THE NEW YORK COURT OF APPEALS
CIVIL JURISDICTION AND PRACTICE OUTLINE

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THE NEW YORK COURT OF APPEALS
CIVIL JURISDICTION AND PRACTICE OUTLINE

Prepared by the Clerk's Office, New York Court of Appeals

I. APPEALS AS OF RIGHT

A. Individual Jurisdictional Predicates

An appeal as of right must meet one of the following statutory jurisdictional predicates (CPLR 5601) or it is subject to dismissal upon motion or by the Court sua sponte (see 22 NYCRR 500.10).

1. Two-Justice Dissent at the Appellate Division -- CPLR 5601(a)

   a. The dissent must be on a question of law (compare Scheer v Koubek, mot to dismiss appeal denied 69 NY2d 983 [1987] [difference between majority and dissent centered on conflicting interpretations of Insurance Law and consequent conclusion as to whether plaintiff made out a prima facie case: legal question] and Matter of Gardstein v Kemp & Beatley, Inc., mot to dismiss appeal denied 61 NY2d 900 [1984] [dispute between majority and dissent focuses on sufficiency (not weight) of the evidence to support finding of corporate oppression of shareholder: legal question] with Merrill v Albany Med. Center Hosp., appeal dismissed 71 NY2d 990 [1988] [dissent predicated on unpreserved issues] and Matter of Cindy M.G. v Michael A., appeal dismissed 71 NY2d 948 [1988] [difference between majority and dissent based on differing view of underlying facts, not applicable legal standard]; see generally Arthur Karger, Powers of the New York Court of Appeals § 6:15, at 203-207 [3d ed rev 2005]).

   b. The dissent must be in appellant's favor (Matter of Barron & Vesel v Gammerman, cross appeal dismissed 63 NY2d 671 [1984]; Christovao v Unisul-Uniao de Coop. Transf., 41 NY2d 338 [1977]).

   c. The Appellate Division order must be final.

2. Constitutional Question -- CPLR 5601(b)(1) -- Appeal from Final Appellate Division Order

The constitutional question must be both directly involved in the Appellate Division order and substantial. The appellant has the burden of establishing the direct involvement of the constitutional question (see Karger, § 39, at 245).

a. Direct Involvement (see Karger, § 7:8; 7:9-7:10, at 231-243).

i. The constitutional question must have been properly raised in the courts below. Thus, the issue must be preserved before the court of original instance (Matter of Schulz v State of New York, 81 NY2d 336, 344 [1983]; Matter of Shannon B., appeal dismissed 70 NY2d 458, 462 [1987]), and raised again at, or at least be passed upon by, the Appellate Division on an appeal to that court, if one was taken (see Matter of Skenesborough Stone, Inc. v Village of Whitehall, appeal dismissed 95 NY2d 902 [2000]).

ii. The Appellate Division must have taken a view of the case that necessarily required it to pass upon the constitutional issue raised. Thus, an appeal will be dismissed where the Appellate Division's decision rests on an independent nonconstitutional ground (Marwanqa v Human Resources Admin., mot to dismiss appeal granted 69 NY2d 1037 [1987] [Statute of Limitations]; Matter of Fossella v Dinkins, appeal dismissed 66 NY2d 162,168 [1985] [statutory grounds]; Matter of Cioffi v Town of Guilderland, appeal dismissed 69 NY2d 984 [1987] [mootness]; Burns v Egan, appeal dismissed 68 NY2d 806 [1986] [res judicata, laches, standing]).

b. Substantiality (see Karger, §7:5, at 226-228)

Whether a substantial constitutional question is presented is a determination that must be made on a case by case basis. The Court has examined the nature of the constitutional interest at stake, the novelty of the constitutional claim, whether the argument raised may have merit, and whether a basis has been established for distinguishing a state constitutional claim (if asserted) from a federal constitutional claim. The Court has stated that questions that have been "clearly resolved against an appellant's position . . . lack the degree of substantiality necessary to sustain an appeal as of right under CPLR 5601(b)(1)" (Matter of David A.C., 43 NY2d 708, 709 [1977]). On the other hand, a constitutional argument

need not prevail on the merits to support an appeal on constitutional grounds (see Rose v Moody, 83 NY2d 65, 69 [1993]).

3. Constitutional Question -- CPLR 5601(b)(2) -- Direct Appeal from Court of Original Instance (When That Court Is Not the Appellate Division)

   a. The only question involved must be the constitutionality of a statutory provision; where issues are involved that must be resolved in addition to the constitutional question, the appeal is transferred to the Appellate Division (Jetro Cash and Carry Enters. v State of New York Dept. of Taxation and Fin., appeal transferred 81 NY2d 776 [1992] [discussion of plaintiff's possible failure to exhaust administrative remedies]; Town of Brookhaven v State of New York, appeal transferred 70 NY2d 999 [1998] [Court required to determine whether disputed material issues of fact existed prior to determining whether summary judgment could be granted on constitutional claims; threshold finality inquiry]; Matter of Morley v Town of Oswegatchie, appeal transferred 70 NY2d 925 [1987] [question of statutory interpretation that could be dispositive of constitutional question]; New York State Club Assn. v City of New York, appeal transferred 67 NY2d 717 [1986] [ripeness, standing, subject matter jurisdiction, issue whether declaratory judgment action is proper vehicle to test constitutionality of legislative enactment]; Kerrigan v Kenny, appeal transferred 64 NY2d 1109 [1985] [mootness]).

   b. The effectiveness of a stipulation to eliminate nonconstitutional issues will be strictly scrutinized by the Court. Presence of nonconstitutional issues is fatal to a direct appeal.

4. Stipulation for Judgment Absolute -- CPLR 5601(c) (see Karger, §§ 8:1-8:2, at 251-285; 12 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 5601.13, 5601.16)

   a. The Appellate Division must grant a new trial or hearing (as opposed to a first or initial hearing) (Matter of Knight-Ridder Broadcasting v Greenberg, mot to dismiss appeal denied 69 NY2d 875 [1987]; Matter of Town of Highlands v Weyant, appeal dismissed 30 NY2d 948 [1977]; see also CPLR 5615).

   b. The stipulation for judgment absolute must not be illusory. Such was the case where a judgment was originally entered in plaintiff's favor on liability but awarding plaintiff no damages and the

Appellate Division reversed and ordered a new trial on damages. Even if defendant lost on appeal, a new trial would still have to be held to determine the amount of the damages to which plaintiff was entitled. Thus, defendant gave up nothing by stipulating to judgment absolute (Goldberg v Elkom Co., appeal dismissed 36 NY2d 914 [1975]). Likewise, where a defendant stipulates to judgment absolute on the issue of liability in the event of an affirmance, no appeal lies pursuant to CPLR 5601(c). A stipulation for judgment absolute must effect a final determination of the action as to both liability and damages (Lusenskas v Axelrod, appeal dismissed 81 NY2d 300 [1993]). The stipulation, to be effective, must be for judgment absolute. Thus, a plaintiff-appellant who stipulates only to a reduction in the damages awarded at trial -- as opposed to dismissal of the complaint -- may not appeal pursuant to CPLR 5601(c) (Hedgepeth v Merz, appeal dismissed 70 NY2d 836 [1987]).

c. In this regard, it is worth noting that the Appellate Division does not have the power to grant leave to appeal on a certified question from an order granting a new trial or hearing (Fishman v Manhattan and Bronx Surface Tr. Op. Auth., mot to dismiss appeal granted 78 NY2d 878 [1991]). When a new trial or hearing is ordered, the Appellate Division cannot grant leave to appeal even if no appeal would lie as of right under CPLR 5601(c) (Maynard v Greenberg, appeal dismissed 82 NY2d 913 [1994]).

d. Even if the appellant would be otherwise aggrieved under normal agrievement rules, CPLR 5601(c) does not authorize an appeal to the Court of Appeals by a party in whose favor the Appellate Division has reversed a judgment and granted a new trial (Huerta v New York City Tr. Auth., 98 NY2d 643 [2002]).

e. Even in the rare cases where an appeal lies under CPLR 5601(c), appealing under this predicate involves certain dangers that can trap the unwary appellant. To prevail on an appeal on a stipulation for a judgment absolute, the appellant must show that the Appellate Division erred as a matter of law in granting a new trial or hearing. If, however, the Court of Appeals determines that the Appellate Division's order turned on a question of fact or an exercise of discretion, the Court has no alternative but to automatically affirm and render a judgment absolute (see Clayton v Wilmot and Cassidy, 34 NY2d 992 [1974]). Thus, if the Appellate Division reversal turned on an unpreserved issue, the determination below would be pursuant to the Appellate Division's discretionary interest

of justice review powers, and the appellant would end up with an affirmance and a judgment absolute in the Court of Appeals.

