AMENDED CLE MATERIALS:

MOTION PRACTICE IN THE APPELLATE DIVISION

by

Elliott Scheinberg, Esq.

divmat1@gmail.com

This replaces the material in the printed handout; those materials should be disregarded.

MOTION PRACTICE IN THE APPELLATE DIVISION:

– THERE ARE MANY DIFFERENT APPLICATIONS FOR RELIEF

THAT ARE AVAILABLE DURING THE PENDENCY OF AN APPEAL

1. CPLR 5511, Motion that a PARTY IS NOT AGGRIEVED – JURISDICTIONAL

2. CPLR 5511: Appellant Is DISSATISFIED w/ the REASONING OF THE COURT

3. CPLR 5511: Appellant Appeals from a CONSENT ORDER or A DEFAULT

4. Motion for a PREFERENCE

5. Motion for an EXTENSION OF TIME:

– To Perfect an Appeal – 1250.9(b) (p. 20):
– (1) 60 DAYS PER STIP; (2) 30 BY LETTER; (3) MOTION

– Or to File and Serve a Brief – 1250.9(g)

6. Motion for LEAVE TO APPEAL TO THE COURT OF APPEALS

7. Motion, CPLR 5519, for a STAY OF ENFORCEMENT:

– Payments, Tort Claims

– Transfer Personal or Property

– Stay Proceedings, Pending the Determination of the Appeal

– Transfer of Custody,

9. Motion to STRIKE A BRIEF/RECORD/APPENDIX:

– Contains Dehors the Record Material

– Inadequate Record

-- Necessary Exhibits/Testimony Not Included in the Record

– Appendix, CPLR 5528

– Appendix CPLR 5528(a)(5) – basic contents of briefs and appendicies

> An appendix, which may be bound separately, containing only such parts of the record on appeal as are necessary to consider the questions involved, ***including those parts the appellant reasonably assumes will be relied upon by the respondent***; provided, however, that the appellate division in each department may by rule applicable in the department authorize an appellant at his election to proceed upon a record on appeal printed or reproduced in like manner as an appendix, and in the event of such election an appendix shall not be required.

UNIFIED RULES: 1250.7(d)(1): Form and Content of Records and Appendices; Exhibits

> 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;
>
> (iii) decision and opinion of the court or agency, and report of a referee, if any;
>
> (iv) pleadings, and in a criminal case, the indictment or superior court information;
>
> (v) material excerpts from transcripts of testimony or from documents in connection with a motion. ***Such excerpts shall include all the testimony or averments 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;

9(a): CONSEQUENCES FOR AN IMPROPER APPENDIX:

– Court Can Dismiss that Branch of the Appeal;

– Court May Order Appellant to Submit a further Appendix; OR

– Court Can Dismiss the Appeal Unless Appellant Submits a further Appendix

[*E. P. Reynolds, Inc. v. Nager Elec. Co.*, 17 N.Y.2d 51, 54-56 (1966)]; *Reale v. Reale*, 104 A.D.3d 747 (2d Dep't 2013); *Kumar v Chander*, 149 AD3d 709, 712 [2d Dept 2017].

PRACTICE TIP: CONSULT WITH OPPOSING COUNSEL RE APPENDIX

Practice Commentaries, C5528:2. Contents of the Appendix:
"Actually, the appellant should make no assumption at all, but should consult with the respondent to find out precisely what the respondent wants included, and, if the request is not unreasonable, include it ...

If the appellant proves disobliging, the respondent may, in an appendix contained in or accompanying its own brief, include the additional parts of the record the respondent feels necessary for the consideration of its position."

DECISION AND *ORDER*" FOLLOWING A TRIAL

EXAMPLE: AT THE CONCLUSION OF A TRIAL
SUPREME COURT ISSUES A "DECISION *AND ORDER*"
THAT ORDERS YOUR CLIENT TO DO SOMETHING

IS THIS "DECISION AND *ORDER*" APPEALABLE AS OF RIGHT

BEFORE THE ENTRY OF JUDGMENT?

– CPLR 5512 STATES THAT "AN ORDER OR A JUDGMENT

IS AN APPEALABLE PAPER."

ANSWER: – IT'S APPEALABLE EVERY DEPT

EXCEPT IN THE SECOND DEPT

– WHY DOES THE SECOND DEPT
NOT CONSIDER IT APPEALABLE AS OF RIGHT?

– IT CONSIDERS IT A DECISION

BECAUSE A MOTION ENDS IN AN ORDER,

A TRIAL ENDS IN A JUDGMENT,

A DECISION ISN'T APPEALABLE AS OF RIGHT

– THE AGGRIEVED PARTY FACES ENFORCEMENT, SANCTIONS.

(a): WAIT FOR ENTRY OF THE JUDGMENT, APPEAL, STAY;

(b): MAKE A MOTION TO THE TRIAL COURT FOR A STAY;

(c): (1) MOVE FOR LEAVE TO APPEAL AND SEEK A STAY

OR

(2) PERFORM AN ACT IN CPLR 5519 THAT GETS AN AUTOMATIC STAY

– AND PRAY THAT LEAVE'S GRANTED

– (d): CPLR 5520(c), ALLOWS THE FILING OF A PREMATURE NOTICE OF APPEAL[1]

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[1] **CPLR 5520. Omissions; appeal by improper method**
(a) Omissions. If an appellant either serves or files a timely notice of appeal or notice of motion for permission to appeal, but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the appeal is taken or the court of original instance may grant an extension of time for curing the omission.

(b) Appeal by permission instead of as of right. An appeal taken by permission shall not be dismissed upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the motion for permission was made within the time limited for taking the appeal.

(c) DEFECTS IN FORM. WHERE A NOTICE OF APPEAL IS PREMATURE [[[or contains an inaccurate description of the judgment or order appealed from,]]] THE APPELLATE COURT, IN ITS DISCRETION, WHEN THE INTERESTS OF JUSTICE SO DEMAND, MAY TREAT SUCH A NOTICE AS VALID.

– THE COURT OF APPEALS AND

THE FIRST AND THIRD DEPARTMENTS

LOOK BEYOND THE NOMENCLATURE.

THE COURT OF APPEALS:

Reynolds v Dustman, 1 NY3d 559, 560-61, 772 N.Y.S.2d 247 [2003]:
Petitioner commenced this [A]rticle 78 proceeding challenging respondents' jail time credit determination. **Supreme Court dismissed the petition on the merits in a paper which, although labeled a "decision," ended with a sentence stating that "[t]his decision shall constitute the order of the court."**

* * *

Although the Supreme Court paper [] identifies itself as both a decision and order, it can be treated as a judgment determining the proceeding, an appealable paper (CPLR 411; 5512[a]).

