Taking and Perfecting a Civil Appeal to the Appellate Division

I. Preliminary Remarks

A person aggrieved by a determination of a court may wish to have it reviewed and overturned by an appellate court. Once the determination is embodied in the form of an appealable paper, the aggrieved person may *take* an appeal by serving and filing a notice of appeal or a motion for leave to appeal. The appeal is then *perfected* when the appellant does all the acts required to place it on the appellate court's calendar.

II. Starting the running of the time to appeal

A. Service with notice of entry

For actions originating in the Supreme Court, the County Court, and the Surrogate's Court, service of the appealable paper with written notice of its entry in the office of the clerk of the court of original instance starts the time to take an appeal running (CPLR 5513; SCPA 2701). The statute was amended in 1996 to specifically provide that service must be made by a party (L 1996, ch 214, § 1).

In the Family Court and Court of Claims the rule is different. In the Family Court, service of the order upon the appellant by a party, a law guardian, or the court is sufficient to start the running of the time to appeal (Family Ct Act § 1113). In the Court of Claims, service by a party of the order or judgment or service of a certified copy thereof by the clerk of the court starts the running of the time to appeal (Court of Claims Act § 25).

It is customary for the prevailing party to take the initiative to serve the order or judgment with notice of its entry on his or her opponents. Pursuant to case law, the party who moves to dismiss an appeal as untimely must have served a copy of the order or judgment with notice of its entry in order to start the running of the appellant's time to appeal against that party. The movant may not rely on service of the paper with notice of entry by another prevailing party (*O'Brien v City of New York,* 6 AD2d 63 [1st Dept., 1958]; *Maddox v City of New York*, 104 AD2d 430 [2nd Dept., 1984]).

Compliance with CPLR 5513(a) requires a notice of entry that refers to the appealable paper, and the date and place of its entry (*Matter of Reynolds v Dustman, 1* NY3d 559 [2003]). A letter enclosing a copy of an order upon which the date of its entry was stamped was held to be sufficient compliance with the statute to start the running of the time to appeal (*Norstar Bank, of Upstate N.Y. v Office of Control Sys.,* 78 NY2d 1110, 1111 [1991]), but service of cover letter describing a paper as a decision, even though it was both a decision and order, was an insufficient notice to start the time running (*Matter of Reynolds v Dustman, supra*).

B. ***Time limits – Supreme, County, and Surrogate's Courts***

1. Appeals as of right

If the appeal lies as of right, a notice of appeal must be served and filed within 30 days after service upon the appellant of the paper with notice of its entry or, if the appellant has made such service, within 30 days thereafter (CPLR 5513[a]).

2. Appeals by permission

If appeal lies only by permission, the calculation is somewhat more complicated. The 30-day time period is the same (CPLR 5513[b]), but the date from which the computation runs has an additional wrinkle. The time within which a motion for permission to appeal must be made is computed from the date of service by the adversary of the paper sought to be appealed with notice of its entry, or, where the appellant has served that paper, from the date of such service. If permission to appeal is first sought from the court of original instance and is denied, the appellant has an additional 30 days to make a second motion for leave to appeal to the court to which the appeal is sought to be taken, measured from the date of service of a copy of the order of the court of original instance denying permission, with notice of its entry (CPLR 5513[b]).

C. Time Limits – Family Court and Court of Claims

An appeal from the Family Court must be taken (1) within 30 days after service by a party or a law guardian upon the appellant of the order sought to be reviewed, (2) within 30 days after receipt by the appellant of a copy of the order in open court, or (3) within 35 days after mailing of the order to the appellant by the clerk, *whichever is earliest* (Family Ct Act § 1113).

An appeal from the Court of Claims must be taken within 30 days after service by a party of the order or judgment sought to be reviewed with notice of its entry, or within 30 days after service upon the appellant of a certified copy of the order or judgment by the clerk of the court (Court of Claims Act § 25).

D. Additional time for cross appellants

A party served with a notice of appeal or motion for leave to appeal by an adverse party has 10 days from such service to take a cross appeal or move for permission to cross appeal, or the remainder of the 30-day period specified in CPLR 5513(a) or (b), whichever is longer (CPLR 5513[c]).

E. Additional time based on the method of service

Pursuant to CPLR 2103(b), an appellant obtains a 5-day extension of the 30-day period in which to take an appeal if service is by regular mail (CPLR 2103[b][2]), and a 1-day extension if service is by overnight delivery service (CPLR 2103[b][6]). An appellant who served the order or judgment with notice of its entry upon an adversary by regular mail or overnight delivery service now gets the benefit of the additional time allowed by CPLR 2103(b) (*see,* CPLR 5513[d]; L 1999, ch 94, § 1; 86 Siegel's Practice Review, *Time to Appeal,* at 3 [Aug. 1999]).

F. Additional time where last day of period is a Saturday, Sunday, or public holiday

General Construction Law § 25-a(1) provides, in relevant part, that "[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day" (*see also*, 22 NYCRR1250.1[c][5]).

G. Additional time where wrong method used

If an appeal taken as of right is dismissed because appeal lies only by permission, or if a motion for leave to appeal is denied and except for the time limitations in CPLR 5513 some other method of taking the appeal or moving for permission is available, the time limited for utilizing the other method is computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise (CPLR 5514[a]).