5. Appeal Pursuant to CPLR 5601(d)

a. This jurisdictional predicate permits review of an Appellate Division order that satisfies all of the jurisdictional requirements for an appeal as of right pursuant to CPLR 5601(a) or (b)(1), except finality, on the basis of a subsequent order or judgment which finally determines the action or proceeding in which the earlier Appellate Division order was issued. Only the earlier nonfinal order is reviewed on such an appeal (CPLR 5501[b]; see Matter of Greatsinger, 66 NY2d 680, 682-683 [1985]; Matter of Farber v U.S. Trucking Corp., 26 NY2d 44, 55 [1970]).

An appellant who wishes to challenge new matters decided by the trial court, instead of taking a CPLR 5601(d) appeal, must take a second appeal to the Appellate Division, which will review only the new matters. The appellant can thereafter take a CPLR 5601(d) appeal from the second Appellate Division order, obtaining Court of Appeals review only of the prior nonfinal Appellate Division order (see Curiale v Ardra Ins. Co., appeal dismissed in part 86 NY2d 774 [1995]; Gilroy v American Broadcasting Co., 46 NY2d 580 [1979]). If jurisdictional predicate requirements for an appeal as of right are not met by the second order, the appellant must also move for leave to appeal in order to obtain review of the issues decided in the second Appellate Division order. If jurisdictional requirements for an appeal as of right are met by the second Appellate Division order, the appellant need not use CPLR 5601(d) to obtain Court of Appeals review. Rather, the appellant can appeal as of right from the second order, and obtain Court of Appeals review of the prior nonfinal order pursuant to CPLR 5501, assuming the nonfinal order "necessarily affects" the final order (see Sections V-C-2 and VII of this outline).

Note that an adversary's appeal from the final judgment to the Appellate Division does not extend a party's time to take a CPLR 5601(d) appeal. The failure to take an available CPLR 5601(d) appeal after entry of the final judgment may render the appeal untimely or otherwise waived (see Goldman Copeland Assoc. v Goodstein Bros. & Co., lv dismissed 96 NY2d 796 [2000]).

b. Besides the requirement that the earlier Appellate Division order satisfy all of the requirements for an appeal as of right pursuant to

CPLR 5601(a) or (b)(1), except finality, two additional requirements must be met:

i. The order or judgment appealed from must finally determine the action or proceeding in which the Appellate Division issued its earlier nonfinal order (Park Slope Jewish Ctr. v Stern, appeal dismissed 72 NY2d 873 [1988] [judgment restating contents of nonfinal Appellate Division order]; Bouchard v Abbott, appeal dismissed 67 NY2d 983 [judgment incorporated terms of Appellate Division order and did not resolve factual dispute left outstanding by the order]).

ii. The prior Appellate Division order must necessarily affect the final order or judgment appealed from (Javarone v Pallone, appeal dismissed 90 NY2d 884 [order denying motion to vacate stipulation of discontinuance does not necessarily affect final judgment disposing of remaining claims]; see Karger, § 9:5, at 297-314 [1997]). Accordingly, CPLR 5601(d) is not available to obtain review of an Appellate Division order entered in a prior action or proceeding (see Matter of Concerned Citizens To Review Jefferson Val. Mall v Town Bd. of Town of Yorktown, 54 NY2d 957 [1981]; see also Section VII of this outline for more on the "necessarily affects" doctrine).

B. Rule 500.10 Review -- Examination of Subject Matter Jurisdiction

As stated in Rule 500.10, the Court may determine, sua sponte, whether it has subject matter jurisdiction over an appeal taken as of right or by permission of the Appellate Division. This is sometimes referred to as Sua Sponte Dismissal or SSD review or “jurisdictional review.”

Jurisdictional review is invoked when a question arises concerning the validity of a jurisdictional predicate for an appeal as of right or the validity of an Appellate Division leave grant in a civil case. Since the Court’s jurisdiction was significantly streamlined by legislation effective January 1, 1986 (see L 1985, ch 300), jurisdictional review is invoked when a question is raised in four main areas: finality, constitutional questions, direct appeals and two-Justice dissents. If the Court determines, after an inquiry made to the parties involved, that a jurisdictional predicate is lacking, it will dismiss the appeal sua sponte.

Under the authority of Rule 500.10, the Clerk of the Court screens all appeals taken as of right pursuant to CPLR 5601 or by permission of the Appellate Division pursuant to CPLR 5602 (b) to determine the validity of the jurisdictional

predicate and timeliness of the appeal. If a jurisdictional question arises, a jurisdictional inquiry letter is sent to counsel inviting written comment. After comments are received or the period for counsels' comment expires, the Court determines whether to retain or dismiss the appeal.

II. MOTIONS FOR LEAVE TO APPEAL

A. Certiorari Jurisdiction

Effective January 1, 1986, CPLR 5601 was amended to eliminate some traditional grounds for appeals as of right to the Court of Appeals in favor of greater certiorari jurisdiction. Now, all civil appeals are heard by permission of the Appellate Division or the Court of Appeals except where a constitutional question is directly involved (see CPLR 5601[b]), where two Justices at the Appellate Division dissented on a question of law (CPLR 5601[a]) or in the limited circumstance prescribed for an appeal by stipulation for judgment absolute (CPLR 5601[c]).

B. What is a Motion for Leave?

A motion for leave to appeal presents the opportunity for counsel to convince the Court that their case is worthy of the Court's time and scarce judicial resources. Motions for leave to appeal are randomly assigned to each of the Judges to report, in writing, to the Court as a body.

All motions for leave are conferenced and voted on by all the Judges of the Court. Leave to appeal will be granted upon the concurrence of two Judges (CPLR 5602[a]).

C. Statutory Requirements -- Jurisdictional Predicates

1. Motions for Leave To Appeal from Final Appellate Division Orders – CPLR 5602(a)(1)(i)

   CPLR 5602(a)(1)(i) allows a litigant to seek leave to appeal from a final Appellate Division order entered in an action originating in the Supreme Court, a County Court, a Surrogate's Court, the Family Court, the Court of Claims, an administrative agency, or an arbitration. This is by far the most common jurisdictional predicate for a motion for leave. Note that an appeal from a final Appellate Division order brings up for review prior nonfinal orders and judgments that necessarily affect the final order (see CPLR 5501[a]; see also Sections V-C and VII of this outline).

2. Motions for Leave To Appeal To Obtain Review of Prior Nonfinal Orders Only – CPLR 5602(a)(1)(ii)

CPLR 5602(a)(1)(ii) allows a litigant to by-pass a second appeal to the Appellate Division when the movant only seeks review of the Appellate Division's prior nonfinal order and not the subsequent final order made by the nisi prius court after the Appellate Division's remittal. CPLR 5602(a)(1)(ii) is the parallel to CPLR 5601(d), which applies to appeals as of right. In order for a motion seeking leave to appeal pursuant to CPLR 5602(a)(1)(ii) to lie, the following requirements must be met:

a. The judgment sought to be appealed from must be a final judgment. The parties cannot simply enter a "nonfinal" judgment on the Appellate Division order (Burnside Coal & Oil v City of New York, lv dismissed 73 NY2d 852 [1988]). The Court has deemed a stipulation between the parties finally resolving all remaining claims a judgment to allow a motion for leave to appeal pursuant to CPLR 5602(a)(1)(ii) (Voorheesville Gun Club v E.W. Tompkins Co., 82 NY2d 564, 568 [1993]).

   Where the "final" judgment or order on which the motion or appeal is predicated is based on a stipulation between the parties concerning damages, the Court will check the stipulation to make sure it is not illusory or conditional (see Udell v New York News, lv dismissed 70 NY2d 745 [1987] [where stipulation expressly provided that it could not be construed as a concession by plaintiff that damages were limited to any amount, stipulation was deemed illusory and motion was dismissed for nonfinality]; Costanza Constr. Co. v City of Rochester, appeal dismissed 83 NY2d 950, 951 [1989] [dismissal of counterclaims only conditional]).

b. The prior nonfinal Appellate Division order must “necessarily affect” the final order or judgment. For a detailed discussion of the “necessarily affects” requirement, see Section VII, infra.

3. Motions for Leave To Appeal from Nonfinal Orders -- CPLR 5602(a)(2) – Administrative Context

CPLR 5602(a)(2) allows a motion for leave to appeal from a nonfinal Appellate Division order in "a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal."

a. By its terms, this section only applies to motions for leave to appeal (compare language of CPLR 5601 with CPLR 5602). Moreover, the section only applies to proceedings, not to actions (John T. Brady & Co. v City of New York, lv dismissed 56 NY2d 711 [1982]).

b. The remittal must be to the agency and not to (1) a lower court, or (2) a lower court and an agency (see Matter of Golf v New York State Dept. of Social Servs., lv dismissed 88 NY2d 960 [1996]).

c. The public body must be participating in the litigation as an adjudicatory or administrative body. If the body participating is in the capacity of any other litigant, prosecuting or defending a claim before an adjudicatory tribunal, CPLR 5602(a)(2) will not apply (see Matter of F.J. Zeronda, Inc. v Town of Halfmoon, 37 NY2d 198, 200-201 [1975]).

d. Any party to a proceeding which comes within the ambit of CPLR 5602(a)(2) may benefit from the section (see id. at 201 n *).

e. In Workers' Compensation Board cases, review by the Appellate Division is by appeal, so there is no proceeding "instituted by or against" a public body and, thus, a nonfinal Appellate Division order is not appealable by permission pursuant to CPLR 5602(a)(2) (Matter of Marcera v Delco Prods., lv dismissed 88 NY2d 804 [1995]). The same rule applies to unemployment insurance cases where review by the Appellate Division is by appeal under Labor Law § 624 (see Matter of Caufield-Ori [Blumberg - Sweeney], 89 NY2d 982 [1997]).