THE THIRD DEPARTMENT

Bellizzi v. Bellizzi, 82 A.D.3d 1541, 919 N.Y.S.2d 577 [3d Dept 2011]:
[W]e are unpersuaded by the husband's assertion that the [] document issued by Supreme Court does not constitute appealable paper and, thus, the wife's appeal should be dismissed. **"An appealable paper is an order or judgment of the court of original instance" …(CPLR 5512[a]). [W]hile the Supreme Court document [] is labeled a "decision," the language contained at the foot of the document-"so ordered"-clarifies that it is an appealable paper**.

Hammerstein v. Henry Mountain Corp., 11 A.D.3d 836, 784 N.Y.S.2d 657 [3d Dept 2004]:
1) Appeal from an order of the Supreme Court (Coccoma, J.), entered September 30, 2003 in Delaware County, in favor of plaintiff, and (2) motion to dismiss appeal.

* * *

[P]laintiff commenced this foreclosure action.

* * *

Defendant [] contends that this appeal should be dismissed because plaintiff appealed from an unappealable decision rather than from a judgment or order (CPLR 5512[a]. . .). Regardless of the label employed by Supreme Court. . .**we deem the paper a mixed decision and order**. This order "affect[ed] a substantial right" of the parties, making it appealable (CPLR 5701[a][2][v]. . .). Thus, we will not dismiss the appeal, and will [] address its merits.

<u>THE FIRST DEPARTMENT</u>:

In re Samantha F., 2019 NY Slip Op 01310, 1 [1st Dept 2019]:
Although denominated a decision, the paper bears the standard language advising that any appeal from the "order" must be taken within 30 days (§ 1113), and is, in substance, an order finding that the children have been abused/neglected (§ 1051[a]), which is appealable as of right (§ 1112[a]) and therefore n appealable paper.

– **ALTHOUGH THE FOURTH DEPARTMENT**

HAS NO CASE LAW ON THIS ISSUE,

THE FORMER CLERK OF THE COURT

TOLD ME THAT IT IS CONSIDERED APPEALABLE

THE INTERSECTION BETWEEN CPLR 5701(a)(2) v. CPLR 2215

1. CPLR 5701(a)(2) STATES:

AN APPEAL MAY BE TAKEN AS OF RIGHT FROM AN ORDER

WHERE "THE MOTION IT DECIDED WAS MADE ON NOTICE"

2. CPLR 2215:

"A PARTY MAY SERVE UPON THE MOVING PARTY

A NOTICE OF CROSS MOTION DEMANDING RELIEF'

3. ASSUME:

– A PARTY SEEKS RELIEF ONLY IN ITS OPPOSING PAPERS

WITHOUT THE "NOTICE OF CROSS-MOTION"?

– CAN THE SUPREME COURT GRANT THE RELIEF?

– IS A DENIAL OF THE RELIEF APPEALABLE?

4. CoA AND EVERY DEPT HAVE HELD THAT

THE ABSENCE OF "THE FORMAL NOTICE OF CROSS MOTION"

IS NOT DETERMINATIVE

Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co., 23 N.Y.3d 129, 134, 989 N.Y.S.2d 458 (2014):
We held in VSL Corp. v. Dunes Hotels & Casinos, 70 N.Y.2d 948, 524 N.Y.S.2d 671, 519 N.E.2d 617 (1988) that it was error for the Appellate Division to dismiss a complaint sua sponte on forum non conveniens grounds, adding that such a dismissal may occur "only upon the motion of a party" ... **Here, though no party formally moved to dismiss plaintiffs complaint because of the inconvenience of the forum, the issue was briefed and argued at Supreme Court. We hold that VSL did not bar the court from dismissing the complaint under these circumstances.** We also hold that, on this record, Supreme Court was correct as a matter of law in dismissing both the complaint and the third party complaint.

* * *

During an oral argument on another motion, however, Supreme Court suggested that, if the forum non conveniens argument had merit, it would require dismissal of the whole case. The court directed the parties to brief and argue the forum non conveniens issue, which they did.

* * *

The Appellate Division, with two Justices dissenting, reversed . . . It held that CPLR 327(a), as interpreted in VSL, prohibited the dismissal of the main action on forum non conveniens grounds in the absence of a motion seeking that relief.

* * *

[T]here is an obvious potential for unfairness when an appellate court dismisses a case on the basis of an issue that no party has raised or addressed. VSL holds that CPLR 327(a)'s requirement of a "motion" prohibits such a potentially unfair procedure.

There was no similar risk of unfairness in what happened here. While the idea of dismissing the main complaint on forum non conveniens grounds was first mentioned by the Supreme Court Justice, he gave the parties a full opportunity to address the issue-indeed, he asked them to do so. Al-Sanea argued in favor of dismissing the complaint on forum non conveniens grounds, though he did not serve motion papers seeking that relief. We see no reason to read CPLR 327(a) as prohibiting a forum non conveniens dismissal where only the formality of a document labeled "notice of motion" was lacking, and where AHAB, the only party opposed to dismissal, neither objected to nor was prejudiced by the omission of that formality. (emphasis provided).

➤**Smulczeski v. Smulczeski, 128 A.D.3d 671, 10 N.Y.S.3d 24 (2d Dep't 2015):**
To the extent the Supreme Court concluded that it lacked discretion to consider the plaintiff's request for affirmative relief, which was not presented in a proper cross motion pursuant to CPLR 2215, its conclusion was erroneous.

Although "a party seeking relief in connection with another party's motion is, as a general rule, required to do so by way of a cross motion," **courts "retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215.**"

➤**PM-OK Assoc. v. Britz, 256 A.D.2d 151, 152, 681 N.Y.S.2d 500 (1st Dep't 1998):**
[D]espite the failure of defendants [] to cross-move to vacate their defaults pursuant to CPLR 5015, the **IAS COURT *SHOULD HAVE* CONSIDERED THE MERITS OF THEIR OPPOSITION TO PLAINTIFF'S MOTION** ... Such opposition consisted of affirmations and affidavits setting forth excusable default as a result of miscommunication and misunderstanding between the comptroller for the property manager of defendant OCA and counsel for all other defendants.