H. Additional time for disability of attorney

If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally disabled before the expiration of the time limited for taking an appeal or moving for leave to appeal, the time within which to do so is extended for 60 days from the date of the commencement of the disability (CPLR 5514[b]).

I. Additional time for substitution of a party

Unless the court orders otherwise, if the time to take an appeal has not expired before the occurrence of an event permitting substitution of a party (e.g., death or incompetency of a party, the transfer of the party's interest in the subject matter of the suit to another, or a change in the holder of a public office sued in his or her capacity as a public officer), the period is extended as to all parties until 15 days after the substitution is made (CPLR 1022).

J. No other extensions of time available

Except as set forth above and in CPLR 5520 (discussed below), no other extensions of time to take an appeal as of right or to move for permission to appeal may be granted (CPLR 5514[c]).

III. Taking an appeal

A. As of right

An appeal as of right is taken by serving a notice of appeal on each adverse party and filing it in the office where the order or judgment of the court of original instance was entered (CPLR 5515[1]). If in doubt as to who are the adverse parties, it is best to be cautious and serve the notice of appeal on all parties to the action.

An appeal as of right from an order of the Family Court is taken by filing the notice of appeal with the clerk of the Family Court in which the order appealed from was made and by serving it upon each adverse party and the law guardian, if any (Family Ct Act § 1115). There is a special provision regarding the filing and service of a notice of appeal in juvenile delinquency proceedings under Family Court Act article 3 (Family Ct Act § 365.3).

1. The notice of appeal

The notice of appeal must designate (1) the party taking the appeal, (2) the order or judgment or part thereof appealed from, and (3) the court to which the appeal is taken (CPLR 5515[1]). The notice of appeal is jurisdictional (*Rich v Manhattan Ry. Co.,* 150 NY 542, 546 [1896]) and mistakes can be fatal. Never adapt an old notice of appeal; always begin with a blank form and check each required element carefully. Be sure to date the notice of appeal as of the date that it is to be served. The time within which to perfect the appeal is measured from that date (22 NYCRR 1250.9[a]).

Make sure that each person named as an appellant is aggrieved by the judgment or order appealed from and that all aggrieved clients are named as appellants. A mistake in this area can lead to dismissal of the appeal. An example of this is the case of the firm of attorneys who appealed from an order imposing a sanction upon them personally by filing a notice of appeal *in the name of their client.* The appeal was dismissed because the client was not aggrieved by the imposition of a sanction upon the attorneys (*Tuthill v Town & Country Oil Corp.,* 257 AD2d 618 [2nd Dept., 1999]; *cf., Scopelliti v Town of New Castle,* 92 NY2d 944 [1998]). However, in *Matter of Tagliaferri v Weiler* (1 NY3d 605 [2004]) the Court of Appeals held that CPLR 2001 applied to permit an appellate court to disregard a "clerical error" in naming the appealing party where the respondent "indisputably understood" from the papers the true identity of the appellant.

Identify the order or judgment appealed from accurately (*see, Copp v Ramirez,* 62 AD3d 23, 27-28 [1st Dept., 2009]). Do not limit the scope of the appeal in the notice of appeal unless absolutely certain that no other part of the paper is objectionable. When in doubt, appeal from the whole of the judgment or

order. By taking an appeal from only part of an order or judgment, a party waives the right to appeal from the remainder (*Royal v Brooklyn Union Gas Co.,* 122 AD2d 132, 133 [2nd Dept., 1986]; *Boyle v Boyle,* 44 AD3d 885, 886 [2nd Dept., 2007]). An improvident limitation of the scope of the appeal cannot be corrected by a motion to amend the notice of appeal after the time to take the appeal has expired (*City of Mount Vernon v Mount Vernon Hous. Auth.,* 235 AD2d 516 [2nd Dept., 1997]; 64 Siegel's Practice Review, *Appealing an Order,* at 4 [Nov. 1997]).

2. Additional documentation required by the rules of the Appellate Division

The Practice Rules of the Appellate Division require the appellant in a civil case to file in the court of original instance an "additional information statement" with the notice of appeal (22 NYCRR 1250.3[a]). The clerk of the court of original instance files the originals and transmits copies to the Appellate Division (22 NYCRR 1250.3[a]). The appellant must also serve all parties with the additional information statement and notice of appeal.

a. Copies

Each Appellate Division Department has its own local rules governing the number of copies the appellant must file (see, e.g., 22 NYCRR 670.3[a][1] [2d Dept]).

3. Filing fee

Where the appeal is from an order or judgment of the Supreme Court, the county clerk is entitled to a fee of $65 upon the filing of the notice of appeal (CPLR 8022[a]). No fee is required for filing with the clerks of the Court of Claims and the Family and Surrogate's Courts.

4. Paper not yet entered

Because CPLR 5515(1) provides that a notice of appeal is to be filed in the office where the judgment or order appealed from is entered, some clerks refuse to accept a notice of appeal for filing if the paper has not yet been entered on the ground that an appeal therefrom is premature. Nevertheless, there are often important reasons for invoking the jurisdiction of the appellate court as quickly as possible, chief among which is the desire to make a motion to stay enforcement of the order or judgment pending appeal. In a county in which the clerk refuses to accept a notice of appeal for filing if the paper appealed from has not yet been entered, an appellant who needs a stay may take the appeal by serving a notice of appeal on the opponent, make the motion for a stay, and then file with the clerk of the court of original instance as soon as the paper has been entered. Motions to dismiss prematurely taken appeals are virtually unknown and, in the absence of prejudice, a premature notice of appeal may be treated as valid by the court to which the appeal is taken (CPLR 5520[c]).

