

**CONTINUING LEGAL EDUCATION**

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**CRIMINAL APPEALS IN THE FIRST DEPARTMENT:  
SELECTED TOPICS**

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**SUPREME COURT  
APPELLATE DIVISION, FIRST DEPARTMENT  
RULES OF PRACTICE**

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**§ 600.1 Sessions of the Court; Four Justices Present**

(a) The court will convene at 2 o'clock in the afternoon during the appointed terms of the court for the hearing of appeals except on Fridays when the court will convene at 10 o'clock in the forenoon.

(b) Special sessions of the court may be scheduled for such time or such purposes as the court may direct.

(c) 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.

**§ 600.2 Motions Generally; Special Proceedings; Calendars; Submission**

**(a) Motions Generally.**

(1) Any application, brought on by notice of motion, may be made returnable on any regular business day of the court during the period September 1 through June 30 and on Mondays during July and August, at 10 o'clock in the forenoon unless otherwise ordered by a justice of the court.

(2) Cross-motions shall be made returnable the same day as the original motion and shall be served not less than three days before the return date.

(3) The moving papers shall state the nature of the application or relief sought; the return day; and the names, addresses and telephone numbers of the attorneys for all parties in support, and who are entitled to notice, of the

application. Applications made before the appeal is heard must contain a copy of the notice of appeal or other paper which first invoked the jurisdiction of the court, and the order, judgment or determination sought to be reviewed. Applications made for modification, resettlement, etc. of an order of this court shall contain a copy of the order and opinion, if any.

(4) By noon of the business day preceding the day on which a motion is returnable the moving party must file with the clerk the original moving papers with proof of service thereof within the time:

(i) prescribed by CPLR 2214(b) and 5516; or

(ii) directed by a justice of the court.

(5) Answering and replying papers, if any, must be served within the time:

(i) prescribed by CPLR 2214(b); or

(ii) directed by a justice of the court;

and the originals thereof with proof of service must be filed by 4 o'clock in the afternoon of the business day preceding the day on which the application is returnable, unless for good cause shown they are permitted to be filed at a later time.

(6) All papers may be filed either by personal delivery or by ordinary mail. If filed by mail, they shall be considered filed only upon receipt; and the envelope must be marked "Motion Papers". If an acknowledgment of receipt of the papers is desired, there must be enclosed with the papers being filed by mail a self-addressed postage-prepaid postal

card bearing the title of the cause, the nature of the motion, the date on which it is returnable and a statement of the papers filed. Such postal card, when stamped and returned by mail, shall serve as a receipt for the papers listed thereon.

(7) When an application is presented for an interim stay or other relief pending the determination of a motion, the party seeking such relief must inform the clerk at the time of submission whether the opposing party has been notified of the application and whether such party opposes or consents to the granting of the relief sought. Time and manner of service of motion papers shall be directed by a justice. The relief granted to the moving party will be by brief order appended to the notice of motion. The justice's signature will apply to the stay or provisional remedy only; there will be no direction to a party "to show cause" why an order should not be entered.

(8) All parties filing papers pertaining to a motion or special proceeding shall include therewith a stamped self-addressed envelope.

**(b) Special Proceedings.** Unless a justice of the court otherwise directs, all special proceedings originating in the court, except those commenced pursuant to CPLR 506(b)(4), shall be returnable at 10 o'clock in the forenoon of any regular business day of the court during the period August 1 through June 20, and all papers shall be filed in the manner and within the time prescribed in paragraphs (a)(3) and (a)(4) of this section, except that the moving and opposing parties shall submit to the clerk seven conformed copies in addition to the original moving or opposing papers with proof of service of a copy thereof.

**(c) No Calendars.** No calendar of motions and special proceedings shall be published or called.

**(d) Submission of Motions and Special Proceedings.**

(1) All motions and special proceedings, except those commenced pursuant to CPLR 506(b)(4), unless adjourned or withdrawn, shall be deemed submitted on the return date thereof. Attendance of attorneys shall not be required and oral argument will not be heard.

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

**§ 600.3 Applications for Leave to Appeal to Appellate Division**

**(a) When Addressed to a Justice.** An application to a justice of the court for leave to appeal pursuant to CPLR 5701(c) shall be made within the time prescribed by CPLR 5513(c). The papers upon which such an application is made must state whether any previous application has been made and, if so, to whom and the reason given, if any, for the denial of leave or refusal to entertain the application if that be the case.

**(b) When Addressed to the Court.**

(1) Where leave of this court is required for an appeal to be taken to it, the application for such leave must be made in the manner and within the time prescribed by CPLR 5513 and 5516. Applications pursuant to CPLR 5703 for leave to appeal from a determination of the Appellate Term shall be made only after denial of a motion for leave to appeal made

at the Appellate Term as provided by section 640.9 of the Appellate Term Rules.

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

(3) All applications for leave to appeal addressed to the court shall be submitted without oral argument and shall be made returnable at 10 o'clock in the forenoon of a regular business day of the court during the period September 1 through June 20.

#### **§ 600.4 Calendars**

Appeals shall be noticed as enumerated or non-enumerated.

(a) The following appeals are to be noticed as enumerated:

(1) Appeals from final orders and judgments of the Supreme Court, other than those dismissing a cause for failure to prosecute, for failure to serve a complaint or for failure to obey an order of disclosure or to stay or compel arbitration.

(2) Appeals from decrees or orders of the Surrogate's Court finally determining a special proceeding.

(3) Appeals from orders granting or denying motions for a new trial.

(4) Appeals from orders granting or denying motions for summary judgment.

(5) Appeals from orders granting or denying motions to dismiss a complaint, a cause of action, a counterclaim or an answer in point of law.

(6) Appeals from orders of the Appellate Term.

(7) Appeals from judgments or orders in criminal proceedings.

(8) Special proceedings transferred to this court for disposition.

(9) Controversies on agreed statement of facts.

(10) Appeals from orders of the Family Court finally determining a special proceeding.

(11) Appeals from orders granting or denying custody of minors after a hearing.

(12) Special proceedings challenging determination of the New York City tax appeals tribunal.

(13) Such other appeals as the court or a justice thereof may designate as enumerated.



(b) All other types of appeals not set forth in subdivision (a) of this section shall be noticed as nonenumerated.

**§ 600.5 Alternative Methods of Prosecuting Appeal; Time to File Record, Appendix or Agreed Statement**

At appellant's option, an appeal may be prosecuted upon a record or statement authorized by CPLR 5526, 5527 or 5528.

**(a) The Appendix System.**

(1) If the appeal is prosecuted by the appendix system pursuant to CPLR 5528(a)(5), appellant shall subpoena, from the clerk of the court from which the appeal is taken, the papers constituting the record on appeal as set forth in CPLR 5526 and cause them to be filed with the clerk of this court within 30 days after settlement of the transcript of proceedings or statement in lieu of a transcript. At the time the subpoena is served, the appellant shall deliver to the clerk two copies of the statement required by CPLR 5531.

(2) The clerk from whom the papers are subpoenaed shall prefix one copy of the statement required by CPLR 5531 to the papers and firmly fasten such papers across the top, exclusive of the transcript or statement in lieu thereof, if any, and transmit them to the clerk of this court, together with the additional copy of the statement required by CPLR 5531 and a certificate listing the papers constituting the record on appeal and stating whether all such papers are included in the papers transmitted.

(3) If a transcript of proceedings or statement in lieu of a stenographic transcript as settled is not included in the papers so subpoenaed, appellant shall file the ribbon copy of

the transcript or the statement at the time of filing the appellant's brief. Where feasible, the parties shall stipulate, pursuant to CPLR 5525, subdivision (b), that only a portion of the transcript of proceedings need be filed.