➤**Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v. Mirman, 269 A.D.2d 174, 175, 702 N.Y.S.2d 295 (1st Dep't 2000):**
In view of defendant's opportunity to respond to plaintiff's request for restoration in plaintiff's opposition papers, **plaintiff's failure, under these circumstances, to serve a notice of cross-motion was not fatal to that relief** . . . **the arguments and documents submitted in that connection satisfied plaintiff's burden**.

Town of Brookhaven v. MMCCAS Holdings, Inc., 137 A.D.3d 1258, 1258 59 (2d Dep't 2016):
[U]nder the circumstances of this case, it was improper for the Supreme Court to deny. the Town's motion on the ground [] that the Town was collaterally estopped from seeking a preliminary injunction by the denial of a motion for that relief in a prior, related action.

The defendants, in opposition to the Town's current motion, did not make that argument or include the prior order and motion papers as exhibits to their opposition papers . . . However, because the merits of the motion were argued before the Supreme Court and fully briefed in this Court, this Court will consider the merits of the motion in the interest of judicial economy.

Rappel v. Wincoma Homeowners Ass'n, 125 A.D.3d 833, 834, 4 N.Y.S.3d 276 (2d Dep't 2015):
Although Wincoma did not serve a notice of cross motion on Ambrosio, **Ambrosio was aware of Wincoma's request for relief, opposed that request, and was not otherwise prejudiced by Wincoma's failure to serve a notice of motion**. Under these circumstances, the Supreme Court did not err in entertaining the Wincoma application.

Fried v. Jacob Holding, Inc., 110 A.D.3d 56, 970 N.Y.S.2d 260 (2d Dep't. 2013):
[The principal issue is whether it was proper for the court to consider defendant's application when defendant had not made its request for relief in a formal notice of cross motion (CPLR 2215). Our precedent. . .has been inconsistent, leaving the law unsettled.]

Plaintiffs moved pursuant to CPLR 3215 for leave to enter a default judgment on the issue of liability. Defendant timely filed opposing papers, but did not merely oppose plaintiffs' motion; it also asked the court [in an attorney's affirmation], in effect, for leave to serve a late answer, and to compel plaintiffs to accept its untimely answer. Defendant's application for affirmative relief was not, however, set forth in a notice of cross motion duly served pursuant to CPLR 2215. . .

* * *

Nonetheless, **courts retain discretion to entertain requests for affirmative relief that do not meet the requirements of CPLR 2215. Litigants, however, must be cognizant of an important distinction between the two situations: a party in compliance with CPLR 2215 is entitled to have its cross motion considered; a party not in compliance with the statute must hope that the court opts, in the exercise of its discretion, to entertain the request.** Thus, we are in agreement with our colleagues in the Appellate Division, Third Department, who, in Fox Wander W. Neighborhood Assn. v. Luther Forest Community Assn., 178 A.D.2d at 872, held that, even in the absence of an explicit notice of cross motion, the Supreme Court is not "prohibited" from entertaining the nonmoving party's request for relief.

As with most matters addressed to a court's discretion, more than one factor is relevant, including the need to encourage careful, forthright practice. Other relevant factors include the interrelatedness of the relief requested by the nonmoving party and the relief requested in the main motion . . . the prominence in the opposition papers of the affirmative request for relief and the movant's opportunity to address that request . . . and the interest of judicial economy.

Another consideration for careful practitioners is the availability of appellate review. A request for relief made in the absence of a notice of cross motion is not a "motion made upon notice" (CPLR 5701[a][2]), so an order granting or denying the request is not appealable as of right, and permission to appeal is necessary (CPLR 5701[c]; Blam v. Netcher, 17 A.D.3d 495, 496, 793 N.Y.S.2d 464). By contrast, generally, a party may appeal as of right to challenge the disposition of a motion or cross motion made on notice (CPLR 5701[a]).

Fugazy v. Fugazy, 44 A.D.3d 613, 614, 844 N.Y.S.2d 341 (2d Dep't 2007):
[T]he court did not err in entertaining the defendant's cross motion, which was set forth in his affidavit in opposition to the plaintiff's order to show cause and did not include a formal notice of cross motion. Since the plaintiff was aware of the cross motion, submitted opposition to it, and was not unduly prejudiced by the lack of service of a notice of cross motion, the court providently exercised its discretion in entertaining the defendant's cross motion

Marx v. Marx, 258 A.D.2d 366, 367, 685 N.Y.S.2d 224 (1st Dep't 1999):
The absence of a notice of cross motion by the outgoing attorney pursuant to CPLR 2215 is not fatal herein since defendant was fully apprised of the outgoing attorney's position respecting payment of his fee in the event defendant elected to discharge him and retain different counsel.

Osterling v. Osterling, 126 A.D.2d 965, 511 N.Y.S.2d 989 (4th Dep't 1987):
The trial court properly denied plaintiff's motion to vacate the order because of procedural irregularities. Although neither party served motion papers on the first motion, the order entered thereon recites that the review undertaken by the court was requested by the parties. Plaintiff does not contend that her attorney was not empowered to act on her behalf, and since counsel for both parties voluntarily appeared and argued, it was within the court's discretionary power under CPLR 2214(c) to resolve the issues presented. Plaintiff must be deemed to have waived any claim of error arising from the informal nature of the proceedings.

Wechsler v. People ex rel. Com'r of Environmental Conservation of State of New York, 13 A.D.3d 941, 942, 787 N.Y.S.2d 433 (3d Dep't 2004):
[W]e discern no error or unfairness in Supreme Court's determination to entertain defendant's cross motion despite the absence of the required "notice of cross-motion" (CPLR 2215). That cross motion provided actual notice to plaintiffs that defendant was seeking summary judgment in its favor pursuant to CPLR 3212(b) and plaintiffs responded to that cross motion.

Fox Wander W. Neighborhood Ass'n Inc. v. Luther Forest Community Ass'n Inc., 178 A.D.2d 871, 872-73, 577 N.Y.S.2d 729 (3d Dep't 1991):
Although CPLR 2215, as amended in 1980, does require that an explicit "notice of cross-motion" be served with cross motion papers . . . Supreme Court is not prohibited by CPLR 2215 from entertaining the motion in the absence of the explicit notice. Here, the opposing party was aware of and responded to the cross motion and the procedure was fair to the parties. The amendment was designed to aid the court in determining the motion by alerting the court that the issue was presented so that it could be most conveniently and expeditiously decided.

Baron v. Grant, 48 A.D.3d 608, 609, 852 N.Y.S.2d 374 (2d Dep't 2008):
Under the circumstances of this case, the Supreme Court should have considered the merits of First Union's posttrial motion. Although First Union failed initially to include a notice of motion therewith, all parties were timely noticed and not prejudiced, as the posttrial motion was fully briefed.