B. By permission

Where an appeal lies only by permission, a party seeking to appeal must make a motion for leave to do so on notice to the other parties in the action. The return date of the motion must be at least 8 and not more than 15 days after the motion is served (CPLR 5516).

In actions originating in the Supreme Court, the application for leave may be made directly to the judge who made the order or to the Appellate Division either upon the refusal of that judge or on direct application (CPLR 5701[c]). Where leave is required in order to obtain review of an order of the Family Court, the application may be made only to the Appellate Division (Family Ct Act § 1112[a]).

An appeal may be taken to the Appellate Division from an order of the Appellate Term that determines an appeal from a judgment or order of a lower court by permission of the Appellate Term, or in case of refusal, by permission of the Appellate Division (CPLR 5703[a]). Motions for leave to appeal from an Appellate Term can be made at the Appellate Division only after a denial of a motion for leave to appeal made at the Appellate Term (22 NYCRR 1250.4[c][3]).

C. Curing errors and omissions

CPLR 5520 permits courts to cure insubstantial defects made in the course of taking an appeal. Appellate courts often reach out to correct such defects on their own motion. An appellant facing a motion to dismiss may wish to cross-move for relief under this section.

1. Omissions

If the appellant timely serves a notice of appeal or motion for leave to appeal but omits to timely file it, or vice-versa, the court to or from which the appeal is taken, or the court of original instance, may grant an extension of time to cure the omission (CPLR 5520[a]). As long as one of the important acts required for invoking the jurisdiction of the appellate court is timely, tardiness in performing the other will almost always be excused.

2. Appeal by permission instead of as of right

Occasionally an appellant errs and moves for permission to appeal from an order or judgment that is appealable as of right. CPLR 5520(b) provides that an appeal that is attempted to be taken by permission shall not be dismissed on the ground that an appeal as of right could have been but was not timely taken, provided that the motion for leave was made within the time limited for taking the appeal. This provision is to some degree duplicative of CPLR 5514(a), discussed above, which provides that where an appeal is dismissed because it was taken by the wrong method, the appellant gets an additional 30 days after service of the order of dismissal with notice of entry to take the appeal by the proper method.

3. Defects in form

Where a notice of appeal is premature or contains an inaccurate description of the order or judgment appealed from, the appellate court may, in its discretion, treat such a notice as valid (CPLR 5520[c]). Under subdivision (c) of CPLR 5520, appeals from decisions have been deemed premature appeals from the orders entered thereon (*Rubenstein v Rubenstein*, 117 AD2d 593, 594, n [2nd Dept., 1986]), and appeals from orders have been deemed premature appeals from final judgments (*Frankel v Manufacturers Hanover Trust Co.,* 106 AD2d 542 [2nd Dept., 1984]).

Misdescription of the order or judgment appealed from is also a frequent problem. If the appellant has served the notice of appeal, information statement, and copy of the order or judgment upon the respondent, there will usually be no prejudice because it will be clear that the appeal is intended to be from the order or judgment annexed to the notice of appeal. In *Vertical Computer Sys., Inc. v Ross Sys., Inc.,* 11 AD3d 375, 379-380 [1st Dept., 2004]), however, the appellant did not include the correct order. The Supreme Court had issued three almost identical orders on the same day in the same case, each bearing a different motion sequence number. The appellant erroneously attached to its notice of appeal a copy of the short form order deciding the motion of its codefendants rather than the one deciding its motion. The Appellate Division, First Department, held that CPLR 5520(c) applied to permit it to resolve confusion as to which paper the appellant sought to have reviewed and to treat the appellant's notice of appeal as valid.

Subdivision (c) of CPLR 5520 is most notable for what it does not permit to be cured—the failure to name of one of several appellants or the complete misnaming of an appellant.

IV. After the appeal has been taken and before perfection

A. The respondent's turn at bat—the motion to dismiss

After an appeal has been taken, the respondent should carefully assess whether it is vulnerable to dismissal on one or more of a number of grounds. Was the appeal timely

taken? Is the appellant aggrieved by the order or judgment appealed from? Is that paper appealable? Does an appeal taken as of right lie only by permission?

Appellate courts generally wish to decide appeals on the merits and are reluctant to dismiss on purely technical grounds. Where a respondent moves to dismiss for untimeliness, courts tend to require scrupulous adherence by the movant to the statutes governing commencement of the time to appeal (*Kelly v Sheehan,* 76 NY 325 [1879]; *Matter of Reynolds v Dustman,* 1 NY3d 559 [2003]). The respondent's moving papers should contain proof of service of the judgment or order appealed from with notice of its entry and proof that service and filing of the notice of appeal or motion for leave to appeal were accomplished after the appropriate time period expired.