(4) Where a full or partial transcript of proceedings is made part of the record on appeal, appellant shall serve upon, or make available to, respondent a conformed copy thereof in the manner and at the time prescribed by subdivision (e) of this section.

**(b) Agreed Statement in Lieu of Record.**

(1) If the appeal is prosecuted pursuant to CPLR 5527, appellant shall reproduce the statement in lieu of a record on appeal as a joint appendix by printing or such other method of reproduction authorized by CPLR 5529. There shall be prefixed to these papers the statement required by CPLR 5531.

(2) Appellant shall file the original and nine copies of the statement, with proof of service of two copies, within 30 days after approval of the statement by the court from which the appeal is taken, as required by CPLR 5527.

**(c) Optional Full Record.** If appellant elects to proceed on a completely reproduced record on appeal as authorized by the provisions of paragraph 5, subdivision (a), of CPLR 5528, the record shall be printed or otherwise reproduced as provided in section 600.10 of this Part, and in such case an appendix shall not be required. A copy of the record, duly certified, as provided in section 600.10(b)(1)(viii) of this Part, and nine copies of such certified reproduced record, with proof of service of two copies, shall be filed within 30 days after settlement of the transcript of proceedings. Where feasible, the parties shall stipulate, pursuant to CPLR 5525,

subdivision (b), that only a portion of the proceedings need be filed.

**(d) When Record Does Not Involve Settlement Or Approval.** If the appeal is prosecuted upon a record which does not involve a transcript or statement requiring settlement or approval by the court from which the appeal is taken, the record on appeal must be filed or caused to be filed as within 30 days after filing of the notice of appeal.

**(e) Settlement of Transcript.**

(1) Within 15 days after receiving the transcript from the court reporter or any other source, the appellant shall make any proposed amendments and serve them and a copy of the transcript upon the respondent. Appellant may serve on respondent, together with the copy of the transcript and the proposed amendments, a notice of settlement containing a specific reference to this subdivision, and stating that if respondent fails to propose amendments or objections within 15 days, the provisions of paragraph (2) of this subdivision shall apply. Within 15 days after such service, the respondent shall make any proposed amendments or objections to the proposed amendments of the appellant and serve them upon the appellant. At any time thereafter and on at least four days' notice to the adverse party, the transcript and the proposed amendments and objections thereto shall be submitted for settlement to the judge or referee before whom the proceedings were had if the parties cannot agree on the amendments to the transcript. The original of the transcript shall be corrected by the appellant in accordance with the agreement of the parties or the direction of the court, and its correctness shall be certified to thereon by the parties or the judge or referee before whom the proceedings were had. When he serves his brief upon the respondent, the appellant shall also serve a conformed copy of the transcript or deposit

it in the office of the clerk of the court of original instance, who shall make it available to respondent.

(2) If the appellant has timely proposed amendments and served them and the transcript and the notice provided by paragraph (1) of this subdivision, and no amendments or objections are proposed by the respondent within the time limited by this rule, the transcript, certified as correct by the court reporter, together with appellant's proposed amendments, shall be deemed correct without the necessity of a stipulation by the parties certifying to its correctness or the settlement of the transcript by the judge or referee. The appellant shall affix to such transcript an affirmation, certifying to his compliance with the time limitation and the respondent's failure to propose amendments or objections within the time prescribed.

**(f) Transcript — Number to Be Prepared by Court Reporter.** Pursuant to CPLR 5525(a), in all appeals taken from judgments or orders entered in this department, the appellant may request that only the ribbon copy of the typewritten transcript be prepared by the reporter. If such request be made, only the ribbon copy shall be required to be prepared by the reporter and furnished to the appellant. If the appeal is by the appendix method, such ribbon copy shall be included in the record on appeal for use by the parties and the court.

#### **§ 600.6 Appeals From Family Court**

An appeal from the Family Court may be prosecuted in accordance with any of the procedures specified in section 600.5 of these rules. Any party to such an appeal may elect to file eight reproduced copies of the brief and appendix, if any, with proof of service of one copy, in lieu of a printed or

otherwise reproduced brief and appendix as required by section 600.10 of these rules. The appeal may also be perfected upon the original record (transcript of hearing, if any, to be ordered by appellant and filed with the clerk of the Family Court) and eight reproduced copies of the brief. There shall be prefixed to the record the statement required by CPLR 5531; an additional copy of the statement shall be filed with the clerk of this court.

**§ 600.7 Action on Submitted Facts; Transferred Causes**

(a) **Submission of a Controversy.** Unless the court otherwise directs, the agreed statement of facts in an action submitted to this court pursuant to CPLR 3222 shall be printed or reproduced by any other authorized method. A copy of the statement required by CPLR 5531 shall be prefixed to the papers constituting the submission. The original and 19 copies thereof with proof of service of three copies are to be filed at the time of filing plaintiff's brief and two copies of the note of issue. All such causes shall be noticed as enumerated in accordance with the provisions of section 600.11 of this Part.

(b) **Transferred Causes.** Article 78 proceedings transferred to this court pursuant to the provisions of CPLR 7804(g) and appeals transferred to this court by an Appellate Division of another department pursuant to CPLR 5711 may be prosecuted in accordance with any of the procedures specified in section 600.5 of this Part, except that the petitioner or appellant, whichever the case may be, shall file the record or cause the same to be filed with the clerk of this court within 30 days after entry of the order of transference.

(c) **State Division of Human Rights Proceedings.** State Division of Human Rights proceedings, transferred to this

court pursuant to Executive Law § 298, shall be deemed enumerated and prosecuted in accordance with sections 600.5 and 600.11 of this Part. No oral argument shall be permitted. The Division, upon receipt by it of petitioner's brief, shall promptly file the original record with this court.

### **§ 600.8 Appeals in Criminal Cases**

#### **(a) Record and Briefs.**

(1) In appeals in criminal cases, other than those in which permission to proceed on the original record is granted, the appellant may elect to proceed by any of the methods specified in section 600.5 of this Part, and the content and form of the record on appeal or appendix shall be as prescribed by section 600.10 of this Part.

(2) The content and form of briefs shall be as prescribed in section 600.10 of these rules and in addition thereto, there shall be included at the beginning of the main brief submitted by appellant a statement setting forth the decision and judgment appealed from; the sentence imposed, if any, and whether an application for an order of stay of judgment pending determination of the appeal was made and, if so, the date of such application, the court to which it was made, and the decision and opinion of the court.

**(b) When to Be Heard.** Appeals in criminal cases shall be placed on the calendar in the manner described in section 600.11(b), (c), (d), (e) and (f) of this Part, but must be brought on for argument within 120 days after the last day in which a notice of appeal was required to be filed, unless the time to perfect the appeal is enlarged by the court or a justice thereof.

**(c) Enlargements of Time.** Every application for an enlargement of time within which to perfect an appeal for argument or submission, or for an extension of time to serve and file the record and brief shall be accompanied by an affidavit satisfactorily explaining the delay and stating whether there is an order of stay of judgment pending determination of the appeal outstanding and, if so, the date such order was granted and whether the appellant is free on bail or his own recognizance.

**(d) Application for Certificate Granting Leave to Appeal.**

(1) Application for a certificate granting leave to appeal to this court shall be made, in writing, within 30 days after service of the order upon the applicant, shall give 15 days' notice to the district attorney, shall be filed with proof of service and shall 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, and shall state:

- (i) the return day;
- (ii) the name and address of the party seeking leave to appeal and the name of the district attorney;
- (iii) the indictment number;
- (iv) the questions of law or fact which ought to be reviewed; and
- (v) that no prior application for such certificate has been made.