Catania v. Lippman, 98 A.D.2d 826, 826-27, 470 N.Y.S.2d 487 (3d Dep't 1983):
Special Term properly considered third-party defendant's cross motion to dismiss the third-party complaint. Although no notice of cross motion was served by third-party defendant as required by CPLR 2215, no prejudice resulted from Special Term hearing the cross motion because (1) third-party defendant previously had requested dismissal of the third-party complaint in his answering affidavit, (2) the affidavit of third-party plaintiff's attorney defended the validity of the third-party complaint, and (3) third-party plaintiff was given an opportunity to argue at Special Term. Under these circumstances, the cross motion was properly considered.

Yuen Lin Lee v. Kwok Wai Lee, 68 A.D.3d 421, 889 N.Y.S.2d 577 (1st Dep't 2009):
Defendant's contention that the stipulation vacating the judgment of divorce was inaccurate and defective and should not have been sua sponte so-ordered by the motion court was not properly before the Appellate Division, since neither party moved on notice to have the stipulation so-ordered and defendant never moved to vacate the stipulation once it was so-ordered. Defendant did not file papers in opposition to plaintiff's motion to vacate the judgment of divorce, the record does not contain a transcript of any oral argument that may have been heard on the return date of that motion, and the record is otherwise insufficient to permit review of the motion court's implicit finding that the stipulation was valid and enforceable.

Steinhardt Group, Inc. v. Citicorp, 303 A.D.2d 326, 326, 757 N.Y.S.2d 537 (1st Dep't 2003):
[N]otwithstanding the circumstance that the relief afforded in the December 20, 2001 order was sua sponte, the basis for the relief, namely, nonjoinder of a necessary party plaintiff the claims of which against defendants were time-barred, was fully litigated in the context of plaintiffs' motion to amend the complaint to name the nonjoined party as a plaintiff.

cf: <u>CASES STRICTLY CONSTRUING CPLR 2215</u>

Abizadeh v Abizadeh, 159 AD3d 856, 857, 72 N.Y.S.3d 566 [2d Dept 2018]:
In the order appealed from, the Supreme Court, in effect, determined that the plaintiff's notice of cross motion failed to comply with CPLR 2214(a), and it denied his cross motion on that basis. The plaintiff appeals.

CPLR 2214(a) provides that a notice of motion shall "specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor" ... **[T]he Supreme Court providently exercised its discretion in denying the plaintiff's cross motion on the ground that the plaintiff's notice of cross motion was deficient** (CPLR 2214[a]; 2215).

The plaintiff's notice of cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor (CPLR 2214[a]).

Although the plaintiff's supporting papers supplied the missing information, a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of motion (Jud. Conf. and Chief Admin. of the Cts. of the State of N.Y., Rep. to the 1980 Legis. in Relat. to Civ. Pract. in the Cts., Rep. of Chief Admin., at 137; see generally Fried v. Jacob Holding, Inc., 110 A.D.3D 56, 61–62, 970 N.Y.S.2D 260).

Komanicky v Contr., 146 AD3d 1042, 1043, 43 N.Y.S.3d 76 [3d Dept 2017]:
To the extent that plaintiff's papers in opposition to the motions can be read as requesting an extension of time to serve defendants pursuant to CPLR 306–b, such affirmative relief should have been sought by way of a cross motion on notice (CPLR 2215 ...).

Hergerton v. Hergerton, 235 A.D.2d 395, 396-97, 652 N.Y.S.2d 77 (2d Dep't 1997):

In the order [] the Supreme Court granted the respondent affirmative relief which she requested in an amended affidavit submitted in opposition to the appellant's motion, inter alia, to vacate the amended judgment. This was error, as the respondent failed to serve the appellant with a notice of cross motion (CPLR 2215; [cf.] Thomas v. The Drifters, 219 A.D.2d 639, 631 N.Y.S.2d 419 . . .). The respondent's amended affidavit, in which she sought, inter alia, an award of attorney's fees and appointment as receiver of the marital residence, was served after the appellant served his reply affidavit, and there is no indication in this record that he had a fair opportunity to respond.

THE APPELLATE DIVISION HAS ALSO

GRANTED LEAVE TO APPEAL FROM AN ORAL MOTION

Wells Fargo Bank, N.A. v. Hudson, 98 A.D.3d 576, 949 N.Y.S.2d 703 (2d Dep't 2012):
ORDERED that on the Court's own motion, the notice of appeal from so much of the order as granted the oral application of the defendant Mahitima Baa to dismiss the complaint insofar as asserted against him is deemed to be an application for leave to appeal from that part of the order, and leave to appeal is granted (CPLR 5701[c]);

Countrywide Funding Corp. v. Reynolds, 41 A.D.3d 524, 524-25, 839 N.Y.S.2d 108 (2d Dep't 2007):
In an action to foreclose a mortgage, the defendants [] appeal (1) from a decision of the Supreme Court [] dated June 9, 2005; and (2), as limited by their brief, from so much of an order of the same court dated July 22, 2005, as, in effect, granted the plaintiff's oral application for leave to amend the complaint, granted the plaintiff's motion for summary judgment against them, denied their cross motion to dismiss the complaint, or in the alternative, to preclude any testimony by the plaintiff, preclude documents not provided by the plaintiff, and strike the plaintiff's note of issue and, sua sponte, directed those defendants to post a bond in the sum of $180,000 before appealing.

* * *

ORDERED that on the court's own motion, the appellants' notice of appeal from so much of the order as granted the plaintiff's oral application for leave to amend the complaint is treated as an application for leave to appeal from that part of the order, and leave to appeal is granted (see CPLR 5701[c]);

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the plaintiff's oral application for leave to amend its complaint and substituting therefor a provision denying the oral application; as so modified, the order is affirmed insofar as reviewed [.]

CPLR 5701(a)(3) – RELIEF FROM EX PARTE ORDERS

– WHAT IS AN EX PARTE ORDER?

– AN ORDER "NOT MADE UPON NOTICE" [cf. CPLR 5701(a)(2)]

– SITUATIONS INVOLVING ORDERS TO SHOW CAUSE:

(a): PARTIES ARGUED THE ISSUE BUT OPPOSING PARTY DID NOT YET SUBMIT WRITTEN OPPOSITION

(b) AN ORDER WHERE OPPOSING SIDE WAS NOT THERE

(c): COURT REFUSES TO SIGN AN OSC

– CPLR 5701(a)(1), appeals as of right, ALL judgments that finally dispose of all issues;

– CPLR 5701(a)(2) - (3): appeals as of right, from orders MADE ON NOTICE; and

– CPLR 5701(a)(c): appeals by permission.