4. Motions for Leave To Appeal by Permission of the Appellate Division -- CPLR 5602(b)

Note that in addition to the statutory predicates discussed above, the Appellate Division can also grant leave to appeal from certain final and nonfinal orders as to which the Court of Appeals lacks constitutional and statutory power to grant leave. Consult CPLR 5602(b). However, the Appellate Division's authority to grant leave from a nonfinal order, where it certifies a question for Court of Appeals review, has limitations (see CPLR 5602[b][1]; Bryant v State of New York, 7 NY3d 732 [2006]).

D. How to Move for Leave to Appeal -- Rule 500.22 Requirements

1. What the document should look like

A motion is made on a copy of the record or appendix used in the court below and an original and six copies of the moving papers. Two copies of the moving papers must be served on the adverse party. The moving papers shall be a single document bound on the left (22 NYCRR 500.1; 500.22[b]).

2. What should be addressed

a. Notice of return date (any non-holiday Monday, or next non-holiday business day following a Monday holiday within the meaning of CPLR 5516, 8 [if papers served personally], 9 [if served by overnight delivery]; 13 [if by mail within the state; or 14 [if by mail outside the state] days after service of notice, whether or not the Court is in session) and relief requested.

b. Questions presented.
Counsel should note that "if a party in its application for leave to appeal specifically limits the issues it seeks to have reviewed, it is bound by such limitation and may not raise additional issues on the appeal" (Quain v Buzzetta Constr. Corp., 69 NY2d 376 [1987]).

c. Procedural history and timeliness chain (22 NYCRR 500.22[b][2]).

d. Jurisdiction (CPLR 5602).

e. Argument as to why leave should be granted.

f. A disclosure statement, if required (22 NYCRR 500.1[f]; 500.22[b][5]).

g. One copy of all relevant orders, judgments, opinions or memoranda, one copy of the record or appendix below and one copy of each party's briefs below.

E. Common Errors in Motions for Leave

1. Failure to provide proof of service

Without proof of service, the Court is unable to determine whether the motion is timely and what the appropriate return date should be. Proof should indicate service of two copies (22 NYCRR 500.22[a]).

2. Failure to establish timeliness chain

Rule 500.22(b)(2) requires a demonstration of the timeliness of the motion (CPLR 5513), including the timeliness of any prior motion in the Appellate Division for leave to appeal to the Court of Appeals, which extends the time to move in the Court of Appeals (CPLR 5514[a]). A failure to comply with this requirement can result in the dismissal of the motion for such defects (see Horowitz v Incorporated Vil. of Roslyn, lv dismissed 74 NY2d 835 [1989]).

a. The timeliness chain should be established in a short paragraph at the beginning of the motion papers which states: (a) each procedural step taken subsequent to the entry of the order from which leave to appeal is sought, (b) the dates all orders were entered and served by a party with notice of entry, and (c) the date the present motion was served. Note: (1) A motion for reargument only at the Appellate Division, which is denied, does not extend a party's time to move for leave to appeal to the Court of Appeals (Eaton v State of New York, lv dismissed 76 NY2d 824 [1990]). Where a motion for reargument is granted, however, even though the original decision is adhered to, the time to appeal does run from the service with notice of entry of the order granting reargument (see Karger, § 12:5, at 445-446). (2) Where movant's prior motion for leave to appeal at Appellate Division was untimely, the motion for leave to appeal to this Court will be dismissed as untimely, even if made within 30 days after service with notice of entry of an Appellate Division order denying leave to appeal (Lehman v Piontkowski, lv dismissed 84 NY2d 890 [1994]).

b. A motion must be served within 30 days of service by a party of the order or judgment sought to be appealed from and notice of entry (CPLR 5513[b]; see Matter of Reynolds v Dustman, 1 NY3d 559 [2003] [describing what constitutes "notice of entry"]). If the order or judgment sought to be appealed from and notice of entry is served by mailing within the state, five days is added to the 30 day time period (CPLR 2103[b][2]); if the order or judgment sought to be appealed from and notice of entry is served by mailing outside the state but within the geographic boundaries of the United States, six days is added to the 30 day time period (CPLR 2103[b][2]); if the order or judgment sought to be appealed from and notice of entry is served by overnight delivery service, one business day is added to the 30 day time period (CPLR 2103[b][7]). Where service is by mailing, service is complete upon deposit of the papers, properly addressed and stamped, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the United States (CPLR 2103[b][f][1]). Since the postmark date may be later than the date papers are deposited in the mail, the postmark on the envelope in which the Appellate Division order with notice of entry is served should not be used as the starting date for the period for seeking leave to appeal (see Kings Park Classroom Teachers Assn. v Kings Park Central School Dist., 63 NY2d 742 [1984]). The return date is determined by counting 8 days (9 if service is by overnight delivery; 13 if by mail within the

state; 14 if by mail outside the state) and taking the next available Monday. The return date need not come within the CPLR 5513(b) 30-day time limit.

Failure to move within the CPLR 5513(b) time period is a jurisdictional defect requiring dismissal (but cf. CPLR 5520[a] [providing Court with discretion to excuse late service or late filing if the other act -- service or filing -- is timely completed]). Moreover, failure to establish the timeliness chain may result in dismissal (see Metzger v Metzger, lv dismissed 82 NY2d 735 [1993]).

c. Counsel must be especially careful to keep the timeliness chain intact in the following scenario: where the Appellate Division reverses a judgment and orders a new trial on damages unless plaintiff stipulates to a reduced sum. The effect of such an order on the computation of timeliness depends on the precise language of the Appellate Division order (see Whitfield v City of New York, 90 NY2d 777, 780-781 [1997]). For example, where the Appellate Division reverses a judgment and orders a new trial on damages unless plaintiff stipulates to a reduced sum, that stipulation shall effectively be treated by the Court for timeliness concerns as the final judgment, and the appeal or motion for leave to appeal must be made to the Court within 30 days (personal service) after the appellant or movant is served with the stipulation and written notice of entry (id.)

d. A party upon whom an adverse party has served a notice of appeal or motion for leave to appeal may serve its own motion for leave to appeal within 10 days (personal service) after service of the notice of appeal or motion by the adverse party, or within 30 days (personal service) after service of the Appellate Division order with written notice of entry, whichever is longer, if such motion is otherwise available (CPLR 5513[c]). If the adverse party had moved at the Appellate Division for leave to appeal to the Court of Appeals, the party relying on CPLR 5513(c) will not be timely unless that party also timely moved at the Appellate Division (511 W 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]; Capasso v Capasso, cross mot for lv dismissed 70 NY2d 988 [1988]).

3. Failure to address finality
Rule 500.22(b)(3) requires a showing that the Court has jurisdiction of the motion and of the proposed appeal, including that the order sought to be appealed from is a final determination or comes within the special class of nonfinal orders which are appealable by permission of the Court of Appeals (CPLR 5602[a][2]). To show finality, the status of every claim, counterclaim, cross claim, or other request for relief pleaded in the action must be indicated. Any post-submission changes in status of such claims must promptly be reported to the Court (see Court of Appeals Notice to the Bar [9-19-89]; 22 NYCRR 500.6). A failure to comply with these requirements can result in the dismissal of the motion for such defects (see Rose v Green, lv dismissed 74 NY2d 836 [1989]).

To evaluate whether a particular order is final for purposes of Court of Appeals jurisdiction, see Section VI of this outline.

Many attorneys mistakenly assume that moving for leave to appeal is a way to cure finality problems. When moving for leave to appeal in the Court of Appeals, as opposed to the Appellate Division, this is absolutely wrong. Except for the limited circumstances authorized by CPLR 5602(a)(2), a motion seeking leave to appeal must be taken from a final determination (see CPLR 5602[a][1]).

4. Failure to show where arguments are preserved in the record (see 22 NYCRR 500.22[b][4]; see also Section V-C of this outline).

5. Exclusive concentration on the merits of the substantive argument without adequately addressing why leave should be granted.
Arguing error below is not enough. The certiorari factors listed in Rule 500.22(b)(4) must be addressed. The primary function of the Court of Appeals is to decide legal issues of State-wide significance, not to correct error made in the Appellate Division.

III. GUIDELINES FOR PREPARING A MOTION FOR LEAVE TO APPEAL

A. Certiorari Factors -- 22 NYCRR 500.22(b)(4)

Question of law should be "novel or of public importance, or involve a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." Denial of a motion for leave to appeal is not equivalent to an affirmance and has no precedential value (see Matter of Marchant v Mead-Morrison Mfg. Co., 252 NY 284 [1929]).

