeal or to file and serve responsive briefs set forth in sections 1250.9(b) and 1250.9(g) of this Part.

(5)All original special proceedings will be heard upon the original record, which shall include: (A) the notice of petition or order to show cause and petition; (B) the original record before the respondent, including a copy of the transcript of the hearing, if any; and (C) the detennination and findings of the respondents.

Miscellaneous Appeals and Proceedings

(a) Annexation Proceedings. Annexation proceedings shall be prosecuted as set forth in General Municipal Law article 17.

(b) Election Appeals. Appeals in proceedings brought pursuant to any provision of the Election Law shall be prosecuted upon the original record, pursuant to a scheduling directive of the court or clerk, with the filing and service of briefs in such number and manner as the court shall direct.

(c) Appeals from the Workers' Compensation Board and Unemployment Insurance Appeal Board. Appeals from decisions of the Workers' Compensation Board and the Unemployment Insurance Appeal Board shall be prosecuted exclusively before the Appellate Division, Third Judicial Department, in accordance with the rules established by that court.

(d) Original Proceedings under the Education Law, Public Health Law and Tax Law. Proceeding seeking review of determinations pursuant to Education Law § 6510, Public Health Law § 230-c or Tax Law § 2016 shall be prosecuted exclusively before the Appellate Division, Third Judicial Department, in accordance with the rules established by that court.

(e) Appeals of Compensation Awards to Judicial Appointees. If the sole issue sought to be reviewed on appeal is the amount of compensation awarded to a judicial appointee (i.e., referee, arbitrator, guardian, guardian ad litem, conservator, committee of the person or a committee of the property of an incompetent or patient, receiver, person designated to perform services for a receiver, such as but not limited to an agent, accountant, attorney, auctioneer or appraiser, person designated to accept service), the cause may be prosecuted by motion or as an appeal. In such event, the review may be had on the original record, and briefs may be filed at the option of the parties.

(f) Appeals from the Appellate Term. When the court has made an order granting leave to appeal from an order of the Appellate Term, the appellant shall file with the clerk of the Appellate Term a copy of the order. Thereafter the appeal may be brought on for argument by the filing of briefs in the same manner as any other cause.

(g) Submitted facts (CPLR 3222). An original agreed statement of facts in an action submitted to the court pursuant to CPLR 3222 shall be filed in the office of the county clerk, and a copy shall be appended to appellant's brief together with a statement required by CPLR 5531. Briefs shall be served and filed in the manner and in accordance with the time requirements prescribed by section 1250.9 of this Part.

Calendar Preference; Calendar Notice; Oral Argument; Post-Argument Submissions

(a) Calendar Preference.

(1)By letter. A party seeking and entitled by law to a preference in the hearing of an appeal shall provide prompt notice by letter to the court setting forth the basis for such preference.

(2)By motion. A party not entitled to a preference by law may move for a calendar preference for good cause shown.

(b) Calendar Notice. Notification that a cause has been placed on the calendar shall be published on the court's website. The court may also arrange for publication of such notice in a daily law journal or other newspaper or periodical regularly published within the Judicial Department.

(c) Oral Argument.

(1)Oral Argument Generally. Oral argument shall be permitted unless proscribed by court rnle or, in a particular cause, by the court in its discretion. Parties who do not file a brief on appeal shall not be permitted to argue a cause.

(2)Oral Argument by Pem1ission. Where oral argument is proscribed by rule, a party may seek leave of the court therefor by filing of a letter application, on notice to all parties, or by motion where required by the comi, within 7 days of the filing of the respondent's main brief. The application or motion shall specify the reasons why oral argument is appropriate and the amount of time requested.

(3)Failure to Request Oral Argument. In the event that any party's main brief shall fail to set forth the appropriate notations indicating that the cause is to be argued and the time required for argument, the cause will be deemed to have been submitted without oral argument by that party.

(4)Failure to Appear for Oral Argument. Where counsel or a self-represented litigant fails to appear timely for oral argument, the matter shall be deemed to have been submitted without oral argument by that party.

(5) Rebuttal. Prior to beginning argument, the appellant may orally request permission to reserve a specific number of minutes for rebuttal in the First and Third Judicial Departments. The time reserved shall be subtracted from the total time assigned to the appellant. The respondent may not request permission to reserve time for sur-rebuttal.

(d) Post-Argument Submissions. Post-argument submissions are discouraged, and may be made only with leave of the court.

Decisions, Orders and Judgments; Costs; Remittitur; Motions for Reargument or Leave to Appeal to the Court of Appeals

(a) Decisions, Orders and Judgments. A decision, order or judgment of the court on a cause shall be deemed entered on the date upon which it was issued. The court shall cause to be posted copies of the court's decisions, orders and judgments on the court's website.

(b) Costs. Costs upon an appeal under CPLR 8107 shall be allowed only as directed by the court in each case. In the absence of a contrary direction, the award by the court of costs in any matter shall be deemed to include disbursements in accordance with CPLR 8301(a).

(c) Remittitur. Unless otherwise ordered by the court, an order determining an appeal shall be remitted, together with the record on appeal, to the clerk of the court of original instance in accordance with CPLR 5524(b).

(d) Motion for Reargument or Leave to Appeal to the Court of Appeals.

(1) Time of motion. A motion for reargument of or leave to appeal to the Court of Appeals from an order of the court shall be made within 30 days after service of the order of the court with notice of entry.

(2) Reargument. An affidavit or affirmation in support of a motion for reargument shall briefly set forth the points alleged to have been overlooked or misapprehended by the court.

(3) Leave to appeal to the Court of Appeals.

(i) An affidavit or affirmation in support of a motion for leave to appeal to the Court of Appeals shall briefly set forth the questions of law sought to be reviewed by the Court of Appeals and the reasons that the questions should be reviewed by the Court of Appeals.

(iv) In a civil matter, a motion for leave to appeal to the Court of Appeals shall, to the extent practicable, be dete1mined by the panel of justices that determined the appeal.

(vii) In a criminal matter, a motion for leave to appeal to the Court of Appeals may be submitted to any member of the panel of justices that determined the appeal. The affidavit or affirmation in support of the motion shall state that no other application for leave to appeal to the Court of Appeals has been made. Service of a copy of an order on an appellant as required by CPL 460.10 (5) (a) shall be made pursuant to CPLR 2103.

Fees of the Clerk of the Court

(a) Fees. The clerk of the court shall be entitled to the following fees, which shall be payable in advance:

(1)upon the filing of a record on a civil appeal or statement in lieu of record on a civil appeal and upon the filing of a notice of petition or order to show cause commencing a special proceeding, $315.

(2)upon the filing of each motion or cross motion with respect to a civil appeal or special proceeding, $45, except that no fee shall be imposed for a motion or cross motion which seeks leave to appeal as a poor person pursuant to CPLR 1101 (a).

(3)such other fees as the court shall direct.

(b) Exemptions. Notwithstanding the foregoing, no party shall be required to pay a filing fee hereunder where such party demonstrates entitlement to an exemption from the payment of such fee under statute or other authority.