The Respondent's Role in the Appellate Process

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By **William B. Stock** | April 06, 2018

The respondent's role in the appellate process is not merely passive and should be proactive. A respondent may affirmatively take many steps during the appellate process that can enhance the respondent's chances of success on the appeal. While an appellant's objective is to try to persuade the appellate court that the judgment or order appealed from was incorrectly decided and should be reversed, the respondent's ultimate objective is to affirmatively demonstrate that the judgment or order appealed from should be affirmed.

The appellate process actually begins before the notice of appeal is served and filed. Under most circumstances, the respondent is the triumphant party at the lower court level and will serve the appealable paper with a notice of entry to "start the clock" running on the appellant's time to serve a notice of appeal. (CPLR 5513[a]). It is critical to state in the notice of entry the correct entry date of the order or judgment, failure to do so results in the time to serve a notice of appeal never beginning to run. See *Reynolds v. Dustman,* 1 N.Y.3d 559, 560 (2003); *Nagin v. Long Island Sav. Bank*, 94 A.D.2d 710 (2d Dept. 1983).

When a notice of appeal is received, the respondent's first step is to determine whether it has been timely served within 30 days, plus five for mailing, from the date of service of the order or judgment with notice of entry.

CPLR 5513. Attention should be paid to notices of entry are e-filed, since the additional five-day rule may not be applicable.

The next step is to determine whether the judgment or order appealed from is actually appealable. For example, an order granting a default judgment is not appealable, the remedy being a motion to vacate the default and then appeal the order that denies that motion. See *State Employees Federal Credit Union v. Starke*, 73 A.D.2d 836 (3d Dept. 2000). In addition, the only appealable paper is an order or judgment. Decisions, including transcripts of those rendered from the bench which is not so-ordered, are not appealable and will be dismissed on appeal.

Additionally, the appellant must be aggrieved by the appealable paper to have standing to prosecute the appeal. (CPLR 5511). If these requirements are not met, the respondent should consider making a motion in the appellate court to dismiss the notice of appeal.

Should the respondent decide not to challenge the notice of appeal, a timely notice of cross-appeal might be the next move.

The appellant may limit the scope of the appeal in the notice of appeal which may bar raising other issues. However, an appellate court may affirm a decision for different reasons than the trial court. Also, an appeal from a final order or judgment will bring up prior non-final orders that necessarily affected the final order or judgment. CPLR 5501(a)(1).

Appellate courts have their own deadlines for perfecting an appeal. Respondent’s counsel should be familiar with them. If the appellant has not timely perfected the appeal, the respondent may wish to move to dismiss it for failure to timely perfect.

The respondent will eventually receive an appellant's brief and record on appeal. When reviewing them, it is the better practice to read the record first in order to form your opinions about the appeal and to determine if the appellant has misstated or distorted facts in his brief. Misstatements and distortions should be addressed in the respondent's brief.

The respondent must make certain that the record contains all of the documents mandated by the CPLR and court rules and that nothing is missing or improperly added. Appellate review is limited to the record made before the lower court and the appellate court will generally not consider documents that are outside the record. If the record is improper, the respondent should immediately ask the appellant's counsel for a correction. If one is not forthcoming, the respondent may want to make a motion to strike.

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The order or judgment appealed from must be carefully analyzed. If the appellant has not addressed an important part of the decision, the respondent's brief should point this out.

The respondent should read past any invective and ad hominem attacks made in an appellant's brief. Judges dislike personal attacks and it is best to dismiss such bluster in a single sentence. Focus instead on the core of the appellant's legal arguments.

All arguments in an appellant brief must be addressed. Failure to address an argument may be deemed a concession to it. The better practice is to address the appellant's arguments in order and head-on and not put the more difficult arguments at the end of the brief.

Cases cited by the appellant must be read, analyzed and, of course, Shepardized and distinguished. With the advent of electronic research, there is a tendency to quote favorable language from cases without being fully aware that there is harmful language in the very same case. Favorable language should be quoted.

The appellate court's rules for a respondent's brief must be examined and complied with. There are many guides to writing an effective and persuasive respondent's brief. Let it only be said that the ultimate objective of a respondent's brief is to persuade the appellate court that the order appealed from was correctly decided and that the appellant's arguments are without merit. Affirmative relief should not be requested unless a notice of cross-appeal was served and filed.

Appellant's counsel frequently raise new arguments in their briefs for the first time on appeal, attempting to avoid the impact of unsuccessful arguments below. Appellate courts will generally not consider such arguments. There are certain exceptions to this rule such as the exception that a new argument can be raised for the first time on appeal if it is a conclusive argument that appears on the face of the record, does not inject new facts in the record and could not have been avoided by the respondent had it been raised in the court below. See *Vanship Holdings Ltd. v. Energy Infrastructure v. Energy Infrastructure Acquisition*, 65 A.D.3d 405, 408-09 (1st Dept. 2009)

Similarly, the respondent must determine if an issue raised on appeal was preserved in the court below. An example: Was an objection timely made at trial?

Here a word about appellate motion practice. Motion practice can be a tactical device to dismiss procedurally defective appeals and to streamline the

appellant’s substantive arguments that need to be addressed in the respondent’s brief.

Oral Argument

The respondent’s role at oral argument mirrors the respondent’s role in writing the brief. The focus is to persuade the appellate tribunal that the lower court’s order was correctly decided and should not be disturbed. An effective oral argument requires mastery of the briefs and record. An appellant’s single distortion of the record pointed out by an alert respondent can go a long way towards defeating an appeal.

The respondent should always take advantage of oral argument since it presents a final opportunity to persuade the appellate court that the order appealed from should be affirmed. An effective oral argument also requires mastering the record and briefs.

The maxim “less is more” may be apt during oral argument. If the appellate bench has asked questions that clearly indicate it has not been persuaded by the appellant’s arguments, then the respondent may be best advised to say little during argument and rest on his brief unless the panel has any questions. By way of anecdote, a powerful oral argument consisted of a respondent, after an appellant had virtually immolated himself before the bench, saying three words: “I waive argument.”

A proactive respondent who utilizes the appellate court’s rules and procedures and submits a well-written, concise brief, can effectively challenge an appellant at virtually every step of the appeals process and thereby enhance the chances of prevailing on appeal.

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