(3) The moving papers must include:

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

(ii) a copy of the memorandum or opinion of the court below or a statement that there was none.

(4) Answering papers or a statement that there is no opposition to the application shall be served and filed not later than noon of the third day before the return date stated in the application. Answering papers shall discuss the merits of the application, or shall state:

(i) that the file has been reviewed and includes a response by the district attorney covering the matters raised in the papers submitted by the applicant in the court below and an opinion or memorandum of the justice of that court; and

(ii) that the application for a certificate granting leave to appeal does not contain any new allegations.

**(c) Expedited Appeal of an Order Reducing an Indictment or Dismissing an Indictment and Directing the Filing of a Prosecutor's Information.**

(1) This subdivision shall govern the procedure for an expedited appeal to the Appellate Division, pursuant to CPL 210.20(6)(c), 450.20(1-a) and 450.55, of an order by a superior court reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information.

(2) After the People file and serve a notice of appeal pursuant to CPL 460.10(1), either party may request that the Court expedite the appeal. If a request is made, the Court



shall hear the appeal on an expedited basis as set forth in this subdivision.

(3)(i) The Appellate Division shall establish an expedited briefing schedule for the appeal. Briefs may be typewritten or reproduced. The People shall file nine copies of a brief and an appendix, which shall include a copy of the indictment and the trial court's decision and order. The respondent shall file nine copies of a brief and, if necessary, an appendix. One copy of the brief and appendix shall be served on opposing counsel.

(ii) The appeal may be taken on one original record, which shall include copies of the indictment, the motion papers, the trial court's decision and order, and the notice of appeal.

(iii) The People shall file with the Appellate Division, separately from the record, one copy of the grand jury minutes.

(iv) The Court shall give preference to the hearing of an appeal perfected pursuant to this subdivision and shall determine the appeal as expeditiously as possible.

**(f) Appeals Taken by the People.** An appeal taken by the People must be perfected by serving a copy of the appellant's brief upon respondent's appellate attorney, or in the event that no appellate attorney has appeared for respondent, upon the attorney who last appeared for him in the trial court, within nine months of the filing of the notice of appeal.

**(g) Assignment of Appellate Counsel.** An attorney who represents a defendant in the superior court and is a member of the Assigned Counsel Plan appellate panel, with

defendant's written consent, may apply to the Appellate Division for appointment as appellate counsel.

**(h) Appeals to the Court of Appeals.** Service of a copy of an order on an appellant as required by CPLR 460.10(5)(a) shall be made pursuant to CPLR 2103.

### **§ 600.9 Appeals in Election Cases**

Appeals from judgment and orders entered in proceedings brought pursuant to any of the provisions of the Election Law may be prosecuted in accordance with any of the methods specified in section 600.5 of this Part or, without printing, upon a record consisting of the original papers, the typewritten transcript of the stenographer's minutes, if any, of the trial or hearing, the statement, in duplicate, required by CPLR 5531, and upon typewritten or reproduced briefs. The typewritten transcript shall be either stipulated as correct by the parties or their attorneys, or settled and certified by the trial judge, as provided in CPLR 5525 and 5532. Such appeals may be brought on for hearing in such manner and on such terms and conditions as the court or a justice thereof may direct by an order granted on the application of any party to the proceeding.

### **§ 600.10 Format and Content of Records, Appendices and Briefs**

#### **(a) Form and Size.**

(1) *Generally — Paper and Page Size.* Records, appendices and briefs shall be reproduced by any method that produces a permanent, legible, black on white copy and shall be on a good grade of white, opaque, unglazed recycled paper

that satisfies the requirements of paragraph (e) of this section. Paper shall measure vertically 11 inches on the bound edge and horizontally 8½ inches. The clerk may refuse to accept for filing a paper which is not legible or otherwise does not comply with the provisions of this Part.

(2) *Binding.* Every record, appendix or brief shall be securely bound on the left side; when such binding is done by means of a metal fastener or other hard material which protrudes or presents sharp edges, such binding shall be covered by linen or plastic masking tape or similar material. The use of Acco, spiral or other bulky binding edge binders is discouraged.

(3) *Typeface and Type Size.* Records, appendices and briefs shall be in clear serified, proportionally spaced typeface, such as times new roman, or serified monospaced typeface, such as courier. Proportionally spaced typeface shall be no less than 14 point size, with the exception that footnotes shall be in type of no less than 12 point size and headings shall be in type no greater than 15 point size. Monospaced typeface shall be no less than 12 point size, with the exception that footnotes shall be in type no less than 10 point size and headings shall be in type no greater than 14 point size. Typewritten text shall be no less than elite size.

(4) *Page Format.* Records, appendices and briefs shall be double spaced, with the exception that footnotes, headings, indented quotations, and a full size facsimile reproduction of the opinion of the trial court taken from the official state reports may be single spaced. The margin on each side of each page shall be at least one inch; the text on each page shall not exceed 9 inches by 6½ inches.

(5) *Captions.* 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 court below, e.g. "Plaintiff", "Defendant", "Petitioner", "Respondent". In appeals from the Surrogate's Courts or from judgments on trust accountings the caption shall contain the title used in the court below, including the name of the decedent or grantor, followed by a listing of all parties to the appeal, properly designated. In proceedings and actions originating in this court, the parties shall be designated "Petitioner" and "Respondent" or "Plaintiff" and "Defendant".

(6) *Numbering.* Pages of records and briefs shall be numbered consecutively. Pages of appendices shall be separately numbered consecutively, each number preceded by the letter "A"; a respondent's appendix, if any, shall be numbered consecutively and may be preceded by the letters "RA".

(7) *Page Headings.* The subject matter of each page of the record or appendix shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper together with the page numbers of the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or re-cross examination shall be stated at the top of each page.

(8) *Motion Papers.* Each affidavit or other paper contained in a record on an appeal from an order shall be preceded by a description thereof that must specify on whose

behalf it was read. The name of the affiant shall be stated at the top of each page containing an affidavit.

(9) *Questions and Answers.* The answer to a question in the appendix shall not begin a new paragraph.

(10) *Quotations.* Asterisks or other appropriate means shall be used to indicate omissions in quoted excerpts. Reference shall be made to the source of the excerpts quoted. Quotations in briefs may be single spaced, indented. Where an excerpt in the appendix is testimony of a witness quoted from the record the beginning of each page of the transcript shall be indicated by parenthetical insertion of the transcript page number.

(11) *Citation of Decisions.* New York decisions shall be cited from the official reports, if any. All other decisions shall be cited from the official reports, if any, and also from the National Reporter System if they are there reported. Decisions not reported officially or in the National Reporter System shall be cited from the most available source.

**(b) Record, What to Contain.**

(1) If appellant elects to proceed on an optional full record as authorized by subdivision (c) of section 600.5 of this Part, the record shall contain, in the following order:

(i) An index of the record's contents, listing and describing each paper separately. That part of the index relating to exhibits shall concisely indicate the contents or nature and date, if given of each exhibit and the pages in the record where it is reproduced and where it is admitted to evidence. The part of the index relating to the transcript of

testimony shall separately list each witness and shall state as to each witness the page at which direct, cross, re-direct, and re-cross examination begins. Such index shall also contain a reference to the pages where a motion for the dismissal of a complaint or for the direction of a verdict or an oral decision of the court, appealed from, appears.

(ii) A statement pursuant to CPLR 5531.

(iii) If the appeal be from a final judgment, the notice of appeal, the judgment roll, the corrected transcript of the proceedings or a statement pursuant to subdivision (d) of CPLR 5525 if a trial or hearing was held, any relevant exhibits, or copies of them, in the court of original instance, any other reviewable order, and any opinions in the case.