CPLR 5701(a)(3), TELLS YOU HOW TO CONVERT AN EX PARTE ORDER INTO AN ORDER THAT'S APPEALABLE AS OF RIGHT

> 5701(a)(3): from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.

(1) MAKE A MOTION IN THE COURT THAT ISSUED THE EX PARTE ORDER;

(2) ON NOTICE TO THE PARTY WHO GOT THE EX PARTE ORDER;

(3) THE SPECIFIED RELIEF IN THE MOTION IS TO VACATE OR MODIFY THE EX PARTE ORDER; AND

(4) IF THE MOTION TO VACATE OR MODIFY THE EX PARTE ORDER IS DENIED, AN APPEAL MAY NOW BE TAKEN AS OF RIGHT FROM THAT DENIAL.

–SAME PROCEDURE FOR RELIEF FROM DEFAULT AND SUA SPONTE ORDERS (*Sholes v. Meagher*, 100 N.Y.2d 333, 763 N.Y.S.2d 522 [2003] .)

Meng v. Allen, 117 A.D.3d 621, 985 N.Y.S.2d 875 (1st Dep't 2014):
A sua sponte order is not appealable as of right . . . and this Court denied plaintiff's motion for leave to appeal. Plaintiff could move before the trial court to vacate the sua sponte order, and possibly appeal as of right from any subsequent denial of that motion (CPLR 5701[a][2] and [3]), but he has not done so.

Livathinos v. Vaughan, 147 A.D.3d 441, 47 N.Y.S.3d 272 (1st Dep't 2017):
There is no right to appeal from a judgment that is based upon a sua sponte order; nor is there a right to appeal from the sua sponte order itself.

CPLR 5704, ALLOWS APPELLATE REVIEW OF EX PARTE ORDERS,

WITHOUT GOING THROUGH THE LENGTHY STEPS IN CPLR 5701(a)(3)

I. HOW DOES 5704 WORK?

– CPLR 5704(a) ASKS: DID THE SUPREME COURT GRANT OR DENY THE EX PARTE RELIEF

II(a): IF THE SUPREME COURT GRANTED AN EX PARTE ORDER:

– EITHER THE APPELLATE DIVISION, A FULL APNEL, OR ONE JUDGE MAY VACATE OR MODIFY THE ORDER

II(b): IF THE SUPREME COURT DENIED AN EX PARTE ORDER:

– ONLY AN ENTIRE PANEL MAY GRANT AN ORDER OR A PROVISIONAL REMEDY

IV. ARE YOU IN THE FIRST OR THE SECOND DEPT?

– 1ST DEPT: REQUIRES A MOTION

– 2ND DEPT: BRING THE VERY PAPERS TO THE APPDIV

CPLR 5704(a):

The appellate division [the whole court] or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division;

and the appellate division may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

EX PARTE ORDERS: **CPLR 5701(c) – APPEALS BY PERMISSION**

– APPLIES TO "ANY ORDER THAT ISN'T APPEALABLE AS OF RIGHT"

– EX PARTE ORDERS

I. BY WHOSE PERMISSION?

I(a): – BY PERMISSION OF THE LOWER COURT JUDGE,

WHO MADE THE EX PARTE ORDER;

OR

I(b): – IF THE ISSUING JUDGE REFUSES TO GRANT PERMISSION

THEN TO THE APPELLATE DIVISION [A FULL PANEL]

OR

I(c): – DIRECTLY TO THE APPELLATE DIVISION

5701(c) VERY TRICKY

I(d): – 5701(c): "BY *PERMISSION OF A JUSTICE* OF THE APPELLATE DIVISION"

– NOT IN CIVIL CASES: TO THE FULL COURT

– CRIMINAL CASES

CPLR 5701(c):
Appeals by permission. An appeal may be taken to the appellate division ***from any order which is not appealable as of right*** in an action originating in the supreme court or a county court by permission of a judge who made the order granted before application to a justice of the appellate division**; or by permission of 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.

EX PARTE ORDERS: **QUERY:**

– WHAT IF AN APPELLANT JUST FILES A NOTICE OF APPEAL

FROM AN EX PARTE ORDER

INSTEAD OF SEEKING PERMISSION?

– APPELLATE DIVISION MAY, SUA SPONTE,

TREAT THE NOTICE OF APPEAL

AS AN APPLICATION FOR REVIEW

In re Austin, 295 AD2d 721, 722, n. 1, 743 N.Y.S.2d 333 [3d Dept 2002]:[2]
Although petitioner is appealing from an ex parte order which is not appealable as of right (CPLR 5701[a][1], [2]), this Court may consider the matter since it has previously treated similar appeals as applications for review pursuant to CPLR 5704(a).

Matter of Washington, 216 AD2d 781, 781, 628 N.Y.S.2d 837 [3d Dept 1995]:
Appeal from an order of the County Court of Clinton County [] which dismissed petitioner's application pursuant to Civil Rights Law article 6 to change his name.

Petitioner, an inmate at Clinton Correctional Facility in Clinton County serving an to 25-year sentence, petitioned to have his name changed to Youseff Shalom Ali for the reason that the "assumption of a new name will conform to the practice and ideals of" his Islamic faith. County Court summarily denied the petition on the ground that the name change would result in recordkeeping problems for various State agencies and that petitioner had lost his civil rights to petition for a name change by reason of his felony conviction. This appeal ensued.

The immediate impediment to the appeal is that an ex parte order is not appealable as of right (CPLR 5701[a][2]) and there are no procedural mechanisms petitioner can utilize to produce an appealable order (Siegel, N.Y.Prac. § 526, at 817 [2d ed]). To resolve this dilemma, we shall treat the appeal as an application by petitioner for review pursuant to CPLR 5704(a) (Matter of Michael JJ., 200 A.D.2d 80, 82, 613 N.Y.S.2d 715).

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[2] *McKee v Coughlin*, 142 AD2d 798, 799, 531 N.Y.S.2d 54 [3d Dept 1988]; *Anostario v Anostario*, 249 AD2d 612, 613, 670 N.Y.S.2d 629 [3d Dept 1998].

CPLR 5704(a)

IF A JUDGE REFUSES TO SIGN AN ORDER TO SHOW CAUSE

– UNDER WHAT AUTHORITY MAY A JUDGE REFUSE?