B. Settlement of the appeal—a trip to CAMP

An Appellate Division department may issue a notice directing the parties to attend a conference before a settlement or mediation program in order to consider settlement, the limitation of issues, and any other matter that may aid in the disposition of the appeal or resolution of the action or proceeding (22 NYCRR 1250.3[c][1]). Counsel to any party may also apply to the court by letter at any time requesting such a conference, and that letter shall include a brief statement indicating why a conference would be appropriate (22 NYCRR 1250.3[c][2]). The unexcused failure to appear for or participate in a settlement or mediation conference, or to comply with the terms of a stipulation or order entered following such conference may result in the imposition of sanctions (22 NYCRR 1250.3[c][3]).

C. Deciding whether to prosecute or withdraw the appeal

Many appeals are taken protectively. A notice of appeal is served and filed to insure that the client will be able to seek review of an adverse order or judgment in the event that it is later determined to be necessary. If the appellant fails to perfect a civil appeal within six months of the date of the notice of appeal, the Appellate Division will deem the matter abandoned and dismissed without further order. Within one year of the date of dismissal, an appellant may move to vacate the dismissal. The motion should include an affidavit explaining good cause for vacatur of the dismissal, indicating an intent to perfect the appeal within a reasonable time, and identifying sufficient facts to establish a meritorious appeal.

Where a party appeals from an interlocutory order, thereafter abandons the appeal by failing to timely perfect, and the appeal is dismissed by the appellate court, that party is estopped for reasons of judicial economy from seeking review on an appeal from a final judgment of any issues that could have been raised on the appeal from the interlocutory order (*Bray v Cox*, 38 NY2d 350 [1976]; *People v Corley*, 67 NY2d 105 [1986]; *Rubeo v National Grange Mut. Ins. Co.,* 93 NY2d 750 [1999]). The moral is that no appeal should be abandoned. A simple letter by the appellant to the clerk with a copy to the adversary requesting withdrawal of an unperfected appeal will suffice (22 NYCRR 1250.2[b][1]). Attorneys who serve and file a notice of appeal for a client should diary the

matter for consideration in about 30 days. At that time a decision should be made either to prosecute or withdraw the appeal.

The rule of *Bray v Cox* and its progeny is not, however, entirely inflexible. An appellate court has the power, in the exercise of its discretion, not to invoke the rule in a proper case *(Aridas v Caserta,* 41 NY2d 1059, 1061 [1977]).

V. Preparation for perfection

Once the decision has been made to perfect, numerous other decisions must be made that cannot be left to the last minute.

A. Determining the contents of the record on appeal

CPLR 5526 specifies the papers that constitute the record on an appeal. On an appeal from a final judgment, the record consists of the notice of appeal, the judgment roll (*see,* CPLR 5017[b]), the corrected transcript of the proceedings if a trial or hearing was held (*see,* CPLR 5525[c]) or the statement in lieu thereof where no stenographic record of the proceedings was made (*see,* CPLR 5525[d]), any relevant exhibits, any non-final judgment or order which necessarily affects the final judgment and which has not previously been subjected to appellate review (*see,* CPLR 5501), and any opinions in the case.

On an appeal from an interlocutory judgment or order, the record consists of the notice of appeal, the paper appealed from, the transcript, if any, the papers and other exhibits on which the paper was founded, and any opinion in the case.

Once the contents of the record on appeal have been determined, the appellant must begin the task of acquiring complete and accurate copies of the original papers on file in the office of the clerk of the court of original instance and must order the production of the transcript of any necessary stenographic minutes of the proceedings. Papers that were not before the court from which the appeal is taken are dehors the record and do not belong in a printed record or appendix on appeal. If a printed record or appendix is accepted for filing that contains material that is dehors the record, the respondent should move to strike it.

B. The transcript of the minutes of a hearing or trial

1. Ordering a transcript

CPLR 5525(a) directs that the appellant order the transcript from the reporter within the time limited for taking the appeal, a direction that is almost never honored. Unless the appellant is the State or political subdivision thereof, or an officer or agency of the State or one of its political subdivisions, he or she must deposit a sum with the reporter, in advance, sufficient to pay the fee for transcription.

The format of court transcripts and the rates of payment therefor are governed by Part 108 of the Rules of the Chief Administrator of the Courts (22 NYCRR part 108). Different rates are provided depending on (1) whether the transcript is to be produced for the Unified Court System, or payment is to come from public funds, or payment is to be made by a private party, and (2) the speed with which the transcript is to be provided. Ordering the transcript well in advance of the time that it is needed—for so-called "regular delivery"—can save considerable expense. This is another reason why a decision as to whether to prosecute the appeal should be made as soon as possible after serving and filing the notice of appeal.

If a transcript is typewritten, the reporter must serve a ribbon copy and a carbon copy on the appellant (CPLR 5525[a]). If the report uses any other means of reproduction, the reporter must serve two copies of the transcript on the appellant (CPLR 5525[a]).

2. Dispensing with transcription

If a record of the proceedings has been made, it must be transcribed in full. To this rule there are only two very limited exceptions. The first of these exceptions is that "[n]o transcript is necessary where a party appeals from a judgment entered on a referee's report, or a decision of the court upon a trial without a jury, and he [or she] relies only upon exceptions to rulings on questions of law made after the case is finally submitted" (CPLR 5525[b]). The second exception is that the parties may stipulate that only a portion of the minutes be transcribed. Because transcription of the minutes of a trial or hearing is one of the major expenses that must be borne by an appellant in perfecting an appeal, respondents are rarely willing to stipulate, hoping that cost will deter the perfection of the appeal altogether.