B. Some Reasons Why the Court Denies Leave

The Court does not state reasons why it does not grant leave to appeal in any particular case. Generally, some reasons why the Court may deny leave:

1. The questions presented are not reviewable.

   Many motions are denied because they simply present questions of fact which have been resolved against the movant. The Court of Appeals may review findings of fact which have been affirmed by the Appellate Division only to determine if there is support in the record for them. Rarely is a motion challenging affirmed findings of fact granted. The same is true for cases involving exercises of discretion by the lower courts. Such questions are beyond the Court's review absent an abuse of discretion.

2. Questions are not preserved.

3. The law is settled.

   a. Law is settled and correctly applied.

   b. Law is settled and any error below did not lead to substantial injustice.

   c. General principles of law settled and case involves mere application to unique facts.

4. The law is not settled, but . . .

   a. Case offers nothing beyond the parties -- no State-wide implications (e.g. construction of a unique contract provision between private parties).

   b. Arguably correct result reached below or the law has not been sufficiently developed by lower courts.

5. Good issue/bad case

   a. Important issues of unsettled law but record is insufficient to address the legal issues.

   b. Legal issues not squarely presented by attorneys.

C. Some Reasons Why the Court Grants Leave To address important legal Issues and

1. Address a split in authority among Departments of the Appellate Division.
2. Construe statutes in developing areas of regulation.
3. Develop emerging areas of common law.
4. Reevaluate outmoded precedent.
5. Correct error below -- incorrect statements of law in a writing by Appellate Division.
6. Correct error below -- to cure substantial injustice.

IV. RULE 500.11 REVIEW -- ALTERNATIVE PROCEDURE FOR SELECTED APPEALS

A. What Is It?

Sometimes referred to as the Sua Sponte Merits examination or SSM, alternative review is in essence the presentation of an appeal to the full Court without oral argument.

B. When Is It Invoked? -- Criteria in 22 NYCRR 500.11(b)

Rule 500.11(b) states: Appeals may be selected by the Court for alternative review on the basis of (1) the presence of lower courts' nonreviewable discretion, mixed questions of law and fact or affirmed findings of fact, all of which are subject to a limited scope of review; (2) clear recent controlling precedent; (3) narrow issues of law not of overriding or State-wide importance; (4) nonpreserved issues; (5) a party's request for such review or (6) other appropriate factors.

C. Countering Misconceptions about the Alternative Procedure

1. Alternative review is not used only when the Court decides to affirm.
2. Rule 500.11 appeals are decided by the full Court. The deliberative process is essentially the same for all appeals. Consequently, a Rule 500.11 appeal receives the same attention as a normal course appeal.

D. Benefits of the Alternative Procedure

1. Time saving for the Court and parties. Appeals pursuant to Rule 500.11 reach disposition in almost one-half the time taken to dispose of appeals heard on full briefs and oral arguments.

2. Conserves judicial and attorney resources as well as legal expenses.

E. How the Alternative Procedure Works

1. The Clerk initiates the alternative procedure after reviewing appellant's preliminary appeal statement (see 22 NYCRR 500.9), or the Court or an individual Judge may recommend such treatment in granting leave to appeal. After submissions are served and filed by all parties, the case is assigned to a reporting Judge. That Judge is free to terminate the alternative procedure without a report or the Judge may prepare a report to terminate the alternative procedure setting forth reasons why full briefing and oral argument are necessary. If the reporting Judge decides to maintain the alternative procedure, a written report on the merits of the case is prepared. The report and any writings by the courts below are circulated to all of the other Judges and are considered and voted on by the entire Court.

2. An appellant may request to proceed under the alternative procedure in the preliminary appeal statement or motion for leave to appeal. On an appeal, respondent may request alternative review by letter to the Clerk of the Court, with proof of service of one copy on each other party, within five days after the appeal is taken.

3. If you receive a Rule 500.11 letter from the Court and you do not wish expedited treatment, your response must be in two parts. First, state objections to the procedure and the reasons supporting them. Note that the guidelines in Rule 500.11(b) include a catch-all subdivision, (b) (6); therefore, counsel are advised to also include reasons why full briefing and oral argument would be of particular benefit in your case. Second, present arguments on the merits of the appeal in case the Court decides to continue alternative review over your objection.

4. Arguments on the merits: In a letter of no more than 7,000 words (see Rule 500.11[m]) explain the essential facts of your case, the holding of the courts below and the best arguments for your position. Importantly, Rule 500.11(f) states: "A party shall be deemed to have abandoned any argument made in the intermediate appellate courts briefs not addressed or reserved in the letter submission to this Court."

V. APPEALABILITY AND REVIEWABILITY

A. Definitions

The concepts of appealability and reviewability are constitutional limitations on the Court's power to hear cases. More precisely, appealability rules act to limit the kinds of cases that may be heard by the Court of Appeals. Reviewability rules, on the other hand, limit the issues that the Court may determine once the case is before the Court. Article VI, § 3(b) of the State Constitution prescribes what kinds of orders are appealable to the Court, and article VI, § 3(a) states that in most cases "the jurisdiction of the Court of Appeals shall be limited to the review of questions of law."

B. Appealability

In addition to the jurisdictional requirements discussed above for appeals as of right and motions for leave to appeal, certain other appealability requirements must be met.

1. Appropriate Court

Action must originate in an appropriate court. For example, the Court lacks jurisdiction to entertain a motion for leave to appeal from an order of the Appellate Division where the appeal to that court was from a judgment or order entered in an appeal from a third court (Matter of Thenebe v Ansonia Assoc., 89 NY2d 858 [1996]). This jurisdictional problem will arise when an action originates in a court other than Supreme Court, County Court, Surrogate's Court, Family Court, Court of Claims or an administrative agency or an arbitration. The motion will be dismissed regardless of whether the Appellate Division order is final.

The Court does not have jurisdiction to entertain a motion for leave to appeal from a determination of a court other than the Appellate Division, except in the circumstances specified in CPLR 5602(a)(1)(ii). Regarding appeals as of right, see CPLR 5601.

2. Aggrievement

a. CPLR 5511 states that only an aggrieved party may appeal (see Hecht v City of New York, 60 NY2d 57, 61 [1983]). A party may appeal if the order appealed from does not grant complete relief to it. A party which is granted complete relief but is dissatisfied with the court's reasoning is not aggrieved within the meaning of CPLR 5511 (see Matter of Sun Co. v City of Syracuse Indus. Dev. Agency, 86 NY2d 776 [1995]; Parochial Bus Sys. v Board of Educ., 60 NY2d 539, 545 [1983]).

b. No appeal lies from an Appellate Division order dismissing an appeal from a determination entered upon a default judgment (CPLR 5511; Matter of Lizette Patricia C., 98 NY2d 688 [2002]).

c. Where the Appellate Division reverses a trial court's judgment and orders a new trial limited to the issue of damages unless plaintiff stipulates to a reduction of damages, and plaintiff so stipulates, the court had held that plaintiff is not aggrieved by the Appellate Division order (see Whitfield v City of New York, 90 NY2d 777, 780 n * [1997]; see also Smith v Hooker Chem. & Plastics Corp., cross mot for lv dismissed 69 NY2d 1029 [1987]). However, in Adams v Genie Indus. (14 NY3d 535 [2010]), the court "conclude[d] that...[i]t is unfair to bar a party from raising legitimate appellate issues [as to liability] simply because that party has made an unrelated agreement on the amount of damages" (id. at 541). The court rejected the aggrievement rule in Whitfield and Batavia Turf Farms v County of Genesee (lv dismissed 91 NY2d 906 [1998]) "to the extent that they go beyond the original Dudley v Perkins (235 NY 448, 457 [1923]) holding" (14 NY3d at 536, 542).