– **CPLR 2214(d):**

– "THE COURT IN A *PROPER CASE* *MAY GRANT* AN ORDER TO SHOW CAUSE ..."

– NO DIRECT APPEAL LIES FROM SUCH REFUSAL

– IT'S NOT AN APPEALABLE PAPER

– REVIEW IS AVAILABLE BY CPLR 5704(a)

– NOT BY MANDAMUS – DISCRETIONARY:

Nav. v. Am. Arbitration Ass'n, 83 A.D.3d 423, 919 N.Y.S.2d 339 (1st Dep't 2011):
No appeal lies from an order declining to sign an order to show cause.

Gache v Town/Vil. of Harrison, 251 AD2d 624, 624-25, 676 N.Y.S.2d 198 [2d Dept 1998]:
ORDERED that the appeal from the purported order is dismissed … as the purported order was merely a refusal to sign an order to show cause, which is not an appealable paper (CPLR 5701[a]).

Azeem v. Murphy, 139 A.D.3d 610, 30 N.Y.S.3d 821 (1st Dep't 2016):
The court's order declining to sign petitioner's order to show cause is not appealable. [Editor's note: Must proceed via CPLR 5704, may not proceed pursuant to Article 78 (mandamus) (a): *Greenhaus v. Milano*, 242 A.D.2d 383, 661 N.Y.S.2d 664 (2d Dep't. 1997); Rosenthal v. Agate, 29 A.D.3d 809, 813 N.Y.S.2d 916 (2d Dep't. 2006)].

King v. Carrion, 128 A.D.3d 461, 462, 7 N.Y.S.3d 894 (1st Dep't 2015):
Petitioner sought to commence an article 78 proceeding against respondents through the means of an order to show cause, which Supreme Court refused to sign . . . No appeal as of right lies from an ex parte order or from the refusal to sign an ex parte order to show cause (CPLR 5701[a][2]). However, review may be obtained by way of an application pursuant to CPLR 5704(a).

Kalyanaram v. New York Inst. of Tech., 91 A.D.3d 532, 936 N.Y.S.2d 543 (1st Dep't 2012):
There is no right of appeal from an order that does not determine a motion on notice (CPLR 5701[a][2); Sholes v. Meagher, 100 N.Y.2d 333, 763 N.Y.S.2d 522, 794 N.E.2d 664 [2003]), including an order declining to sign an order to show cause . . . and a judgment entered upon such an order.

Page v Watson, 304 AD2d 382, 756 N.Y.S.2d 748 [1st Dept 2003]:
No appeal lies from an order entered on default (CPLR 5511). Although plaintiff twice sought to vacate her default, the motion court refused to sign her orders to show cause seeking such relief, and she never sought to have such refusals reviewed by this Court pursuant to CPLR 5704(a). Nor are such refusals appealable as of right such as might make them reviewable under CPLR 5517(b).

Cheri Rest., Inc. v Eoche, 144 AD3d 578, 579, 42 N.Y.S.3d 113 [1st Dept 2016]:
Defendant failed to respond to plaintiff's untimely discovery demands, appear for a scheduled deposition, or attend a scheduled compliance conference. By order entered May 6, 2015, the motion court issued an order on default … On May 8, 2015, defendant filed an order to show cause to vacate the order entered on default. On May 12, 2015, the motion court held oral argument on the order to show cause and ultimately refused to sign the order. The court also issued a written order, entered May 12, 2015, denying defendant's application on the record to vacate the order entered on default. On July 15, 2015, defendant moved by notice of motion to vacate or modify the default order, the denial of which is before us on this appeal. Defendant properly moved by notice of motion to vacate the order entered on default, and the denial of that motion is an order appealable as of right … The prior orders granting a default and striking the answer, refusing to sign the order to show cause, and denying defendant's application were not orders appealable as of right (CPLR 5511 [order entered on default]; also 5701[a] [appeals as of right] …

Moreover, since there was no prior motion to vacate the order entered on default, the July 15, 2015 motion to vacate cannot be construed as a motion to reargue and was not identified as such (CPLR 2221), and the motion court's conclusion that the motion to vacate was an untimely motion to reargue was in error. Thus the motion court also erred in granting plaintiffs' cross motion for sanctions for the filing of a frivolous motion.

– WHAT ELSE CAN THE APPDIV DO

IF A PARTY FILES A NOTICE OF APPEAL FROM A REFUSAL?

– APPDIV CAN TREAT THE NOTICE OF APPEAL

AS AN APPLICATION FOR APPELLATE REVIEW

The Second and Third Departments:

Bridget PP. v. Richard QQ., 101 A.D.3d 1186, 1187, 956 N.Y.S.2d 602 (3d Dep't 2012):
Petitioner (the mother) and respondent (the father) are the unmarried parents of a daughter (born in 1998) and son (born in 1999). In a December 2009 order, the father obtained custody of the children. Thereafter, pursuant to a February 2011 order entered upon consent, custody was continued with the father, and the mother was awarded weekend parenting time. In the meantime, the father filed a petition alleging that the son, who apparently has mental health issues, was a person in need of supervision (PINS). In August 2011, as a result of a PINS proceeding, the son was placed in the custody of the St. Lawrence County Department of Social Services, at which time a separate order of protection was also issued against the mother mandating that any parenting time she exercised with the son be supervised.1 Subsequently, the mother filed this petition seeking modification of the prior consent order so that, among other things, custody of the children would be awarded to her. Family Court refused to issue an order to show cause and, sua sponte, dismissed the petition. This appeal by the mother ensued.

[A] Family Court order denying a "petitioner's ex parte application [ ] for [an] order [ ] to show cause and dismissing the underlying petition [ ] [is] not appealable as of right" . . . Nonetheless, under the circumstances, we deem it appropriate to treat the mother's appeal as an application for review pursuant to CPLR 5704(a), and we will review her claims.

Cooper v Spanakos, 196 AD2d 797, 797-98, 602 N.Y.S.2d 21 [2d Dept 1993]:
In a proceeding to invalidate a petition designating Richard Taylor as a candidate in a primary election to be held on September 14, 1993 … the appeal is from a judgment of the Supreme Court, Kings County [] dated August 6, 1993, which granted the application and invalidated the petition. The notice of appeal from a purported decision dated August 20, 1993, which, in fact, was a refusal to sign an order to show cause why Richard Taylor's default should not be vacated, is deemed an application for appellate review pursuant to CPLR 5704.