(iv) If the appeal be from an interlocutory judgment or any order, the notice of appeal, the judgment or order appealed from, the transcript, if any; the papers and other exhibits upon which the judgment or order was founded, and any opinions in the case.

(v) A stipulation or order settling the transcript pursuant to subdivision (c) of CPLR 5525.

(vi) The opinion in the case or a statement that there was none.

(vii) A stipulation, if any, dispensing with the printing or filing of exhibits.

(a) Exhibits may be omitted upon stipulation of the attorneys for the parties, approved by a justice of the court, which shall contain a list of the exhibits to be omitted and a brief description of each exhibit. Exhibits thus omitted unless of a bulky nature as defined in this subparagraph shall

be filed with the clerk of the court not later than the Wednesday preceding the first day of the term for which the appeal was noticed. Exhibits of a bulky nature (cartons, file drawers, voluminous folders, ledgers, machinery, weapons, etc.) thus omitted need not be filed with the court but shall be kept in readiness by the parties and delivered to the court on telephone notice; a letter, showing that copy has been sent to the adversary, listing such exhibits and stating that they will be available on telephone notice shall be filed with the clerk of the court not later than the Wednesday preceding the first day of the term for which the appeal was noticed.

(b) Exhibits which are not relevant to an appeal may be omitted upon stipulation of the attorneys for the parties which shall contain a list of the exhibits to be omitted, a brief description of each exhibit and a statement that said exhibits will not be relied upon or cited in the briefs of the parties to the appeal.

(viii) A certificate of the proper clerk, or a stipulation waiving certification of the papers pursuant to CPLR 5532, or a certificate subscribed by the attorney certifying to the correctness of the papers pursuant to CPLR 2105.

(2) On an appeal by permission under CPLR 5701 from an order granting or denying a motion for a more definite statement of a vague or ambiguous pleading or for striking any irrelevant, redundant, scandalous or prejudicial matter unnecessarily inserted in a pleading, the portion of the pleading to which the motion is directed must be italicized if the record is printed or underscored if otherwise reproduced.

(3) On the outside front cover of the record shall appear the title of the case, the names, addresses and telephone numbers of the attorneys for the parties, and the

index number in the court of original instance. (See paragraph (a)(5), of this section.)

**(c) Appendix, What to Contain.**

(1) In accordance with CPLR 5528, the appendix of appellant or the joint appendix shall contain those parts of the record necessary to consider the questions involved. A failure to comply with the requirements may result in rejection of the appendix or may affect the imposition of costs.

(2) The appendix should include at least, if in the record, the following:

(i) Notice of appeal; judgment appealed from; decree appealed from; order appealed from or sought to be enforced; notice of motion; order to show cause; opinion (or a statement that there was none); findings of fact and conclusions of law; report of referee or hearing examiner; charge to the jury; verdict; and pleadings if their sufficiency, content, or form is in issue or material.

(ii) Relevant excerpts from transcripts of testimony or papers in connection with a motion. These must contain all the testimony or averments upon which appellant relies or upon which appellant has reason to believe respondent will rely. Such excerpts must not be misleading because of incompleteness or lack of surrounding context.

(iii) Copies of critical exhibits, including significant photographs, to the extent practicable. Critical exhibits may be omitted upon stipulation of the attorneys for the parties, approved by a justice of the court, which shall contain a list of the exhibits to be omitted and a brief description of each exhibit. A copy of this stipulation shall be included in the appendix.



(iv) Exhibits unless of a bulky nature as defined in clause (a) of this subparagraph shall be filed with the clerk of the court not later than the Wednesday preceding the first day of the term for which the appeal was noticed.

(a) Exhibits of a bulky nature (cartons, file drawers, voluminous folders, ledgers, machinery, weapons, etc.) omitted upon stipulation pursuant to subparagraph (2)(iii) of this subdivision need not be filed with the court but shall be kept in readiness by the parties and delivered to the court on telephone notice; a letter, showing that copy has been sent to the adversary, listing such exhibits and stating that they will be available on telephone notice shall be filed with the clerk of the court not later than the Wednesday preceding the first day of the term for which the appeal was noticed.

(b) Exhibits which are not relevant to an appeal may be omitted upon stipulation of the attorneys for the parties which shall contain a list of the exhibits to be omitted, a brief description of each exhibit and a statement that said exhibits will not be relied upon or cited in the briefs of the parties to the appeal.

(3) On the outside front cover of the appendix, whether bound separately or together with the brief, shall appear the title of the case and the names, addresses and telephone numbers of the attorneys for the parties and the index number in the court of original instance. (See paragraph (a)(5) of this section.)

(4) Each appendix shall contain an index of its contents conforming to the extent feasible to the form of index prescribed by subparagraph (b)(1)(i) of this section.

**(d) Briefs, What to Contain.**

*(1) Generally.*

(i) Except by permission of the court, principal briefs shall not exceed 70 pages or 14,000 words. The calculation of the length of a brief shall not include pages containing the table of contents, tables of citations and any authorized addendum containing statutes, rules, regulations, etc. A word count calculation shall include all printed text on each page of the body of the brief. Except by permission of the court, reply briefs shall not exceed 35 pages or 7,000 words. An application for permission to file an oversize brief shall be by letter that demonstrates with specificity good cause for the oversize submission and asserts that the brief has been edited for conciseness and to eliminate repetition. A copy of the proposed brief shall be submitted with the letter.

(ii) The name of counsel who is to argue or submit the appeal must appear at the upper right hand corner of the cover of all briefs regardless by whom filed. Only one counsel shall be listed except when the court shall otherwise order (see section 600.11(f)(2) of this Part).

(iii) Unless authorized by the court, briefs to which are added or appended any matter, other than specifically authorized by this rule, shall not be accepted for filing. Boldface type shall not be used except in point headings or subheadings.

(iv) The opinion and findings, if any, of a hearing officer and the determination and decision of an administrative department, board or agency shall be appended to the main brief filed by such department, board or agency in any proceeding in which a printed, reproduced or typewritten record or appendix is dispensed with by statute or court order

and the proceeding is permitted to be heard on the original papers.

(v) A brief prepared on a computer shall include at the end of the brief a "Printing Specifications Statement" that specifies the processing system, typeface, point size and word count as calculated by the processing system used to prepare the brief.

(2) *Appellant's Brief.* Each respondent shall file the same number of copies of respondent's brief as appellant is required to file, with proof of service on each appellant of the same number of copies as appellant has served. The brief of the appellant shall contain, in the following order:

(i) an index or table of contents including the titles of the points urged in the brief and a table of cases (alphabetically arranged), statutes and other authorities, indicating the pages of the brief where they are cited;

(ii) a concise statement, not exceeding two pages, of the questions involved without names, dates, amounts or particulars. Each question shall be numbered, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;

(iii) a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with supporting references to pages in the record or the appendix, including, if such be the case, a statement that proceedings on the judgment or order appealed from have been stayed pending a determination of the appeal. Such statement shall include, if such be the case, a statement that proceedings on the judgment or order appealed from have been stayed in whole or in part, by statute or order,

pending a determination of the appeal, or that an application for a stay has been denied, giving the date of any order and the court in which the order granting or denying the stay was made;

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

(v) the statement required by CPLR 5531, as an addendum at the end of the brief;

(vi) the opinion upon which the judgment or order appealed from was based shall also be appended to the appellant's brief in any case in which the court has dispensed with a printed, reproduced or typewritten record or appendix and has permitted the appeal to be heard on the original papers; and

(vii) if the appeal is from an order involving alimony and counsel fees, the brief shall state the date of joinder of issue, if issue was joined, and whether the case has been noticed for trial.