Faced with the limitations specified in CPLR 5525(b) and the unwillingness of their opponents to stipulate, appellants sometimes make a motion to the Appellate Division to dispense with transcription entirely or to dispense with transcription of parts of the minutes. In the case of *Perry v Tauro* (21 AD2d 804 [2nd Dept., 1964]) it was held that the court has no power to grant that relief. *Accord Rush v Insogna*, 170 AD2d 753 [3d Dept 1991]; *Affinity Elmwood Gateway Props., LLC v AJC Props. LLC*, 129 AD3d 1686 [4th Dept 2015].

In the absence of a stipulation, all the stenographic minutes must be *transcribed* but not all of the transcript must be *printed.* The appellant may opt to print only relevant portions of the transcript in his or her appendix.

3. Settling the transcript

The stenographic recording of court proceedings and the later transcription of the reporter's notes are activities that are subject to a normal number of human errors which must be corrected before the minutes can be used

in the appellate process. The method used to eliminate these errors is specified in CPLR 5525(c) and is called settlement of the transcript.

Upon receiving the transcript from the reporter, the appellant's counsel must read it with a view to discovering any errors that it contains. Within 15 days after its receipt, the appellant must serve the transcript and a list of any proposed amendments on the respondent together with a notice that he or she has 15 days to propose amendments of his or her own and a list of any objections to the amendments proposed by the appellant (CPLR 5525[c][1], [3]). If the respondent proposes amendments or raises objections, the parties ordinarily attempt to reach agreement as to the appropriate corrections, amend the transcript accordingly, and attach a stipulation certifying its correctness. If the parties cannot agree, either may, on 4 days notice, submit the transcript and proposed amendments for settlement to the judge or referee before whom the proceedings were held. The transcript is then corrected as directed by the judge or referee, who certifies its correctness (CPLR 5525[c][1]). If no amendments or objections are received from the respondent, the transcript as amended by the appellant is deemed correct without the necessity of a stipulation or settlement by the judge or referee (CPLR 5525[c][2]).

VI. Perfection

A. Deciding on the perfection method

There are four different methods of perfecting appeals and certain transferred and original proceedings that are treated as though they were appeals (see, 22 NYCRR 1250.5 [a-e]). Not all perfection methods are available for use in every case.

1. Full reproduced record method 22 NYCRR 1250.7(b)

The full reproduced record may be used to perfect any appeal. It is the most expensive of the four authorized methods because it requires the reproduction of all the papers specified in CPLR 5526 (22 NYCRR 1250.6[a]). A full reproduced record is the appropriate choice where the issues to be presented to the appellate court are broad and touch upon all the papers that were before the court of original instance. Filing an improper record by, for example, omitting the transcript of the proceedings in the trial court, may lead to the dismissal of the appeal.

2. Appendix method

The appendix method is used when the issues are limited and substantial parts of the original papers are irrelevant to the issues to be raised by the appellant and the respondent (22 NYCRR 1250.5[c]). Because fewer of the papers comprising the original record need to be reproduced, the appendix method is less expensive than the full reproduced record method. The appellant must subpoena the original papers comprising the record on appeal from the clerk

of the court of original instance and cause them to be filed with the Appellate Division (22 NYCRR1250.9[a][2][i]). This is not an invitation to save money by reproducing an inadequate appendix in the hope that the Appellate Division will resort to the original papers when it cannot find in the printed appendix the documents necessary to understand the issues raised. The Appellate Division, either on its own motion or on motion of the respondent, generally holds in abeyance an appeal in which an inadequate appendix has been filed and directs the appellant to file a proper appendix on pain of dismissal of the appeal. However, the failure to file an adequate appendix when given an opportunity to do so will lead to dismissal of the appeal.

3. Original record method

The original record method is the least expensive of all. It may be used only in limited cases, including appeals in the **First**, **Second** and **Fourth Deparatments** (1) from the Appellate Term, (2) from the Family Court, (3) under the Election Law, (4) under the Human Rights Law, (5) where the sole issue is the compensation of a judicial appointee, (6) where authorized by statute, (7) in criminal causes, and (8) in any case where permission is granted by order of the Appellate Division (22 NYCRR 1250.5[e]). When this method is used the appellant must subpoena the original papers from the clerk of the court from which the appeal is taken.

4. Agreed statement in lieu of record method

Almost never used, the agreed statement in lieu of record method involves the preparation by the parties of a statement showing how the questions presented arose and were decided by the court from which the appeal is taken and setting forth only so much of the facts as are necessary to decide those questions. The statement must be signed by the parties and approved by the court from which the appeal is taken for use as the record on the appeal. The court may make any corrections or additions it deems necessary to fully present the questions raised (CPLR 5527). The statement is then printed and submitted as a joint appendix (22 NYCRR 1250.5[d]).

B. Consolidating appeals

A party may consolidate civil appeals arising out of the same action or proceeding without the necessity of first obtaining leave of the Appellate Division, provided that each of the consolidated appeals is timely perfected (22 NYCRR 1250.9[f][2]). Appeals are consolidated simply by printing the papers constituting the record on each appeal, or appropriate portions thereof, in one full reproduced record or appendix. Appeals from orders or judgments made in separate actions or proceedings may not be consolidated but, on request, may be scheduled to be heard together (22 NYCRR 1250.9[f][3]).