CPLR 5519

– STAYS, PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS

– IT MAY BE CRITICAL TO MAINTAIN THE STATUS QUO DURING THE PENDENCY OF THE APPEAL

– APPELLANT IS ORDERED TO PAY MONEY

AND IS WORRIED ABOUT SEEKING RESTITUTION

– RESPONDENT SPENT THE $$, OR BECAME INSOLVENT

– TRANSFER OF CHILD CUSTODY

– MOTION FOR SUMMARY JUDGMENT

IS DENIED BEFORE TRIAL

– 5519 ALLOWS FOR AUTOMATIC AND DISCRETIONARY STAYS OF JUDGMENTS AND ORDERS;

– AUTOMATIC STAYS DO NOT REQUIRE A COURT ORDER;

– DISCRETIONARY STAYS DO REQUIRE A COURT ORDER;

– DOES "AUTOMATIC" MEAN ABSOLUTE, UNMODIFIABLE

– DISCRETIONARY STAYS CAN BE CONDITIONED: EXPEDITED BRIEF

CPLR 5519(a) – PROVIDES FOR AUTOMATIC STAYS

– 7 CATEGORIES, WHERE NO COURT ORDER IS NECESSARY

IF THE APPELLANT EITHER GIVES AN UNDERTAKING

OR

PERFORMS A SPECIFIC ACT

– § 5519(a) DOES NOT STAY ALL PROCEEDINGS IN THE ACTION,

IT ONLY STAYS "ALL PROCEEDINGS TO ENFORCE

THE JUDGMENT OR ORDER APPEALED FROM

PENDING THE APPEAL OR MOTION FOR PERMISSION"

CPLR 5519(a):
"**Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal** where.."

Under **(a)(1)**: **IDENTITY STAY:**

– IF THE APPELLANT OR MOVING PARTY IS THE STATE OR ANY POLITICAL AGENCY THEREOF –

– NO UNDERTAKING IS REQUIRED

– EXCEPTION WHERE AUTOMATIC STAY IS LIMITED TO 15 DAYS:

IN CASES WHERE LICENSES HAVE BEEN REVOKED AND REINSTATED IN AN ARTICLE 78 PROCEEDING;

IF THE AGENCY APPEALS THE JUDGMENT OF REINSTATEMENT, THEN THE LICENSE IS REVOKED FOR ONLY 15 DAYS,

THEREAFTER THE AGENCY MUST APPLY FOR A 5519(c) STAY

8 N.Y.Prac., Types of Stays – Automatic, Civil Appellate Practice § 9:3 (2d ed.):
"Under CPLR 5519(a), (b), and (g), an automatic stay is obtained merely by serving the notice of appeal or an affidavit of intention to move for permission to appeal, and in most instances, by taking certain additional steps ... such as furnishing an undertaking."

§ 9:3.Types of stays—Automatic, 8 N.Y.Prac., Civil Appellate Practice § 9:3 (2d ed.):
Pursuant to a 1988 amendment, the automatic stay provision applicable to government entities is limited to 15 days in the situation **where a government entity has revoked the license of a small corporation, partnership, or natural person, which license was then reinstated by the supreme court in an Article 78 proceeding**. Where the government agency appeals the judgment, the license will be revoked for only 15 days and after this time, the government must apply for a court-ordered stay pursuant to CPLR 5519(c).

The automatic stay obtained pursuant to CPLR 5519(a)(1) is unique in that it is the only instance in which a party seeking to vacate, modify or limit the stay must apply to the court in which the appeal is pending. A party seeking to vacate,

modify, or limit all other automatic stays additionally has access to the court of original instance.

4A N.Y.Prac., Com. Litig. in New York State Courts § 56:36 (4th ed.), **Stays and other preliminary relief pending the appeal**:
Non-governmental appellants can get an automatic stay only in the particular circumstances set forth in subdivision (a)(2) through (a)(7), (b) and (g), and this requires that certain steps be taken in addition to filing the notice of appeal or moving for permission to appeal.

– THE AUTOMATIC STAY IN CPLR 5519(a)(1)

DOES NOT APPLY TO APPEALS FROM THE FAMILY COURT [§ 1114]

In re John H., 56 AD3d 1024, 1026-27, 868 N.Y.S.2d 790 [3d Dept 2008]:
[T]he specific language of Family Ct. Act § 1114(a)—that the filing of a notice of appeal from a Family Court order does not give rise to a stay—abrogates the more general automatic stay provision of CPLR 5519(a)(1)—providing an automatic stay where the state or a political subdivision, such as petitioner, is the appellant (Family Ct. Act § 165 [a]; Besharov, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 1114, at 365). Thus, no automatic stay is in effect. Not having moved for a stay, petitioner was required to comply with Family Court's order despite the prosecution of this appeal.

Whiting v Ward, 97 AD3d 861, 862-63, 948 N.Y.S.2d 179 [3d Dept 2012]:
Family Court's dismissal of the father's enforcement petitions was error. Family Ct. Act § 1114(a) specifically provides that the filing of a notice of appeal from a Family Court order does not give rise to an automatic stay. As no party moved this Court for a stay of the August 2010 order pending resolution of the appeal, it remained binding on and enforceable by the parties during the prosecution of the father's appeal (Family Ct. Act § 1114; Matter of John H., 60 A.D.3d 1168, 1169, 876 N.Y.S.2d 169 [2009]; Matter of John H., 56 A.D.3d 1024, 1026, 868 N.Y.S.2d 790 [2008]). The fact that the outcome of the appeal may have nullified or otherwise altered portions of the order sought to be enforced or modified is irrelevant.

Moreover, if it is shown that subsequent proceedings result in an order that supersedes or replaces provisions of an order sought to be enforced or challenged on appeal, this Court will dismiss the appeal as moot ... In short, Family Court's practice of declining to entertain Family Ct. Act article 6 petitions while an appeal is pending from an order entered pursuant to that article is without legal foundation.