(3) *Respondent's Brief.* The brief of the respondent shall contain, in the following order:

(i) an index or table of contents including the titles of the points urged in the brief and a table of cases (alphabetically arranged), statutes and other authorities, indicating the pages of the brief where they are cited;

(ii) a counterstatement of the questions involved or of the nature and facts of the case, if the respondent disagrees with the statement of the appellant; and

(iii) the argument for the respondent, which shall be divided into points by appropriate headings distinctively printed.

(4) *Appellant's Reply Brief*. The reply brief of the appellant shall contain, in the following order:

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

(ii) the reply for the appellant, without repetition of the arguments contained in the main brief, which shall be divided into points by appropriate headings distinctively printed.

**(e) Recycled Paper.** Every brief and every appendix shall be printed or reproduced on recycled paper. For purposes of this rule, paper is recycled if it contains a minimum content of 50 percent waste paper. Cover and oversized exhibits need not be printed or reproduced on recycled paper. Every brief and every appendix shall bear the legend on the bottom of the cover: "Printed [Reproduced] on Recycled Paper." Submission of briefs or appendices not in conformance with this rule shall not constitute a default, but the clerk may accept nonconforming papers on the condition that they be resubmitted in conformance with the requirements of this rule. This rule shall not apply to parties appearing in forma pauperis or pro se.

**(f) Each endorsement required by CPLR 2101(d) shall include an e-mail address.**

**§ 600.11 Perfecting and Hearing of Appeals; Calendars;  
Adjournments**

**(a) When to Be Noticed.**

(1) Unless otherwise ordered by the court, all appeals or causes shall be placed on the calendar within 20 days after filing the record on appeal, statement in lieu of a record, the record in a proceeding commenced pursuant to CPLR 506(b)(4), or the papers in a transferred Article 78 proceeding, except that in the case of a submission of a controversy it shall be placed on the calendar at the time of filing the agreed statement of facts.

(2) The clerk will place no appeal or cause on the calendar where the necessary papers and brief are not offered for filing within the 20 day period prescribed by this section, unless the time for filing has been enlarged by a justice of the court.

(3) The clerk will place no civil appeal or cause on the calendar where the necessary papers and briefs are not offered for filing within nine months of the date of the notice of appeal from the judgment or order appealed from, in proceedings commenced pursuant to CPLR 506(b)(4) within nine months from the date the petition is filed, in article 78 proceedings within nine months from the date of the order transferring the proceeding to the Appellate Division and in appeals to the Appellate Division by permission within nine months from the date of the order granting leave to appeal, unless the time for filing has been enlarged by order of the court. This nine-month limitation applies to all appeals including cross-appeals and may not be extended by agreement or stipulation of the parties. This paragraph does not extend the time of any party to take any step in connection with any appeal or cause. Such times are fixed by

other rules and statutes and the time periods fixed by such other rules and statutes must be complied with.

**(b) How Placed on Calendar.**

(1)(i) Enumerated Appeals. An appeal or cause required by section 600.4 of this Part to be noticed as enumerated shall be placed on the calendar, by the appellant or moving party filing with the clerk, at least 57 days before the first day of the term for which the matter shall have been noticed, two copies of a note of issue with proof of service stating the date the notice of appeal was served, the date the record on appeal or statement in lieu thereof was filed, the nature of the appeal or cause, the court and county in which the action was commenced, the index or indictment number, the date judgment or order was entered, the name of the justice who made the decision, the term for which noticed, and the names, addresses and telephone numbers of the attorneys for all of the parties.

(ii) Nonenumerated Appeals. All other appeals shall be noticed as nonenumerated and shall be placed on the calendar in a manner identical to that for enumerated appeals.

(2) At the time of filing the note of issue, appellant or moving party shall also file ten copies of the brief, or brief and appendix conforming to the requirements of section 600.10 of this Part, with proof of service of two copies thereof, except that where a typewritten brief is authorized or the appeal is from the Family Court, eight reproduced copies of the brief with proof of service of one copy may be filed. For appeals perfected after June 30, 2010, one of the copies of each brief shall be filed and served by e-mail, and that copy shall satisfy the Clerk's Office's specifications for filing a text-searchable portable document format file by e-mail. For appendices filed after August 31, 2010, one of the copies

of each appendix shall be filed and served by e-mail, and that copy shall satisfy the Clerk's Office's specifications for filing a text-searchable portable document format file by e-mail.

(3) E-mails shall be directed

(i) in civil matters (except Family Court matters) to  
AD1copy-civil@courts.state.ny.us

(ii) in criminal matters to  
AD1copy-criminal@courts.state.ny.us

(iii) in Family Court matters to  
AD1copy-family@courts.state.ny.us

**(c) Answering and Reply Briefs.** Answering and Reply Briefs. At least 27 days before the first day of the term for which the appeal or cause shall have been noticed, the respondent or opposing party shall file nine copies of the answering brief, or brief and appendix conforming to the requirements of section 600.10 of this Part, with proof of service of two copies, except that where a typewritten brief is authorized or the appeal is from the Family Court, eight reproduced copies of the brief with proof of service of one copy may be filed. For briefs filed after June 30, 2010, one of the copies of each brief shall be filed and served by e-mail, and that copy shall satisfy the Clerk's Office's specifications for filing a text-searchable portable document format file by e-mail. For appendices filed after August 31, 2010, one of the copies of each appendix shall be filed and served by e-mail, and that copy shall satisfy the Clerk's Office's specifications for filing a text-searchable portable document format file by e-mail. Within nine days after such service the appellant or moving party may file a like number of copies of a reply as were filed of the main brief, conforming to the requirements of section 600.10 of this Part, with proof of service of the



same number of copies as were served of the main brief. For replies filed after June 30, 2010, one of the copies of each reply shall be filed and served by e-mail, and that copy shall satisfy the Clerk's Office's specifications for filing a text-searchable portable document format file by e-mail.

**(d) Cross Appeals.**

(1) The parties shall consult and thereafter file a joint record or joint appendix which shall include therein a copy of the cross-notice of appeal. The cost of the joint record or joint appendix and the transcript, if any, shall be borne equally among the parties.

(2) It shall be the duty of the first filer of a notice of appeal to perfect the appeal. Respondent-cross-appellant shall file its answering brief pursuant to the scheduled date for a respondent for that specific term and shall include therein the points and arguments on its cross-appeal. Appellant shall have nine days thereafter to file its reply brief and, thereafter, respondent-cross-appellant shall have nine days to file its reply brief.

**(e) Service by Mail.** Whenever service of a record, appendix, note of issue, appellant's or respondent's briefs, is made through the post office, such service must comply with CPLR 2103(b)(2), *viz.*, be made 5 days prior to the last day designated herein.

**(f) Time Permitted for Argument.**

(1) Counsel for the parties shall consult and determine whether they wish to argue or submit. If they wish to argue, the clerk shall be notified by the parties in one writing of the time desired for argument by each party. The writing shall be in the possession of the clerk on or before the court's

scheduled date therefor in that particular term. In the absence of such notification, the appeal shall be marked submitted with respect to all parties.

(2) On the argument of an enumerated appeal, not more than 15 minutes shall be permitted on either side and only one counsel on each side shall be heard except when the court shall otherwise order. Any party may for good cause request additional time by a writing delivered to the clerk before the day of argument.

(3) Oral argument shall not be allowed in non-enumerated appeals, except by permission of the Court.

(4) No briefs, letters, or other communications in connection with an appeal or a cause will be accepted after the argument or submission of an appeal or cause unless permission is granted by the Court.