C. Concurrent and cross appeals

Unless otherwise ordered by the court, all parties appealing from the same order or judgment must consult and prepare a joint record or joint appendix that shall contain all the notices of appeal of the several parties (22 NYCRR 1250.9[f][2]). The cost of the joint record or appendix and of the transcript shall be borne equally by the parties (22 NYCRR 1250.9[f][2]).

Cross appellants are parties who appeal from different parts of the same order or judgment and whose interests are adverse to each other. The party who first perfects the appeal is denominated the appellant-respondent (22 NYCRR 1250.9[f][1][iii]). The cross appellant is deonominated the respondent-appellant (22 NYCRR 1250.9[f][1][iv]).

Concurrent appellants are parties who appeal from the same order or judgment and whose interests are not adverse to each other but are adverse to the respondent (e.g., two defendants separately move for summary judgment as against the plaintiff, the motions are denied in one order, and the defendants separately appeal). The joint record or joint appendix of concurrent appellants and their several briefs must be served and filed together. If one concurrent appellant wants to perfect earlier than the other, or if the latter refuses to cooperate or decides not to perfect, the concurrent appellant who desires to proceed will need to submit a motion to waive the requirement that they perfect jointly or, if appropriate, a letter from the other appellant's counsel withdrawing the appeal on behalf of his or her client.

D. Time limits for perfection

A civil cause is deemed abandoned unless perfected within six months from the date of the notice of appeal, the order granting leave to appeal, or the order transferring an original proceeding to the Appellate Division (22 NYCRR 1250.9[a]). The time to perfect concurrent appeals is measured from the latest date on the several concurrent notices of appeal (22 NYCRR 1250.9[f][2]).

E. Perfection - placing the cause on the calendar

A civil cause is called "perfected" when all the acts necessary to place the matter on the court's calendar have been performed. An appeal is perfected when the record is filed pursuant to one of the four authorized perfection methods together with the appellant's brief and proof of service on the adverse parties (22 NYCRR 1250.5).

1. Time of filing

Papers are deemed filed at the Appellate Division only as of the time they are actually received in the clerk's office accompanied by proof of service on all necessary parties (22 NYCRR 1250.1[c][1]). Allow sufficient time to get the papers to the clerk's office on time. *Do not wait until the last day to file!* Papers

received in the clerk's office after the time to file has expired will be rejected and an application for an enlargement will have to be made.

(i) Electronic filing. For the purpose of meeting deadlines imposed by court rule, order, or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions filed electronically will be deemed filed as of the time copies of the submissions are transmitted to the NYSCEF site. The filing of additional hard copies of such electronic filings pursuant to court rules shall not affect the timeliness of the filing (22 NYCRR 1250.1[c][1][i]).

(ii) Hard copy filing. For the purpose of meeting deadlines imposed by court rule, order or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions not filed electronically will be deemed filed as of the time hard copies of the submissions are received and stamped by the office of the clerk (22 NYCRR 1250.1[c][1][ii]).

(iii) A document deemed filed for purposes of timeliness under this rule may thereafter be reviewed and rejected by the clerk for failure to comply with any applicable statute, rule or order (22 NYCRR 1250.1[c][1][iii]).

2. Number of copies

1) if employing the reproduced full record method, an original and five hard copies of a reproduced full record, an original and five hard copies of appellant's brief, and one digital copy of the record and brief, with proof of service of one hard copy of the record and brief upon each other party to the appeal (22 NYCRR 1250.9[a]; or

(2) if employing the appendix method, an original, five hard copies and one digital copy of appellant's brief and appendix, with proof of service of one hard copy of the brief and appendix upon each other party to the appeal, and, either (i) in the **First and Second Departments,** proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division, or (ii) in the **Third and Fourth Departments**, a digital copy of the complete record;

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

(4) if perfecting on the original record, an original and five hard copies and one digital copy of appellant's brief, with proof of service of one hard copy of the brief upon each other party to the appeal and either (i) in the **First and Second Departments** proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division or (ii) in the **Fourth Department**, a hard copy of the complete record (22 NYCRR1250.9[a]).

3. Filing fee

Unless the appellant has been granted poor person relief (CPLR 1102[d]) or is the State or one of its agencies or officers (CPLR 8017), the appellant must pay a filing fee of $315 at the time of perfection (22 NYCRR 1250.17[a][1]).

F. Answering and reply briefs

The respondent's answering brief must be served and filed not more than 30 days after service of the appellant's brief (22 NYCRR 1250.9[c]). The appellant's reply brief is due 10 days after the service of the respondent's answering brief (22 NYCRR 1250.9[d]), or in the **First Department**, in accordance with the court's published terms calendar.

The answering brief on a cross appeal must be served and filed not more than 30 days after service of the record and the appellant's brief and it must include the points on the cross appeal. The appellant's reply brief is due not more than 30 days after service of the respondent-appellant's answering brief. A respondent-appellant's reply brief is due not more than 10 days after service of the appellant's reply brief (22 NYCRR 1250.9[f]).

The time limits for filing answering and reply briefs are subject to the normal extensions where service of the brief from which the time to file is measured was accomplished by regular mail or overnight delivery service (CPLR 2103[b][2], [6]), or where the answering or reply brief is due on a Saturday, Sunday, or public holiday (General Construction Law § 25-a).