3. Finality -- covered in detail in Section VI of this outline.

4. Miscellaneous Appealability Problems

a. Dual Review -- Where the same party both appeals to the Appellate Division and appeals to the Court of Appeals, the appeal to the Court will be conditionally dismissed. Where the same party both appeals to the Appellate Division and moves for leave to appeal to the Court of Appeals, the motion will be dismissed outright. Dual review is generally not permitted (Parker v Rogerson, 35 NY2d 751, 753 [1974]; see also CBS Inc. v Ziff Davis Pub., lv dismissed 73 NY2d 807 [1988]). However, where different parties pursue different avenues of appeal or motion before the Court, they will be permitted to continue (Harry R. Defler Corp. v Kleeman, 18 NY2d 797 [1966]).

b. Appealable paper -- An appeal will be dismissed where the improper paper is sought to be appealed.

i. No order or judgment -- Where appellant/movant seeks to appeal from something other than an order or judgment, the appeal/motion will be dismissed (Matter of Sims v Coughlin, appeal dismissed 86 NY2d 776 [1995] [decision]; Matter of Abdurrahman v Berry, lv dismissed 73 NY2d 806 [1998] [letter]).

ii. Subsequent Supreme Court order or judgment -- CPLR 5611 reads in part "[I]f the Appellate Division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it" (see American Acquisition Co. v Kodak Elec. Printing Sys., 87 NY2d 1049 [1996]).

iii. Order of individual Appellate Division Justice -- No appeal lies from an order of an individual Justice of the Appellate Division (People ex rel. Mahler v Jablonsky, appeal dismissed 82 NY2d 919 [1994]).

iv. The finality of an Appellate Division order dismissing an appeal to that court is determined by an examination of the finality of the underlying order (Langeloth Found. v Dickerson Pond Assocs., lv dismissed 74 NY2d 841 [1989]).

v. No civil motion for leave to appeal or appeal as of right lies directly from the order of the Appellate Term of Supreme Court (Williamson v Housing Preservation and Dev. of City of New York, lv dismissed 82 NY2d 919 [1994]).

c. Dismissal of Prior Appeal for Failure To Prosecute

A prior dismissal of an appeal for failure to prosecute is a determination on the merits and acts as a bar to a subsequent appeal raising the issues that could have been raised on the prior appeal (see Bray v Cox, 38 NY2d 350 [1976]). Thus, the subsequent motion/appeal may be dismissed (see id.; compare Rubeo v National Grange Mut. Ins. Co., 93 NY2d 750 [1999]; Faricelli v TSS Seedman's, 94 NY2d 772 [1999] [Appellate Division has discretion to entertain appeal notwithstanding dismissal of prior appeal for failure to prosecute]).

d. Criminal Appeals

Appeals in criminal cases must be taken pursuant to the Criminal Procedure Law, not CPLR 5601 or 5602 (Matter of Newsday, Inc., 3 NY3d 651 [2004] [newspaper's motion to intervene and obtain access to record in criminal case]; People v Blake, appeal dismissed 73 NY2d 985 [1989] [CPL 450.15, 460.15 application]; People v Dare, appeal dismissed 74 NY2d 707 [1989] [application for writ of error coram nobis]).

e. Corporation Appearance

CPLR 321(a) dictates that a motion or appeal by a corporate party must be filed by an attorney.

f. Mootness

Where the issues presented are no longer determinative of a live controversy, the Court will not entertain an appeal or motion for leave to appeal. The Court cannot entertain the motion or appeal because it cannot give advisory opinions (see Matter of Hearst Corp. v Clyne, 50 NY2d 707, 713-714 [1980]). However, the Court may entertain an appeal or motion when each of the three prongs of the mootness exception is satisfied: "(1) a likelihood of repetition . . .; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e. substantial and novel issues" (id. at 714-715).

C. Reviewability

Once it is determined that an order is appealable, a litigant must consider which issues and orders that arose in the litigation are reviewable by the Court of Appeals.

1. Preservation -- Issues Reviewable

a. The Court of Appeals' power to review lower court rulings made on motions, applications and points of evidence is, in part, limited by statutes and case law requiring that appropriate objections be registered below as a prerequisite to appellate review (see CPLR 4017, 4110-b and 5501[a][3] and [4]). The Court will determine whether an issue has properly been preserved below, whether or not the parties raise the question of preservation (see Halloran v Virginia Chems., 41 NY2d 386, 393 [1977]). Counsel bears the

responsibility of showing the Court where each issue raised has been preserved in the record.

b. Differences in Appellate Division and Court of Appeals review

The Appellate Division may reach questions of trial error, even if unpreserved, in an exercise of its "interest of justice" jurisdiction (see Martin v City of Cohoes, 37 NY2d 162 [1975], rearg denied 37 NY2d 817, on remand 50 AD2d 1035, appeal dismissed 39 NY2d 740, lv denied 39 NY2d 910). The Court of Appeals, on the other hand, generally may only review questions of law and, therefore, may not review unpreserved error even if the Appellate Division has chosen to do so (see Brown v City of New York, 60 NY2d 893, 894 [1983]).

c. Preservation of legal issues and theories

i. As a general matter, appellate courts are reluctant to review legal arguments raised for the first time on appeal. Several policy reasons underlie this rule, such as avoiding unfairness to the other party, giving deference to the lower courts and encouraging the proper administration of justice by demanding an end to litigation and requiring the parties and trial courts to focus the issues before they reach the Court of Appeals (Bingham v New York City Trans. Auth., 99 NY2d 355, 359 [2003]).

Under appropriate circumstances, however, the Court of Appeals may entertain new legal arguments and theories raised on appeal. Those very limited circumstances include: (1) new arguments based on a change in statutory law while the appeal is pending (see Post v 120 East End Ave. Corp., 62 NY2d 19, 28-29 [1984]); (2) where the new argument could not have been obviated or cured by factual showings or legal countersteps had the arguments been tendered below (People ex rel. Roides v Smith, 67 NY2d 899, 901 [2001]); (3) questions of pure statutory interpretation (Matter of Richardson v Fiedler Roofing, 67 NY2d 246, 250 [1986]). These "exceptions" are narrowly construed.

ii. The general rule requires that constitutional questions be raised at the first available opportunity as a prerequisite to review in the Court of Appeals (see e.g. Matter of Barbara C., 64 NY2d 866, 868 [1986]). There is some indication that the Court may make an exception to this doctrine and examine a constitutional issue raised for the first time in the Court of Appeals if the issue implicates grave public policy concerns (see Park of Edgewater v Joy, 50 NY2d 946, 949 [1980] citing Massachusetts Natl. Bank v Shinn, 163 NY 360, 363 [1900]).

d. Preservation in the administrative agency context

The Court's reluctance to review new legal arguments is equally applicable in the administrative agency context for policy reasons similar to those discussed above. Thus, arguments which were not raised by a party at the administrative level are considered unpreserved and not reviewable by the Court of Appeals, subject to very limited exceptions (see Matter of Crowley v O'Keefe, mot to dismiss appeal granted 74 NY2d 780 [1989]; Matter of Samuels v Kelly, lv denied 73 NY2d 707 [1989]).

2. CPLR 5501(a) -- Review of Prior Nonfinal Orders and Determinations

a. CPLR 5501(a) provides that an appeal from a final judgment brings up for review, among other things:

i. any nonfinal judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal (CPLR 5501[a][1]);

ii. any order denying a new trial or hearing which was not previously reviewed by the court to which the appeal was taken (CPLR 5501[a][2]); and

iii. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, any charge to the jury, or failure to charge as requested by the appellant, to which the appellant objected (CPLR 5501[a][3]).

b. Note that CPLR 5501(a)(1), which applies to prior nonfinal orders and judgments, contains the “necessarily affects” requirement. CPLR 5501(a)(3), which applies to trial rulings, however, does not.

c. For an in-depth discussion of the “necessarily affects” requirement, see Section VII of this outline.

3. Scope of Review

Once it is determined which orders, determinations, and issues are reviewable, the scope of the Court’s review must be considered.

a. Limited to questions of law

As noted earlier, the State Constitution limits the Court's review powers to questions of law. Questions of fact are not reviewable except in:

i. death penalty cases (CPL 470.30[1]);

ii. Commission on Judicial Conduct matters (see e.g. Matter of Edwards, 67 NY2d 153 [1986]);

iii. cases where the Appellate Division reverses or modifies and finds new facts, in which case the Court’s review power is limited as discussed further below (CPLR 5501[b]); and

iv. defamation cases involving a public figure defendant -- where the issue concerns whether plaintiff has proven the essential element of actual malice, the Court has a constitutional duty to review the evidence and to "exercise independent judgment to determine whether the record establishes actual malice with convincing clarity" (Prozeralik v Capital Cities Communications, 82 NY2d 466, 474-475 [1993], quoting Harte-Hanks Communications v Connaughton, 491 US 657, 659 [1989]).

b. Questions that are never reviewable

i. An Appellate Division determination whether the trial judge correctly decided a CPLR 4404(a) motion to set aside the verdict as "contrary to the weight of the evidence" is not reviewable (Levo v Greenwald, 66 NY2d 962 [1962]; Gutin v Frank Mascali & Sons, Inc., 11 NY2d 97, 98-99 [1962]).