(a)(2)and (3): **MONEY JUDGMENTS** – **LUMP SUM OR INSTALLMENTS**;

– REQUIRES AN UNDERTAKING OF THE LUMP SUM OR THE INSTALLMENT

Under **(a)(4)**: **DELIVERY OF PERSONAL PROPERTY**:

– **APPELLANT HAS A CHOICE:**

– (1) **GIVE AN UNDERTAKING**; **OR**

– (2) **MAYASK THE SUPREME COURT TO DESIGNATE AN OFFICE IN WHOSE CUSTODY THE PROPERTY IS PLACED;**

Under **(a)(5)**: **THE EXECUTION OF ANY INSTRUMENT:**

– (1) **THE INSTRUMENT IS EXECUTED; AND**

– (2) **DEPOSITED IN THE OFFICE WHERE the original "J or O" is entered;**

Under **(a)(6)**: **CONVEYANCE OF REAL PROPERTY**

– **UNDERTAKING:**

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

if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the **undertaking** shall also provide that the appellant or moving party shall pay any such deficiency; or

(a)(7): **– IF THE JUDGMENT OR ORDER DIRECTS**

THE PERFORMANCE OF TWO OR MORE

OF THE ACTS SPECIFIED IN (2) THROUGH (6):

– EX: (1) PAY MONEY; (2) DELIVER PERSONAL PROPERTY

(3) DELIVER REAL PROPERTY; (4) EXECUTE AN INSTRUMENT

– THE APPELLANT OR MOVING PARTY MUST COMPLY

WITH EACH **APPLICABLE SUBPARAGRAPH**.

CPLR 5519(b) – STAYS IN TORT ACTIONS

THAT ARE DEFENDED BY THE DEFENDANT'S LIABILITY INSURER

THE CARRIER MUST DO TWO THINGS

IN ORDER TO TO GET THE AUTOMATIC STAY:

1: IT MUST PROVIDE AN UNDERTAKING;

AND CAN ONLY GET AN AUTOMATIC STAY

TO THE EXTENT OF THE POLICY COVERAGE;

AND

2: THE INSURER MUST NOTIFY ITS INSURED

OF THE LIMITED STAY

SO THE INSURED CAN GET ITS OWN UNDERTAKING,

OTHERWISE THE CREDITOR CAN GO AFTER

THE INSURED FOR THE EXCESS AMOUNT

SUBSECTIONS (d) and (e) CONTROL

WHEN A SECOND APPELLATE STEP IS TAKEN

– THIS MEANS THERE WAS AN AFFIRMANCE IN THE APPDIV,

(d): **– IF THERE IS AN APPEAL TO A HIGHER COURT,**

THE UNDERTAKING REMAINS IN EFFECT THROUGHOUT THE

APPELLATE PROCESS

(d) Undertaking. On an appeal from an order affirming a judgment or order, the undertaking shall secure both the order and the judgment or order which is affirmed.

CPLR 5519(e) – HOW LONG DOES THE § (d) STAY CONTINUE?

1: – IF A FURTHER APPEAL IS TAKEN, TO THE CoA,

FIVE DAY RULE:

2. – § (e) OFFERS A 5-DAY STAY,
AFTER SERVICE OF THE AFFIRMANCE OR MODIFICATION (by APPDIV)
SO THAT THE APPELLANT MAY DO WHAT'S NECESSARY
TOWARDS THE SECOND APPEAL, CoA

2(a): – QUESTION:
WHAT IF THE APPEAL TO THE CoA ISN'T AS OF RIGHT
AND YOU NEED TO SEEK LEAVE TO APPEAL?

ANSWER:

2(b): THE STAY CONTINUES DURING THE PENDENCY OF THAT MOTION
PROVIDED IT'S MADE WITHIN THE FIVE-DAY PERIOD

2(c): IF THE MOTION FOR LEAVE IS GRANTED
THE STAY CONTINUES THROUGHOUT THE APPEAL
UNTIL 5 DAYS AFTER SERVICE OF THAT DETERMINATION

2(d): IF THE MOTION FOR LEAVE IS DENIED THE STAY CONTINUES UNTIL 5 DAYS AFTER SERVICE OF THAT DETERMINATION

(e) Continuation of stay. If the judgment or order appealed from is affirmed or modified, **the stay shall continue for five days after service upon the appellant of the order of affirmance or modification** with notice of its entry in the court to which the appeal was taken.

If an appeal is taken, or a motion is made for permission to appeal, from such an order before the expiration of the five days, the stay shall continue until five days after service of notice of the entry of the order determining such appeal or motion. When a motion for permission to appeal is involved, the stay, or any other stay granted pending determination of the motion for permission to appeal, shall:

> (i) if the motion is granted, continue until five days after the appeal is determined; or
>
> (ii) if the motion is denied, continue until five days after the movant is served with the order of denial with notice of its entry.

CPLR 5519(f) – "PROCEEDINGS AFTER STAY"

(f) A stay of enforcement shall not prevent the court of original instance from proceeding in any matter not affected by the judgment or order appealed from or from directing the sale of perishable property.

CPLR 5519(g) –

–THE DR APPEALS IN MEDICAL, DENTAL, PODIATRIC MALPRACTICE CASE

WHERE JUDGMENT FOR PLAINTIFF EXCEEDS $1M

(1): **THE DR EITHER GIVES AN UNDERTAKING FOR $1M**

OR

THE AMOUNT OF THE MALPRACTICE POLICY — WHICHEVER IS MORE

AND

(2): THE APPELLATE COURT FINDS:

"A REASONABLE PROBABILITY THAT THE JUDGMENT

MAY BE REVERSED OR DETERMINED EXCESSIVE"

Also, the appellant and appellant's insurer must provide a joint undertaking that during stay, the appellant will make no fraudulent conveyance without fair consideration, per the Debtor Creditor law § 273-a.

UNDER § 5519(g):
§ 9:3.Types of stays—Automatic, 8 N.Y.Prac., Civil Appellate Practice § 9:3 (2d ed.):
In considering whether to grant such a stay, the appellate court is directed by the statute not to consider whether a stay might be available under either subdivisions (a) or (b) of CPLR 5519.

+

CPLR 5519(g): "THE COURT SHALL NOT CONSIDER THE AVAILABILITY OF A STAY PURSUANT TO SUBDIVISION (a) OR (b) OF THIS SECTION"

CPLR 5519(c) -- DISCRETIONARY STAYS BY COURT ORDER

– (c) IS A CATCH ALL PROVISION IF NOTHING AUTOMATIC APPLIES

OR

IF SOMEONE DOESN'T WANT TO OR CAN'T PAY THE COST OF BONDING

– A 5519(c) MOTION MAY BE MADE

EITHER

IN THE COURT OF ORIGINAL INSTANCE

OR

IN THE APPELLATE COURT

– ONLY THE COURT ISSUING THE STAY

MAY VACATE, LIMIT, OR MODIFY

AN AUTOMATIC STAY IN (a) OR (b)

AS WELL AS ANY STAY OBTAINED

BY EARLIER APPLICATION UNDER § (c).

– WHEN GOV'T AGENCY INVOLVED,

ONLY THE COURT TO WHICH APPEAL IS TAKEN
MAY VACATE OR MODIFY

CPLR 5519(c): The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed

by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).