G. Enlargements of time

Extension of time to perfect appeal. The parties may stipulate to extend the time to perfect an appeal up to 60 days. The stipulation must be filed with the court. In the alternative, an appellant may apply by letter, on notice to all parties, to extend the time to perfect an appeal for up to 60 days (22 NYCRR 1250.9[b]).

Thereafter the appellant may apply by letter, on notice to all parties, to extend the time to perfect by up to an additional 30 days. Any further application for an extension of time to perfect the appeal shall be made by motion (22 NYCRR 1250.9[b]).

Extensions of Time to File and Serve Responsive Briefs. The parties may stipulate to extend the time to file and serve an answering brief by up to 30 days and a reply brief by up to 10 days (22 NYCRR 1250.9[g][1]). A stipulation shall not be effective unless promptly filed with the court. In the alternative, party may apply by letter, on notice to all parties, to extend the time to file and serve an answering brief by up to 30 days and a reply brief up to 10 days. The Appellate Division will not accept more than two such stipulations or applications. Any further application must be made by motion.

VII. Form and content of records, appendices, and briefs

The applicable rules regarding the form and content of reproduced full records, appendices, and briefs are set forth in detail in CPLR 5526, 5528, and 5529, and in 22

NYCRR 1250.7, 1250.8. The practitioner should consult those sections for a complete treatment of the subject. What follows is a selective review and explanation of those provisions that seem to be the cause of the most questions by litigants.

A. Provisions of general applicability

1. The original

Nine of each brief, record, and appendix must be filed. One of these must be marked "original." The original must be signed in ink in accordance with the provisions of the so-called "signing requirement" contained in 22 NYCRR 130-1.1-a(a) (see, 22 NYCRR 1250.1[d]). Proof of service of the requisite number of copies on each respondent is to be affixed to the inside back cover of the original.

2. Paper size, binding, and page numbering

Paper shall be of a quality approved by the chief administrator of the courts and shall be opaque, unglazed, white in color and measure 11 inches along the bound edge by 8½ inches. Records, appendices and briefs shall be bound on the left side in a manner that shall keep all the pages securely together; however, binding by use of any metal fastener or similar hard material that protrudes or presents a bulky surface or sharp edge is prohibited. Records and appendices shall be divided into volumes not to exceed two inches in thickness. (22 NYCRR 1250.6[c]). Pages of each brief, record, and separately bound appendix must be numbered consecutively (CPLR 5529[b]). Pages of an appendix that is bound together with a brief must be separately numbered consecutively, with each number preceded by the letter A (CPLR 5529[b]).

3. The cover

The cover shall set forth the title of the action or proceeding. The upper right-hand section shall contain a notation stating: whether the cause is to be argued or submitted; if it is to be argued, the time actually required for the argument; and the name of the attorney who will argue. The lower right-hand section shall contain the name, address, telephone number and email address of the attorney filing the brief and shall indicate whom the attorney represents (22 NYCRR 1250.8[a]).

A cover which shall contain the title of the cause on the upper portion, and, on the lower portion, the names, addresses, telephone numbers and email addresses of the attorneys, the county clerk's index or file number, the docket or other identifying number or numbers used in the court from which the appeal is taken, and the superior court information or indictment number (22 NYCRR 1250.7[b][1]).

The cover of a brief must set forth the name, address, and telephone number of the attorney that filed it and must indicate the party whom that attorney represents.

4. CPLR 5531 statement

In the **First and Second Department**, the appellant's brief must include an addendum with the statement required by CPLR 5531 (22 NYCRR 1250.8[b][7]).

B. The reproduced record or appendix

1. Format

Records and appendices must contain accurate reproductions of the papers submitted to the court of original instance as they appear in the files of the office of the clerk of that court, formatted in accordance with the practice there. Reproductions may be slightly reduced to fit the page and to accommodate the page headings required by CPLR 5529(c). However, if reduction substantially reduces readability, the record or appendix will be rejected for filing.

2. Page headings

CPLR 5529(c) requires that pages of the record or appendix bear a heading setting forth the subject matter contained therein. In the case of papers other than testimony, the subject-matter heading need only appear at the top of the first page of each paper. In the case of testimony, the heading must appear at the top of each page and must state the name of the witness, by whom he or she was called, and whether the testimony is direct, cross, redirect, or recross examination.

3. Table of contents

The table of contents of a record or appendix sets forth the headings required by CPLR 5529(c) and states the initial page number of each paper printed and the number of the page at which the direct, cross, redirect, and recross examination of each witness begins (CPLR 5528[a][1]; 22 NYCRR 1250.7[b][3]).

4. "Minuscript"

No record or appendix may include a transcript of testimony given at a trial, hearing or deposition that is reproduced in condensed format such that two or more pages of transcript in standard format appear on one page, unless the transcript was submitted in that format to the court from which the appeal is taken (22 NYCRR 1250.7[e]).

5. Proof of settlement of transcript or statement

Where a record or appendix contains the transcript of testimony taken at a trial or hearing or statement in lieu thereof, it must also contain an affirmation, stipulation, or order establishing that the transcript or statement was settled in accordance with the requirements of CPLR 5525 (22 NYCRR 1250.7[f]).