**(g) Adjournments.** Enumerated appeals or causes which have been placed on the calendar may be adjourned once upon the written stipulation of counsel, provided such stipulation is filed with the clerk not later than 26 days before the first day of the term for which the appeal has been noticed and the matter is not being adjourned to the June Term. Any further adjournment by stipulation must be approved by the justice of the court. If the appeal or cause is not argued or submitted during the term to which it has been adjourned, it shall be marked off the calendar.

**§ 600.12 Preference; Dismissal of Appeal or Cause;  
Dismissal Calendar Calls**

**(a) Preference.**

(1) Any party to an appeal entitled by law to a preference in the hearing of the appeal may serve and file a demand for a preference which shall set forth the provision of law relied upon for such preference. If the demand is sustained by the court, the appeal shall be preferred.

(2) A preference under CPLR 5521 may be obtained upon good cause shown in an application made to the court on notice to the other parties to the appeal.

**(b) Dismissal of Appeal or Cause.** In the event the appellant or moving party fails to prosecute the appeal or cause within the time prescribed by this Part, or fails to restore an appeal or cause to the calendar within 60 days after it has been marked off the calendar, any other party to the appeal may move to dismiss the appeal for lack of prosecution on eight days' notice. The moving papers on such an application must include a copy of the notice of appeal.

**(c) Dismissal Calendar Calls.**

(1) In May of each year the clerk shall make up a calendar of all civil appeals or causes not brought on for hearing within nine months from the filing of the record or papers upon which the matter was to be heard, exclusive of such appeals or causes which are then on the calendar or were marked off the calendar less than 60 days prior to May first.

(2) In May and October of each year the clerk shall make up a calendar of all criminal appeals or causes and all appeals involving writs of habeas corpus in criminal causes

not brought on for hearing within eighteen months of the awarding of poor person relief, exclusive of such criminal appeals or causes which are then on the calendar or were marked off the calendar less than 60 days prior to the calendar call. Fifteen days' notice of the time and date of such dismissal calendar call, and of the opportunity to submit an affidavit thereupon pursuant to paragraph (4) of this subdivision, shall be given to the appellants by ordinary mail; if the appellant is a defendant such notice shall be at his last known place of residence, or if imprisoned, at the institution at which confined, and similarly to his attorney if any upon the appeal or who last appeared for him.

(3) The calendars so prepared shall be published in the *New York Law Journal* for five consecutive days and called by the clerk on the fifth day of publication. The clerk shall cause a notice to be published in the *New York Law Journal* during the same period calling attention to the publication of the calendars and stating the date and time the calendars will be called.

(4) In the event the appellant or moving party fails to submit an affidavit with proof of service of a copy thereof prior to or on the call of any of the calendars referred to in paragraphs (1) and (2) of this subdivision satisfactorily explaining the delay and containing the following information:

(i) the nature of the order or judgment appealed from;

(ii) the date the judgment or order appealed from was entered or, if the matter was transferred to this court pursuant to CPLR 7804, the date of the order of transferral;

(iii) the date the notice of appeal was served;

(iv) whether any enlargement of time to perfect the appeal has been granted; and

(v) in the case of criminal appeals, the sentence imposed and whether the defendant is on probation or parole, or free on an order of stay of judgment pending determination of the appeal;

an order will be entered dismissing the appeal or cause.

#### **§ 600.13 Costs**

Costs upon an appeal under CPLR 8107 shall be allowed only as directed by the court in each case.

#### **§ 600.14 Motions for Reargument or Leave to Appeal to the Court of Appeals**

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

(b) **Leave to Appeal.** Applications for permission to appeal to the Court of Appeals shall be made in the manner and within the time prescribed by CPLR 5513(c) and 5516 and must be submitted without oral argument. The moving papers shall include a copy of the order of this court from

which leave to appeal is requested, and shall set forth the questions of law to be reviewed by the Court of Appeals.

**§ 600.15 Fees of the Clerk of the Court**

(a) On behalf of the State of New York, the clerk of the court is entitled to receive the following fees:

(1) For an embossed and engraved certificate of admission as an attorney and counselor at law, twenty-five dollars;

(2) For a certificate of good standing, five dollars;

(3) For furnishing a copy, certified or uncertified, of an opinion, decision, order, record, or other paper in his custody, one dollar for the first page and 50 cents for each additional page; and

(4) For comparing and certifying a prepared copy of an opinion, decision, order, record, or other paper in his custody, 50 cents for the first page and 25 cents for each additional page, with a minimum fee of one dollar.

(5) For and upon the filing of the record, or the statement in lieu of the record, on a civil appeal, or upon the filing of a notice of petition commencing a special proceeding, \$315 by check or money order payable to "Appellate Division, First Department," except in the case of a party who by statute or order of the court has been authorized to prosecute a cause as a poor person pursuant to CPLR 1101 or is exempted from the fee requirement by CPLR 8017.

(6) For and upon the filing of each motion or cross-motion with respect to such appeal, \$45 by check or money

order payable to "Appellate Division, First Department," except in a case of a motion that seeks leave to appeal as a poor person pursuant to CPLR 1101(a).

(b) None of the fees prescribed in subdivision (a), subsections (1) through (4), of this section shall be charged any department or agency of the Federal, City or State governments or any duly organized bar association. No charge shall be made for furnishing a copy of the order, opinion or decision of the court to any party to an appeal or proceeding pending in the court.

(c) The clerk shall keep proper books of account and records showing the income from fees which books and records shall be subject to examination and audit by the State Comptroller. On or before the 15th day of April and October in each year the clerk shall render an account under oath to the State Comptroller of all the income from fees since the rendition of the last account, and shall pay such income to the State Comptroller. The clerk shall furnish a copy of the account to each justice of the court.

**§ 600.16 Appeals From an Order Concerning a Grand Jury Report; Appeal From a Judgment Predicated Upon the Entry of a Plea of Guilty**

(a) **Appeal From an Order Concerning a Grand Jury Report.** 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 sections hereof governing appeals in criminal cases. An appeal from such an order shall be a preferred cause and may be added to the term calendar by stipulation approved by the court or upon motion made in the manner provided by

section 600.2 of this Part. The record, briefs and other papers on such an appeal shall be sealed and not be available for public inspection except as permitted by CPL 190.85(3). Unless otherwise directed by the court, oral argument will not be allowed.

**(b) Appeal from a Judgment Predicated Upon the Entry of a Plea of Guilty.** On an appeal from a judgment rendered in a criminal proceeding following entry of a guilty plea pursuant to CPL Article 220, respondent may elect to file a brief that urges an affirmance of the judgment solely upon a claim that there is no reviewable issue because appellant made a valid waiver of the right to appeal. Upon the submission or argument of the appeal, the court in its discretion may direct the respondent to submit a supplemental brief addressing additional issues to which the appellant may reply.

#### **§ 600.17 Pre-argument Conference**

**(a)** In every civil case (except one originating in Family Court) in which a notice of appeal is filed or an order granting leave to appeal to the Appellate Division entered, or an order transferring an Article 78 proceeding to the Appellate Division is entered, counsel for the appellant or petitioner shall file, together with the above, a pre-argument statement, proof of service and, where applicable, a copy of the opinion or short form order which contains a memorandum.

**(b)** The preargument statement must set forth:

- (1) Title of the action;
- (2) Full names of original parties and any change in the parties;



(3) Name, address and telephone number of counsel for appellant or petitioner;

(4) Name, address and telephone number of counsel for respondent;

(5) Court and county, or administrative body from which the appeal is taken;

(6) Nature and object of the cause of action or special proceeding (e.g., contract-personal services, sale of goods; tort—personal injury, automobile accident, malpractice, equity—specific performance, injunction, etc.);

(7) Result reached in the court of administrative body below; and

(8) Grounds for seeking reversal, annulment or modification.