However, where a jury verdict has been set aside on the ground that, as a matter of law, the verdict is not supported by sufficient evidence, that determination is reviewable. The relevant inquiry is whether there is any "valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]). Where it is not clear from the Appellate Division writing whether the Appellate Division has set aside a verdict on sufficiency of evidence or weight of evidence grounds in a jury tried case, examine the court's corrective action. New trial ordered -- weight; dismissal of complaint -- sufficiency (see id. at 498). The foregoing analysis cannot be used in bench trial cases because the Appellate Division can render judgment for the appealing party as a matter of fact without the need for a new trial. When, in a jury case, the Appellate Division reverses a judgment entered on a plaintiff's verdict, on both sufficiency and weight of the evidence grounds, the Court can review whether the legal sufficiency ruling was correct. If the Court disagrees with the Appellate Division and concludes that the verdict is supported by legally sufficient evidence, the Court cannot reinstate the judgment entered on the verdict; instead, it must order a new trial because it cannot disturb the Appellate Division's weight of evidence determination (Sage v Fairchild-Swearingen, 70 NY2d 579, 588 [1987]).

ii. A determination of excessiveness (or inadequacy) of the jury's verdict (Rios v Smith, 95 NY2d 647, 654 [2001]; Woska v Murray, 57 NY2d 928 [1982]; Zipprich v Smith Trucking Co., 2 NY2d 177, 188 [1956]).

iii. An Appellate Division determination to reverse a judgment in a civil action on the basis of unpreserved legal error (Brown v City of New York, 60 NY2d 893 [1983]). The Court of Appeals has no power to review either the unpreserved error or the Appellate Division's exercise of discretion in reaching the issue (see Elezaj v Carlin Constr. Co., 89 NY2d 992, 994 [1997]).

c. Limited Review

i. Findings of fact that are affirmed by the Appellate Division are only reviewable to determine if there is evidence in the record to support them (Cannon v Putnam, 76 NY2d 644, 651 [1990]; Morgan Servs. v Lavan Corp., 59 NY2d 796, 797 [1983]).

ii. In situations where the Appellate Division reverses or modifies and expressly or impliedly finds new facts, the Court of Appeals can determine which of the findings more nearly comports with the weight of the evidence (CPLR 5501[b]; Matter of Y.K., 87 NY2d 430, 432 [1996]; Loughry v Lincoln First Bank, N.A., 67 NY2d 369, 380 [1986]).

iii. Provided the lower courts had the power to exercise discretion (Brady v Ottaway Newspapers, 63 NY2d 1031 [1984]), the Court of Appeals will not interfere with the exercise of that discretion absent an abuse (Herrick v Second Cuthouse, 64 NY2d 692 [1984]). However, an issue of law will be presented where the Appellate Division in exercising its discretion expressly fails to take into account all the various factors that are properly entitled to consideration (Varkonyi v Varig, 22 NY2d 333, 337 [1968]). In such cases, the Court can set out the proper factors and, if judgment cannot be rendered as a matter of law, remit the case to the Appellate Division to exercise its own discretion on the basis of all the relevant factors (id. at 338).

VI. WHAT IS A FINAL DETERMINATION? -- A SYSTEMATIC APPROACH

A. Constitutional Requirement

In civil cases, the New York Constitution (article VI, §§ 3[1] and [2]) mandates only final orders are appealable to the Court of Appeals with the very limited exceptions of:

1. appeals by stipulation for judgment or order absolute recognized in section 3(3);

2. appeals permitted by the Court of Appeals in proceedings by or against a public body or officer allowed by section 3(5);

3. appeals permitted by the Appellate Division on certified questions allowed by section 3(4).

B. Nonfinality

In general, a final order is one that disposes of all the causes of action between the parties and leaves nothing for further judicial intervention apart from mere ministerial matters (Burke v Crosson, 85 NY2d 10, 15 [1995]). Although the definition is simple, identifying the final order is occasionally tricky.

Some orders leave nothing pending in the litigation and yet are still deemed nonfinal for purposes of Court of Appeals jurisdiction. In order to understand this apparent anomaly, one must first understand that the critical question for determining finality is whether the order finally determines an action or proceeding, not whether the order leaves further litigation pending. Thus, finality should be viewed as a point along the continuum of litigation. There are orders which clearly come too early along that continuum, such as those administering the course of litigation or disposing of motions for temporary or provisional relief. Likewise, there are orders which come too late along the continuum, such as those seeking enforcement of a previously rendered final order.

The following is a logical sequence of questions counsel should ask when evaluating whether a particular Appellate Division order is final for purposes of Court of Appeals jurisdiction.

1. Merits Not Addressed -- Too Early

Does the order merely administer the course of litigation or dispose of a motion for temporary or provisional relief?

- Caceras v Zorbas, lv dismissed 69 NY2d 899 [1987] [discovery from party in a pending action]; Lynn v Jensen Assocs., lv dismissed 64 NY2d

766 [1985] [discovery from nonparty in a pending action]. Compare Matter of Isbrandtsen, lv denied 70 NY2d 616 [1988] [discovery motion not made within a pending action commences a separate special proceeding].

- Avital v Feldman, lv dismissed 87 NY2d 1056 [1996] [order denying a motion to amend a complaint to add a new party].

- Thompson v Whitestone Sav. and Loan Assn., lv dismissed 64 NY2d 610 [1985] [denial of class certification].

- People ex rel. Dunaway v Warden, lv dismissed 87 NY2d 918 [1996] [order denying poor person relief].

- Auer v Power Auth. of State of New York, lv dismissed 62 NY2d 688 [1984] [order granting change of venue].

- Klorman v J. Walter Thompson Co., lv dismissed 61 NY2d 905 [1984] [order addressed to pleadings; complaint dismissed without prejudice to replead].

- Maltby v Harlow Meyer Savage, Inc., lv dismissed 88 NY2d 874 [1996] [order denying motion for temporary restraining order and preliminary injunction].

- Matter of Terrence K., lv dismissed 70 NY2d 951 [1988] [order denying request for a preliminary injunction and a stay].

- Burgess v Burgess, lv dismissed 71 NY2d 889 [1988] [order denying motion for downward modification of temporary support].

- Spillman v City of Rochester, lv dismissed 72 NY2d 909 [1988] [order denying request for a protective order].

- Key Bank of New York v Burgess, lv dismissed 88 NY2d 1064 [1996] [order denying a motion to intervene].

2. Merits Not Addressed -- Too Late

Does the order merely enforce a previous final order? If so, it is nonfinal. However, an order granting a motion to amend a prior final order is considered a new final order to the extent of the amendment (see Karger, § 196, at 104-105).

a. Enforcement

- New York State Assn. of Counties v Axelrod, lv dismissed 87 NY2d 918 [1996] [Appellate Division order denying a motion to enforce the judgment entered in the proceeding].

- Furey v Furey, lv dismissed 89 NY2d 916 [1996] [motion for a money judgment to enforce a provision of the judgment].

An action seeking a judgment for maintenance or permanent support arrears is considered final, notwithstanding its apparent similarity to an enforcement proceeding (Creque v Creque, lv denied 86 NY2d 707[1995]; Kohn v Kohn, lv denied in part 70 NY2d 999 [1988]).

Proceedings commenced via petition under the authority of Family Court Act § 454 to enforce a prior determination are treated as separate special proceedings notwithstanding their apparent similarity to enforcement motions made in the context of matrimonial actions in Supreme Court.

b. Contempt Motions

- Matter of Public Emp. Fedn. v Division of Classification and Compensation of New York State Civil Serv. Commn., appeal dismissed 66 NY2d 758 [1985] [order granting or denying motion for finding of contempt with respect to an earlier court order to which contemnor was a party is nonfinal].

Compare Matter of Werlin v Goldberg, lv denied 70 NY2d 615 [1988] [order punishing contempt committed in immediate view and presence of court is reviewable in article 78 proceeding and can result in a final order determining a separate special proceeding].

c. Motions To Amend or Resettle Final Judgments or Orders

- Matter of Kaplan v Werlin, lv dismissed in part & denied in part 87 NY2d 915 [1996] [motion to "correct" judgment denied; Appellate Division affirmed].

- Cox v Cox, lv dismissed 89 NY2d 860 [1996] [motion to amend granted; Appellate Division reversed].

- Smithtown General Hosp. v State Farm Mut. Automobile Ins. Co., lv dismissed 88 NY2d 1065 [1996] [post judgment motion for attorney's fees, when denied, results in nonfinal order since such orders are treated as denials of motions to amend]; but see Loretto v Group W. Cable, Inc., lv denied 71 NY2d 802 [1998] [order denying CPLR 909 post judgment motion for attorney's fees in class actions pursuant to 42 USC § 1983 treated as finally resolving a separate special proceeding].

When motion to amend a final determination is granted, it may create a new final paper (see Matter of Kaplan v Werlin, lv denied 88 NY2d 812 [1996]).

d. Motions To Vacate

- Matter of Babey-Brooke v Ziegner, appeal dismissed 61 NY2d 758 [1984] [order denying motion to vacate a default judgment].

- Jeffs v Janessa, Inc., lv dismissed 88 NY2d 1037 [1996] [order denying motion to restore action to trial calendar after CPLR 3404 dismissal]; Paglia v Agrawal, lv dismissed 69 NY2d 946 [1987] [order denying motion to vacate prior dismissal pursuant to CPLR 3404].

- Brown Cow Farm v Volvo of America Corp., lv dismissed 63 NY2d 605, 770 [1984] [motion to vacate granted; entire action pending].

- Miles v Blue Label Trucking, lv dismissed 89 NY2d 917 [1996] [motion to vacate granted; Appellate Division reversed].

e. Motions for Renewal, Reargument or Leave To Appeal

- Robertson v City of New York, appeal dismissed 90 NY2d 844 [1997] [Supreme Court grants renewal and, on renewal, rules for plaintiff; Appellate Division reverses and denies motion to renew; nonfinal even if rationale supporting Appellate Division order denying motion to renew pertains to merits and not to the standards governing renewal motions].