6. Certification

The contents of a reproduced full record or appendix must be certified to be true copies of the original documents contained in the file of the court from which the appeal is taken. The certification may be either by: (l) a certificate of the appellant's attorney pursuant to CPLR 2l05; (2) a certificate of the proper clerk; or (3) a stipulation in lieu of certification pursuant to CPLR 5532. The signed certification or stipulation shall be contained in the filed record or appendix marked "original" (see 22 NYCRR 1250.7[g]).

Compliance with this requirement by an attorney is simple because after comparing the reproduction with the filed original, he or she may make a certificate pursuant to CPLR 2105 attesting to the accuracy of the reproduction. However, compliance with this requirement by a *pro se* appellant is often difficult. If he or she is not an attorney, certification pursuant to CPLR 2105 is unavailable, opposing attorneys often refuse to stipulate to the accuracy of the contents of a record prepared by the pro se litigant, and certification by the clerk of the trial court is often prohibitively expensive. In such a situation the litigant may move pursuant to 22 NYCRR 1250.7[g] to waive the necessity of compliance with the certification requirement, attaching a copy of the proposed record or appendix to the motion papers. An attorney for a respondent who has refused to stipulate and who faces such a motion from a pro se opponent to dispense with certification should take it seriously and should be prepared to point out instances in which the papers in the litigant's proposed record do not conform to the originals in the court file.

C. Briefs

1. Format

Briefs prepared on a computer shall be printed in either a serifed, proportionally spaced typeface such as Times Roman, or a serifed, monospaced typeface such as Courier. Narrow or condensed typefaces and/or condensed font spacing may not be used. Except in headings and in quotations of language that appears in such type in the original source, words may not be in bold type or type consisting of all capital letters. (i) Briefs set in a proportionally spaced typeface. The body of a brief utilizing a proportionally spaced typeface shall be printed in 14-point type, but footnotes may be printed in type of no less than 12 points. (ii) Briefs set in a monospaced typeface. The body of a brief utilizing a monospaced

typeface shall be printed in 12-point type containing no more than 10½ characters per inch, but footnotes may be printed in type of no less than 10 points. Computer-generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k). (22 NYCRR 1250.8[f]). Practitioners are advised to consult subdivisions (a) through (k) of § 1250.8 of the rules for a complete treatment of the subject.

2. Argument requests

A request for argument is made on the cover of the main brief of the respective parties. The upper right-hand section shall contain a notation stating: whether the cause is to be argued or submitted; if it is to be argued, the time actually required for the argument; and the name of the attorney who will argue. (22 NYCRR 1250.8[a]). In the absence of such a notation on the cover of a party's main brief, the appeal will be deemed to have been submitted without oral argument by that party (22 NYCRR 1250.15[c][3]).

Oral argument is permitted unless proscribed by a local Appellate Division Department rule or by the court in its discretion in a particular cause. 22 NYCRR 1250.15[c][1]. When permitted, oral argument is limited to 15 minutes for each attorney who has filed a brief.

3. Addenda

Briefs may include addenda that are composed exclusively of decisions, statutes, ordinances, rules, regulations, local laws, or other similar matter cited therein that were not published or that are not otherwise readily available (22 NYCRR 1250.8[k]).

4. Additions to briefs

After perfection and before argument, an attorney may advise the court of new relevant decisions by a letter addressed to the clerk, with a copy to his or her adversary. Such letters should be confined to the citation of the case and a statement of its appropriate place in the argument contained in the brief. Extensive argument as to the meaning of the case is not permitted.

VIII. Notifying the court of events that affect continued prosecution

The court must be informed immediately of events that affect the continued prosecution of an appeal or original proceeding.

The parties or their attorneys shall immediately notify the court when there is a settlement of a matter or any issue therein or when a matter or any issue therein has been rendered moot. The parties or their attorneys shall likewise immediately notify the court if the cause should not be calendared because of the death of a party, bankruptcy or other appropriate event. Any such notification shall be followed by an application for appropriate relief. Any party or attorney who, without good cause shown, fails to comply with the requirements of this subdivision may be subject to the imposition of sanctions. (22 NYCRR 1250.2[c]).

IX. Calendaring

A. Calendars

1. Avoiding calendar conflicts

Attorneys who wish to avoid having a perfected appeal placed on a day calendar on a day upon which they have established plans for vacation or other important events may advise the court by letter addressed to the attention of the calendar clerk, with a copy to the adversary. To the extent possible the calendar clerk will attempt to honor requests to avoid scheduling conflicts. However, once an appeal appears on a day calendar, adjournments are rarely granted.

2. Lateness

On the day set for argument it sometimes occurs that an attorney is delayed in traffic and is unable to reach the courthouse by the time of the calendar call. Where that happens, the attorney should call the courthouse prior to the calendar call and ask to speak to a deputy clerk. The deputy clerk will advise the Justices and the adversary that the attorney is delayed and wishes to argue. Attorneys may not merely show up late for argument. The matter will have been marked submitted and argument will not be permitted.

B. Post-argument submissions

Post-argument submissions are discouraged, and may be made only with leave of the court. (22 NYCRR 1250.15[d]]). Applications for such permission should be made by letter to the clerk, with a copy to the adversary.

X. Website

Each Appellate Division department maintains a website that contains, among many other things, the answers to frequently asked questions, a history of the court and its courthouse, its rules of procedure, its Guide to Civil Practice, and its decisions, calendars, forms, and practice aids. Practitioners should check their sites for the latest information about each court.