Where appropriate, the statement must indicate whether there is any related action or proceeding now pending in any court of this or any jurisdiction, and if so, the status of the case. If an additional appeal is pending in the same action, indicate the date of entry of the order or judgment and attach a copy of the notice of appeal and the preargument statement.

(c) The notice of appeal, or the order granting leave to appeal, or the order transferring the case to the Appellate Division shall be filed by the appellant in duplicate in the office where the judgment or order of the court of original instance is entered.

(d) The clerk of the court from which the appeal is taken shall promptly transmit to the Appellate Division the

preargument statement and a copy of the notice of appeal or order granting leave or transferral.

(e) By order of the Court, counsel and the parties to the actions may be directed to attend a preargument conference before a judicial administrative officer or such other person as may be designated by the Appellate Division.

(f) Should a preargument conference not be scheduled within 20 days after the filing of a notice of appeal, any party to the appeal or Article 78 proceeding may apply to the Court to have such a conference.

(g) Within 10 days after an order directing a preargument conference has been entered, counsel for respondent must file with the court a counter preargument statement together with proof of service. The counter statement must set forth the extent to which respondent challenges the assertions made by appellant in the preargument statement. The statement also must include an explanation of grounds for granting the relief sought by respondent.

(h) Any attorney who, without good cause shown, fails to file the materials listed in subdivisions (a) or (g), fails to timely appear for a scheduled conference, fails to abide by the terms of a stipulation or order entered following a preargument conference or fails to demonstrate good faith during the preargument process shall be subject to such sanctions as justice of the court may direct.

(i) Upon the conclusion of the conference, if the parties have entered into a stipulation the Court shall file an order of approval.

**§ 600.18 Habeas Corpus Appeals**

Appeals from judgments or orders entered in any proceeding or action alleging that a person is illegally imprisoned or otherwise unlawfully restrained in his liberty within the State may be prosecuted in accordance with any of the methods specified in section 600.5 of this Part. Such appeals may also be brought on for hearing in such mode, time and manner and on such terms and conditions as this court or a justice thereof may direct by an order granted on the application of any party to the appeal.

**§ 600.19 Appeals From Award of Compensation as to Judicial Appointees**

If, subsequent to the filing of a notice of appeal, the sole issue sought to be reviewed 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 appeal may be prosecuted in accordance with any of the methods specified in section 600.5 of this Part; or in lieu thereof may be prosecuted by motion in accordance with the procedure applicable to special proceedings, subdivision 600.2(b) of this Part. In such event, the review may be had on the original record, and briefs may be filed at the option of the parties.

**SUMMARY STATEMENT ON APPLICATION FOR  
EXPEDITED SERVICE AND/OR INTERIM RELIEF**  
(SUBMITTED BY MOVING PARTY)

Date \_\_\_\_\_

Title \_\_\_\_\_ Index/Indict# \_\_\_\_\_  
of \_\_\_\_\_  
Matter \_\_\_\_\_

Appeal by \_\_\_\_\_ from \_\_\_\_\_ order judgment of decree \_\_\_\_\_ Supreme Surrogate's Family Court entered on \_\_\_\_\_, 20\_\_\_\_ County \_\_\_\_\_

Name of Judge \_\_\_\_\_ Notice of Appeal filed on \_\_\_\_\_, 20\_\_\_\_

If from administrative determination, state agency \_\_\_\_\_

Nature of action or proceeding \_\_\_\_\_

Provisions of order judgment appealed from \_\_\_\_\_  
decree \_\_\_\_\_

If applying for stay, state reasons why requested \_\_\_\_\_

Has any undertaking been posted? \_\_\_\_\_ If yes, state amount and type \_\_\_\_\_

Has application be made to court below for this relief \_\_\_\_\_ If yes, state Disposition \_\_\_\_\_  
Has there been any prior application herein in this Court \_\_\_\_\_ If yes, state dates and nature \_\_\_\_\_

Has adversary been advised of this application? \_\_\_\_\_ Does he/she consent \_\_\_\_\_

Attorneys for Movant

Attorneys for Opposition

Name \_\_\_\_\_

\_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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Tel No. \_\_\_\_\_

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Appearing by \_\_\_\_\_

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(Do not write below this line)

Disposition

\_\_\_\_\_

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\_\_\_\_\_

Justice \_\_\_\_\_

Date \_\_\_\_\_

Motion date \_\_\_\_\_ Opposition \_\_\_\_\_ Reply \_\_\_\_\_

EXPEDITE \_\_\_\_\_ PHONE ATTORNEYS \_\_\_\_\_ DECISION BY \_\_\_\_\_

ALL PAPERS TO BE SERVED PERSONALLY

\_\_\_\_\_  
Court Attorney

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

-----X  
People of the State of New York

-against-

Affidavit in Support of  
Motion to Proceed as a  
Poor Person

\_\_\_\_\_  
Defendant-Appellant

Indictment No. \_\_\_\_\_

-----X

State of New York  
County of \_\_\_\_\_ ss.:

\_\_\_\_\_, being duly sworn, deposes and  
says:

1. I am the defendant-appellant in the above-captioned case, and I make this affidavit in support of my motion to proceed in forma pauperis..

2. I am presently in the custody of the Superintendent of \_\_\_\_\_  
pursuant to a judgment of the Supreme Court, \_\_\_\_\_ County, rendered on  
\_\_\_\_\_, convicting me of \_\_\_\_\_, and sentencing me to  
(fill in sentence) \_\_\_\_\_.

3. I am unable because of my indigence to pay the costs, fees, and expenses necessary to prosecute this appeal. I am currently incarcerated and am earning \$ \_\_\_\_\_ per week income.

4. I own \$ \_\_\_\_\_ worth of real property .

5. I \_\_\_\_\_ do / \_\_\_\_\_ do not own a car.

6. I have \$ \_\_\_\_\_ in savings.

7. I \_\_\_\_\_ do / \_\_\_\_\_ do not collect unemployment benefits.

8. I \_\_\_\_\_ do / \_\_\_\_\_ do not collect alimony or support.

9. I \_\_\_\_\_ do / \_\_\_\_\_ do not collect pension.

10. I \_\_\_\_\_ do / \_\_\_\_\_ do not have sources of income.

11. I was represented in the Supreme Court by :

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an attorney employed by the

\_\_\_\_\_ Legal Aid Society, \_\_\_\_\_ Bronx Defender Services, \_\_\_\_\_ Neighborhood Defender Services,

OR

\_\_\_\_\_ a member of the 18b Assigned Counsel Plan,

OR

\_\_\_\_\_ other assigned counsel (*explain*),

---

---

OR

\_\_\_\_\_ retained counsel (*explain retainer*) \_\_\_\_\_

---

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12. During the trial proceedings, I (*check one box*):

\_\_\_\_\_ was incarcerated.

OR

\_\_\_\_\_ released on my own recognizance.

OR

\_\_\_\_\_ released on bail in the sum of \$ \_\_\_\_\_ ,

which was posted by *(fill in details)* \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

Wherefore, I respectfully ask for an order permitting me to prosecute this appeal as a poor person and I be furnished with the stenographic transcripts of this action without fee and that I be assigned an attorney to represent me on appeal and for such other and further relief as may be proper and equitable.