- Campbell v JSB Realty Co., appeal dismissed 64 NY2d 881 [1985] [Appellate Division order denying leave to appeal to Appellate Division].

- Cherchio v Alley, lv dismissed 66 NY2d 604, 914 [1985] [Appellate Division order denying reargument or leave to appeal to Court of Appeals].

3. Merits Addressed -- Remittals for Further Judicial Action

Does the order leave further judicial or quasi-judicial action pending?

This category encompasses many nonfinal orders. Counsel should note that the order need not expressly remit for further action; any order which contemplates further judicial or quasi-judicial action is nonfinal.

a. Examples of Remittals

- Glass v Weiner, appeal dismissed 64 NY2d 775 [1985] [for assessment of damages].
- Matter of Donald U., lv dismissed 64 NY2d 603, 775 [1985] [for further "processing" of adoption proceeding].
- Matter of Danon v Department of Fin. of City of New York, appeal dismissed 64 NY2d 601, 885 [1984] [for reaudit].
- Matter of Karaminites v Reid, appeal dismissed 65 NY2d 784 [1985] [for imposition of appropriate penalty].
- Cornell Univ. v Bagnardi, appeal dismissed 65 NY2d 923 [1985] [to Zoning Board for further quasi-judicial action].
- State Communities Aid Assn. v Regan, appeal dismissed 66 NY2d 759 [1985] [for calculation of attorney's fees].

b. Exception

-- Remittals for Ministerial Action

Are the further proceedings merely ministerial? (see generally Karger, § 4:10, at 73-77). If so, the order will be considered final.

- Matter of Green v Lo Grande, appeal dismissed 61 NY2d 758 [1984] [remittal to Town Board to issue a special use permit not ministerial because conditions could be imposed].
- Hirschfeld v IC Sec., lv dismissed 72 NY2d 841 [1988] [order remitting to Supreme Court for recalculation of damages in breach of contract counterclaim requires further judicial action and is therefore nonfinal].
- Fra-Dee Constr. v Roberts, lv denied 70 NY2d 611 [1987] [order remitting to Commissioner of Labor to reduce punitive interest rate on a back wages determination from 10% to 6% contemplates purely ministerial action and is final].

c. Exception -- Complete Relief Obtained

Although further quasi-judicial action may be contemplated by the order, did the plaintiff/petitioner receive all relief requested? If so, the order will be considered final.

- Matter of Inland Vale Farm Co. v Stergianopolus, 65 NY2d 718, 719 n * [1985] [matter remitted to respondent for the preparation of an environmental impact statement -- the full relief requested. Notwithstanding the remittal, order final].

d. Conditional Orders

A conditional order where the condition has been satisfied may be deemed final where the satisfaction of the condition terminates the litigation.

i. Where an Appellate Division order reverses a Supreme Court judgment and directs a new trial unless the party stipulates to a different amount of damages, the order is nonfinal where the party has not so stipulated (Whitfield v City of New York, lv dismissed in an opinion 90 NY2d 777 [1997]). Note that in analyzing which paper is the final appealable paper in this circumstance (i.e., the stipulation, the judgment entered on the stipulation, or the Appellate Division order itself), strict attention should be paid to the express language of the Appellate Division order (id. at 780-781).

ii. Where an order grants summary judgment conditioned on payment of money, and payment occurs, order is final (Meisner v Crane, lv denied 70 NY2d 613 [1987]).

iii. Where an order dismisses a complaint if defendant accepts conditions, and it is unclear if conditions were satisfied, order is nonfinal (ECU Trust Reg. Vaduz v Union Bank of Switzerland, lv dismissed 71 NY2d 994 [1988]).

4. Merits Addressed -- Claims Pending

Does the order resolve only some of the claims or counterclaims?

To determine whether any claims remain pending, counsel should determine the status of every claim, counterclaim, cross claim or other request for relief pleaded in the action and assure that they have all been finally resolved.

- Lane-Weber v Plainedge Union Free School Dist., lv dismissed 87 NY2d 968 [1996] [denial of motion to dismiss complaint; entire action pending].

- Dupuy v Hayner Hoyt, 87 NY2d 1056 [1996] [grant of partial summary judgment leaves other causes of action pending].

- Saunder v Baryshnikov, appeal dismissed 65 NY2d 637 [1985] [counterclaim pending].

- Walden v F.W. Woolworth Co., lv dismissed 72 NY2d 840 [1988] [liability resolved; damages to be established].

- Wallis v Falken-Smith, lv dismissed 72 NY2d 807 [1988] [request for attorneys' fees pending].

C. Exceptions to Nonfinality

Under certain circumstances, an otherwise nonfinal order may nevertheless be appealable pursuant to one of several exceptions to finality.

1. Express Severance

Is there an express severance?

An order which expressly severs a pending cause of action will generally be deemed final by the Court of Appeals. However, a severance which does not sever a complete cause of action but merely severs a portion of a cause of action will not be given effect (see Burke v Crosson, 85 NY2d 10, 18 n 5 [1985]; Tauber v Bankers Trust Co., lv dismissed 95 NY2d 848 [2000]; Karger, § 5:6, at 114-117).

- Sontag v Sontag, lv dismissed 66 NY2d 554, 555 [1985] [order which purports to sever items of relief not a valid express severance; nonfinal].

- F & G Heating Co. v Board of Educ. of City of New York, lv dismissed 64 NY2d 1109 [1985] [express severance of a portion of a damage claim within a single cause of action ineffective; nonfinal].

- Gair, Gair & Conason, P.C. v Stier, lv denied 69 NY2d 606 [1987] [recognizing express severance].

- Weizenecker v Weizenecker, lv denied 72 NY2d 809 [1988] [order finally disposing of certain causes of action and transferring another cause of action to another court for prosecution deemed to effect an express severance].

2. Implied Severance

Are the pending claims impliedly severable from the decided claims?

The doctrine of implied severance is applied only where the causes of action the order or judgment resolves "do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action" (Burke v Crosson, 85 NY2d 10,16 [1985]). As this language from Burke suggests, this doctrine is rarely invoked and narrowly construed. Burke expressly rejects the analysis used in cases such as Sirlin Plumbing Co. v Maple Hill Homes (20 NY2d 401 [1967]), Orange & Rockland Utils. v Howard Oil Co. (46 NY2d 880 [1979]) and Ratka v St. Francis Hosp. (44 NY2d 604 [1978]) (Burke, 85 NY2d at 17 n 3).

Burke holds that "an order dismissing or granting relief on one or more causes of action arising out of a single contract or series of factually related contracts would not be impliedly severable and would not be deemed final where the other claims or counterclaims derived from the same contract or contracts were left pending" (id. at 16).

3. Party Finality

Are all claims asserted by or against one party decided?

Referred to as party finality, this rule is an exception to the general proposition that the entire case must be resolved before resort to the Court of Appeals will be allowed. Simply stated, party finality is present in any order which fully disposes of that party's claims and all claims, including cross claims and third-party claims, against that party, without resolving the entire litigation (see generally Karger, §5:9 at 128-137).

- Barile v Kavanaugh, 67 NY2d 392, 395 n 2 [1986] [party finality where separate causes of action are asserted against different sets of defendants and only one cause of action was finally decided].

- We're Assocs. Co. v Cohen, 65 NY2d 148, 149 n 1 [1985] [party finality as to individual defendants although claims remain pending against corporate defendant]. Compare General Instrument Corp. v Florin, lv dismissed 72 NY2d 909 [1988] [no party finality where order terminates claim against individual partners but leaves claims against partnership pending].

- Herbert v Morgan Drive-A-Way, 84 NY2d 836 [1994] [no party finality; although complaint dismissed as to owner and operator defendants, the complaint remained pending against administrator defendant and that

defendant's cross claim against owner and operator defendants had not been dismissed].

- Landon v New York Hosp., appeal dismissed in part 65 NY2d 639 [1984] [in a mother's and father's medical malpractice action, six causes of action asserted: two by each of the parents in their own right and two by the father on behalf of the injured infant. The four causes asserted by the parents were dismissed, leaving pending the two causes asserted on behalf of the child. Party finality as to the mother but not as to the father].

Party finality is an exception to the rule that the action or proceeding must be finally determined and there are instances where countervailing policy considerations make invocation of the doctrine unwarranted (see Sunrise Auto Partners, L.P. v H.N. Frankel & Co., 90 NY2d 842 [1997]).

4. Irreparable Injury

Does the doctrine of irreparable injury apply to make an otherwise nonfinal order appealable?

The doctrine of irreparable injury will apply to make appealable an otherwise nonfinal order in those rare instances where the order sought to be appealed from directs an irrevocable change in position that will cause immediate irreparable injury (see generally Karger, § 5:2, at 103-109).

- Regional Gravel Prods. v Stanton, lv denied in part 71 NY2d 949 [1988] [irreparable injury where order directs transfer of title to real property].