\_\_\_\_\_  
Defendant-Appellant

Sworn to before me

this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
Notary Public



# CONTINUING LEGAL EDUCATION - APPELLATE PRACTICE

## BAIL, PRESERVATION, JUDICIAL NOTICE, AND HARMLESS ERROR

By Norman A. Olch

### I. Bail Pending Appeal

- CPL §§ 460.50, 460.60, 530.50
- one application - CPL § 460.50(3)
- 120 day rule - CPL § 460.50(4)

### II. Preservation

- General Preservation Rule: CPL § 470.05(2)

•Constitutional Issues: Court of Appeals will not consider constitutional issues raised for the first time in the Court of Appeals; Appellate Division can reach such issues in the exercise of its discretion

*Mohassel v. Fenwick*, 5 N.Y.3d 44, 53 (2005): failure to preserve due process challenge to rent stabilization statute

*Mtr. of Barbara C.*, 64 N.Y.2d 866 (1985)

*Cibro Petroleum Products, Inc., v. Chu*, 67 N.Y.2d 806 (1986)

### III. Exceptions to the Preservation Rule

A. Judicial notice (see below)

B. Interests of Justice: it is within the power of the Appellate Division to reverse in the interests of justice in the absence of an objection, but not the Court of Appeals. *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975); *Bingham v. New York City Transit Auth.*, 99 N.Y.2d 355, 359-360 (2003)

### C. New legal argument

*Sega v. State of New York*, 60 K.Y.2d 183, 190 n.2 (1983): "On appeal, a respondent may proffer in support of affirmance any legal argument that may be resolved on the record, regardless of whether it has been argued previously, if the matter is one which could not have been countered by the appellant had it been raised in the trial court." This means a legal argument which could not have been obviated by evidence at the trial. *But see, Misicki v. Caradonna*, 12 N.Y.3d 511, 519 (2009) (litigant, not the Court, must raise the new legal claim)

*Bingham v. New York City Transit Auth.*, 99 N.Y.2d 355, 359 (2003)

*Post v. 220 East End Ave. Corp.*, 62 N.Y.2d 19, 28-29 (1984): new legal argument based on an amendment to a statute

*Standard Funding Corp. v. Lewitt*, 225 AD.2d 608 (2nd Dept. 1996): "we will consider this issue even though it is raised for the first time on appeal, because it concerns an issue of law apparent on the face of the record which could not have been avoided by the opposing party if brought to their attention at proper juncture"; *Williams v. Naylor*, 64 A.D.3d 588 (2nd Dept. 2009)

### D. Statutory interpretation by appellant

*Mtr. of Richardson*, 67 N.Y.2d 246, 250 (1986); issue of statutory interpretation can be raised for first time on appeal by appellant seeking reversal. Note: that this is not an issue which can be obviated by proof at the trial.

### E. Public Policy

*Mtr. or Niagara Wheatfield Administrators Assn.*, 44 N.Y.2d 68, 72 (1978): claim that contract is void as against public policy can be raised for the first time in the Appellate Division by a party or by the court sua sponte

F. Subject Matter Jurisdiction: claim that the trial court, the Appellate Division, or an administrative agency does not have subject matter jurisdiction can be raised for the first time on appeal

*Roma v. Ruffo*, 92 N.Y.2d 489, 493 (1998)  
*Cappiello v. Cappiello*, 66 N.Y.2d 107, 108-109 (1985)  
*Montella v. Bratton*, 93 N.Y.2d 424, 432 (1999)

G. Change in the Law: an appeal is decided based upon the law at the time the appeal is decided, and not in accordance with the law as it was at the time of the original determination which is on appeal. This situation can arise, for example, when the legislature amends the statute while the case is on appeal.

*In re Kahn's Application*, 284 N.Y. 515, 523 (1940)

H. Fundamental defects in the mode of procedure: in a criminal case, there is a "narrowly drawn class of fundamental defects immune from the preservation requirement." *People v. Monroe*, 90 N.Y.2d 982, 984 (1997). For a discussion of this "narrow, historical exception" which is aimed at modes of trial procedure at basic variance with those mandated by the Constitution and statute, see, *People v. Patterson*, 39 N.Y.2d 288, 296-296 (1976)(burden of proof); *People v. Kisoan*, 8 N.Y.3d 129 (2007)(failure to inform counsel of the contents of a substantive note from a deliberating jury before the judge responds to the note)

I. New Facts: applied in child custody cases. *Matter of Michael B.*, 80 N.Y.2d 299 (1992).

IV. **Judicial Notice**: appellate courts can take judicial notice of law and facts which are not part of the record on appeal

CPLR § 4511: judicial notice taken by "every court"

*James v. Powell*, 19 N.Y.2d 249, 259 (1967): court takes judicial notice of statute of Puerto Rico for first time on appeal

*Hunter v. The New York, Ontario & Western R.R, Co.*, 116 N.Y. 615, 621-622 (1889).

*Mtr. of Wilhelm*, 62 A.D.2d 1155 (4th Dept. 1978)

1. Judicial notice can be used as the basis to affirm or reverse a judgment

*Mtr. of Michael B.*, 80 N.Y.2d 299, 317-318 (1992): in a child custody case, notice of changed circumstances not in the record is appropriate

*Mtr. of Albano v. Kirby*, 36 N.Y.2d 526, 532-533 (1975)  
*Zouppas v. Yannikidou*, 16 A.D.2d 52, 54 (1st Dept. 1962)

## 2. Specific instances

a. incontrovertible documentary evidence dehors the record

*Khatibi v. Weill*, 8 A.D.3d 485 (2nd Dept. 2004) (court records and files)

*Kirp V. Caleb's Path Realty Corp.*, 19 A.D.2d 744 (2nd Dept. 1963); in action to recover broker's commission, court takes judicial notice of plaintiff's real estate broker's license

*State v. Peerless Ins. Co.*, 117 A.D.2d 370 (3rd Dept. 1986): judicial notice of New York State Department of Taxation and Finance Notice of Determination

*Cohan v. Miskhopoulous*, 118 A.D.2d 530, 531 (2nd Dept. 1986): judicial notice of Appellate Term reversal in related case

*Schmidt v. Magnetic Bead Corp.*, 97 A.D.2d 151, 158 n.3 (2nd Dept. 1983): court takes judicial notice of shareholders acquisition agreement because it is contained in the record on appeal in another case pending before the court

b. foreign law

*Edwards v. Erie Coach Lines Co.*, 17 N.Y.3d 306 (2011)

*Compare, Wariri v. Wlldenstein & Co., Inc.*, 297 A.D.2d 214 (1st Dept. 2002)(French Law), with, *Harris S.A. De C.V. v. Grupo Sistemas*, 279 A.D.2d 263, 264 (1st Dept. 2001), lv. denied, 96 N.Y.2d 709 (2001) (Mexican law)

**V. Harmless Error:** Litigants are entitled to a fair trial, not a perfect trial. Accordingly, an appeals court will consider an error harmless, and will not reverse a judgment, if the court is satisfied that the result would have been the same even if the

error had not been made. Almost all constitutional error can be determined in context to be harmless

- *People v. Hardy*, 4 N.Y.3d 192, 199 (2005): "prosecutor's own summation illustrates how important [the evidence] was to the People's case"; "heavy reliance" in summation on the evidence

- in appellant's brief anticipate the People's claim of harmless error and address why claimed error is not harmless

#### **VI. The Hopeless Appeal**

- "[H]appily, all constitutional questions are always open." *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963) (Douglas, J. concurring).

#### **VII. Ahead in the U.S. Supreme Court**

- search incident to a lawful arrest: searching the contents of a cellphone. *U.S. v. Wurie* and *California v. Riley*

- See, *U.S. v. Jones*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 945, 954 et seq. (Sotomayor, J. concurring) and 957 et seq. (Alito, J. concurring)