- Matter of Christopher T., lv granted 63 NY2d 601 [1984] [in a proceeding to permanently terminate parental rights, order which authorizes DSS to consent to adoption as to one child and remits for further hearings as to a second child is nonfinal but appealable due to irreparable injury].

- Gardstein v Kemp & Beatley, Inc., mot to dismiss appeal denied 61 NY2d 900 [1984] [order directing corporate dissolution resulting in loss of corporate name and selling off of assets causes irreparable injury]. Compare May v Flowers, lv dismissed 65 NY2d 637 [1985] [order dissolving partnership, expelling certain defendants, and ordering an accounting, but which specifically authorized the business to continue under the same name nonfinal; no irreparable injury].

The irreparable injury doctrine is rarely used, and almost never used where the mere transfer of money is involved (see e.g. Town of Orangetown v Magee, appeal dismissed 86 NY2d 778 [1995]).

D. Separate Special Proceedings

Does the order finally determine a separate special proceeding?

Some apparently nonfinal orders that do not finally determine an entire litigation, but do finally determine a separate special proceeding, are final and appealable for purposes of the finality rule (see generally Karger, §§ 5:21-5:28, at 160-190). Some special proceedings are defined as such in the Consolidated Laws (see e.g. Family Court Act arts 4-10). Others have been recognized as such by the Court. Some examples of separate special proceedings follow:

- Baker v New York City Health & Hosps. Corp., 36 NY2d 925 [1975] [an order granting or denying a motion pursuant to section 50-e of the General Municipal Law for leave to serve and file a late notice of claim on a municipality is a final order in a special proceeding]. Compare Marabello v City of New York, appeal dismissed 62 NY2d 942 [1984] [order denying application to supplement an original notice of claim pursuant to General Municipal Law § 50-e(6) is nonfinal] and Barrios v City of New York, lv dismissed 100 NY2d 534 [2003] [order granting application to amend a notice of claim is nonfinal even when the application to amend the notice of claim is the first application filed in court].

- Matter of Departmental Disciplinary Comm. for the First Judicial Dept. [Malatesta], lv denied 61 NY2d 601 [1983] [an order granting or denying a motion to quash a subpoena which is not issued in a pending proceeding, but rather precedes any judicial activity, commences a separate special proceeding]. Compare Weissman v 4 West 16th St. Sponsor Corp., appeal dismissed 68 NY2d 807 [1986] [order in pending proceeding is nonfinal].

- Matter of Codey [Capital Cities, Am. Broadcasting Corp.], 82 NY2d 521, 526-527 [1993] [a CPL 640.10 application by a party to a criminal proceeding in one state to compel the presence of a witness residing in another state or to compel the production of evidence located in another state commences a separate special proceeding on civil side of Court's docket].

- Matter of Board of Educ. of City of Auburn [Auburn Teachers Assn.], lv denied as unnecessary 38 NY2d 740 [1975] [order denying motion to stay arbitration is a final order resolving a separate special proceeding]; see also Flanagan v Prudential-Bache Sec., 67 NY2d 500, 505 n * [1986] [order granting or denying a motion to compel arbitration is a final order resolving a separate special proceeding]; CPLR 7503. However, an order which merely grants a motion to stay an action pending arbitration does not finally determine the action within the meaning of the Constitution (see Kushlin v Bialer, 26 NY2d 748 [1970]).

- Matter of Vilcek v Biochem, Inc., lv denied in part 70 NY2d 728 [1987] [motion to disqualify an arbitrator commences a separate special proceeding].

- Miller v Macri, lv denied 70 NY2d 610 [1987] [application for provisional relief in an arbitrable controversy commences a separate special proceeding].

VII. THE "NECESSARILY AFFECTS" REQUIREMENT

A. General Overview

In accordance with the strong public policy against piecemeal appeals in a single litigation, nonfinal Appellate Division orders are generally not appealable to the Court of Appeals, except under certain limited circumstances. Nevertheless,

> the correctness of a final determination may often turn on the correctness of such a nonfinal order, and the appeal from the final determination would then be pointless if that order could not also be reviewed. It has accordingly long been the practice in this State to permit review, on an appeal from a final determination, of any nonfinal determination necessarily affecting the final determination which has not previously been reviewed by the appellate court

(Karger, § 9:5, at 297-314). The "necessarily affects" requirement now appears in several places throughout the CPLR:

1. Appealability

The "necessarily affects" requirement appears as a limitation on appeals:

Appeals as of Right Directly from Final Trial Court Judgments - CPLR 5601(d)

> An appeal as of right may be taken to the Court of Appeals from a final Appellate Division order or directly from a final trial court judgment or order where the Appellate Division made an order on a prior appeal that "necessarily affects" the final determination (see Section I-A-5 of this outline).

b. Motion for Leave To Appeal Directly from a Final Trial Court Judgment - CPLR 5602(a)(1)(ii)

> A litigant may seek leave to appeal directly from a final trial court judgment, where the Appellate Division made an order on a prior appeal that "necessarily affects" the final determination (see Section II-C-2 of this outline).

2. Reviewability

The "necessarily affects" requirement also appears as a limitation on reviewability. CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review any nonfinal judgment or order that "necessarily affects" the final judgment (see Section V-C-2 of this outline).

B. The "Necessarily Affects" Requirement

1. As this Court has stated, its "opinions have rarely discussed the meaning of the expression 'necessarily affects'. . . [and] have never attempted . . . a generally applicable definition" (Oakes v Patel, 20 NY3d 633, 644 [2013]). Indeed, it is difficult to distill a rule of general applicability in this area. Arthur Karger gives a workable definition of the "necessarily affects" requirement. According to Karger, a nonfinal order "necessarily affects" a final determination "if the result of reversing that order would necessarily be to require a reversal or modification of the final determination" and "there shall have been no further opportunity during the litigation to raise again the questions decided by the nonfinal order" (Karger, § 9:5, at 304-305, 311; see also Cohen and Karger, Powers of the Court of Appeals, § 79, at 340).

2. A prior nonfinal Appellate Division order cannot necessarily affect a final judgment or order unless it is issued in the same proceeding (Town of Oyster Bay v Preco Chem. Corp., lv dismissed 58 NY2d 1066 [1983]).

3. For a helpful discussion of the types of orders that necessarily affect subsequent orders, see Karger, § 9:5, at 297-314; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5501:4, at 18; 12 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 5501.05-5501.08.

C. Examples of Orders That Necessarily Affect Final Judgments

1. An order denying defendant's motion for summary judgment to dismiss complaint which establishes a law issue in the case (GIT Indus. v Rose, mot to dismiss appeal denied 60 NY2d 631 [1983]; compare Quinn v The Stuart Lakes Club, appeal dismissed 56 NY2d 569 [1981] [order denying summary judgment does not necessarily affect final judgment when the Appellate Division did not foreclose the possibility of summary relief on expanded record]).

2. An order granting a new trial, but restricting the scope of the issues involved in the retrial (Kenford Co. v County of Erie, mot to dismiss appeal denied 72 NY2d 939 [1988]). However, an order granting a new trial of the whole case, thereby permitting every question raised in the first trial to be raised in the new trial, does not "necessarily affect" the final judgment rendered after retrial (Atkinson v County of Oneida, mot to dismiss appeal granted 57 NY2d 1044 [1982]).

3. An order granting a motion to dismiss counterclaims and third-party claims pleaded with the answer, for failure to state a cause of action (Siegmund Strauss, Inc. v 149th Realty Corp., 20 NY3d 37, 42-43 [2012]).

4. An order granting or denying a motion to amend a pleading to include a new cause of action or defense (Oakes, 20 NY3d at 644-645).

D. Examples of Nonfinal Orders That Do Not Necessarily Affect Final Judgments

1. An order which denies a party the right to include certain materials in the record on appeal (Kasachkoff v City of New York, mot to dismiss appeal granted in part 67 NY2d 645 [1986]).

2. An order holding a party in contempt (New York City Tr. Auth. v Lindner, lv dismissed 58 NY2d 796 [1983]).

3. An order denying a party's application for class certification (Karlin v IVF Am., 93 NY2d 282, 290 [1999]).

FINALITY CONTINUUM

TOO EARLY	FINAL	TOO LATE
Order Administering Course of Litigation		Order Denying Motion for Renewal, Reargument or Leave to Appeal; Order Denying Motion to Vacate
Order Awarding or Denying Provisional Relief (e.g., denial of stay pending appeal to intermediate appellate court)		
Order Denying (in whole or part) Motion to Dismiss	Order Resolving All Causes of Action in Complaint and all Cross Claims and Counterclaims, including all nonministerial items of relief	Order Denying or Granting a Motion to Enforce Final Determination
Order Denying (in whole or part) Motion for Summary Judgment		
Interlocutory Judgment (e.g., fixing liability but leaving damages to be tried)		Or Order Denying Motion to Amend Prior Order or Judgment

This table is intended for use as a conceptual aid only. Exceptions and variations abound, so make sure you research your particular situation.