

## Court of Appeals Practice

Stuart M. Cohen  
Attorney at Law  
[www.smcappeals.com](http://www.smcappeals.com)

### I. Considerations re whether to pursue an appeal in the Court of Appeals

#### A. Cost (civil cases)

1. Of possible motion for leave
2. Of possible appeal, including printing and filing (paper and electronic)
3. Of possible future proceedings if CoA remits the case to another court
4. Of possible precedent that could adversely affect your client or others in your client's field of business or activity

B. Likelihood of success of both obtaining leave and on the merits, which requires consideration of appealability of the determination sought to be reviewed, the Court's scope of review (usually is more limited than at Appellate Division, and usually does not extend to review of factual questions or to review of exercises of discretion, absent an abuse as a matter of law)

#### 1. Statistical information for 2017

- a. appeals taken by leave of Court of Appeals (civil cases) or Judge thereof (criminal cases): 38 (65 of 995 motions for leave in civil cases granted; 74 of 1923 leave applications in criminal cases granted)
- b. appeals taken by leave of Appellate Division or Justice thereof: 29 (we do not know how many motions and applications were denied)

2. Statistics may not apply to your case -- if you have the right case, you are likely (or at least much more likely) to get leave

C. Appealability of determination sought to be reviewed (note that appealability, especially as of right, is much more limited than at the Appellate Division)

1. Is the determination appealable at all
2. If the determination is appealable, is it appealable as of right, or only by permission

### II. Basics of Court of Appeals civil jurisdiction

#### A. appeals as of right

1. dual dissent (CPLR 5601[a])

2. constitutional question (CPLR 5601 [b] [1] and [2])
3. stipulation for judgment absolute (CPLR 5601 [c])
4. based on nonfinal determination of Appellate Division (CPLR 5601 [d])
5. violation of terms of Court of Appeals remittitur on prior appeal (Karger, § 5:30)

B. appeals by permission -- from which courts leave may be sought

1. by leave of Appellate Division or Court of Appeals

- a. from final order in action originating in specified court, administrative proceeding or arbitration
- b. from final order or judgment to review prior nonfinal order -- analogue of 5601(d) that applies when only review of a prior nonfinal determination is sought
- c. from certain nonfinal orders rendered in administrative proceedings -- available only under limited circumstances

2. by leave of Appellate Division only -- CPLR 5602(b) permits the Appellate Division to 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. However, there are certain limits on this power, the most common being that the Appellate Division may not grant leave to appeal from an order granting a new trial or hearing. Such an appeal in an action originating in one of the specified superior courts must be taken as of right by stipulation for judgment absolute pursuant to CPLR 5601(c).

C. finality -- finality determines many aspects of appealability, including whether a determination is appealable as of right or only by leave and, if by leave, which court may grant leave. The Court's Civil Practice Outline has a detailed treatment of finality, and Karger devotes a large part of his monumental work to it. For now, it may be best to state some basic concepts and principles.

1. That a determination is the last in time in the litigation does not make it a final determination; just as some orders come too early (e.g., denials of summary judgment and motions to dismiss and orders regulating discovery), so can orders come too late; in general, orders such as those denying reargument do not result in new final determinations, but constitute refusals to open up previously rendered final determinations;

2. an order that finally determines some causes of action but no others as to the same parties is unlikely to be regarded as final under the doctrine of implied severance if the

finally resolved causes of action arise from the same nucleus of operative facts as the non finally resolved issues, which almost always is the case;

3. in contrast, the Court often recognizes party finality when all claims by and against one or more parties have finally be resolved, though they may remain pending against other parties;

4. exceptions to the finality requirement abound; see the Outline and Karger for a comprehensive list.

III. Basics of Court of Appeals criminal jurisdiction -- Unlike civil cases, where the decision to appeal or to seek leave to appeal is the product of deliberation that weighs the costs (in time and money) of continuing the litigation against the likelihood of success, in criminal cases the rules of the Appellate Division in all Departments require counsel representing defendants in those courts to seek leave to appeal to the Court of Appeals upon the client's request. Moreover, the failure to seek leave to appeal to the Court of Appeals may result in a failure to exhaust available remedies that could preclude the client from obtaining relief in later collateral proceedings. Details as to the applicability of the concepts of appeal and review to criminal cases appear in the Criminal Practice Outline, found under the heading Practice Aids on the Court's web site. Keep in mind certain points:

A. All appeals to the Court of Appeals in non capital criminal cases are from orders of intermediate appellate courts (the Appellate Division, Appellate Term [in the First and Second Departments] and County Court [in the Third and Fourth Departments]). There are no appeals to the Appellate Division from orders of County Court or Appellate Term.

B. All appeals to the Court of Appeals in non capital criminal cases are by leave of a single Judge of the Court of Appeals or Justice of the Appellate Division. Only a Judge of the Court of Appeals may grant leave to appeal from an order of the Appellate Term or County Court, or from an Appellate Division order dismissing an appeal taken to that court. Leave to appeal from other appealable Appellate Division orders may be granted by a Judge of the Court of Appeals or a Justice of the Appellate Division.

C. Unlike in some civil cases, in criminal cases only one application for leave to appeal to the Court of Appeals is permitted. One may not apply to a Justice of the Appellate Division and then, upon refusal of that Justice, to a Judge of the Court of Appeals. Similarly, an order of a Justice of the Appellate Division denying leave to appeal to the Court of Appeals (or, for that matter, any order of any single judge or justice) is itself not appealable to the Court of Appeals.

D. Applications for leave to appeal to the Court of Appeals addressed to Justices of the Appellate Division are governed by the Rules of each Department. Generally, one may choose the Justice to whom the application is directed, so long as that Justice was on the panel deciding the appeal. A dissenting Justice may be a good prospect for granting leave.

E. Court of Appeals Rule 500.20 governs leave applications to Court of Appeals Judges. The applicant may not choose the Judge to whom the application will be assigned.

F.. CPL 450.90 is the main statute governing appealability to the Court of Appeals in criminal cases. Note that it treats orders of affirmance differently from orders of modification or reversal. See the Criminal Practice Outline for further details.

G.. Unlike civil cases, where a failure to timely file or serve a notice of appeal or motion for leave to appeal usually is fatal, CPL 460.30 provides an avenue for seeking permission to file a late application for leave to appeal by way of a motion to the court to which the appeal is sought to be taken. Lateness of up to a year may be excused, but it is within the court's discretion to grant or withhold that relief.

#### IV. Complying with the Court's Rules of Practice

##### A. Motions for leave

##### 1. which rules apply

- a. 500.1 - general requirements
- b. 500.3 (b) - filing fee (note that amount is not specified - call clerk of  
check CPLR 8022)
- c. 500.5 - redaction
- d. 500.6 - developments - ongoing obligation
- e. 500.7 - post return communications
- f, 500.8 (b) - withdrawal of motion
- g. 500.21 - general requirements for motions
- h. 500.22 - requirements for motions for leave
- i. 500.23 - amicus motions
- j. 500.24 - reargument motions
- k. 500.25 - emergency matters and orders to show cause
- l. 500.26 (b) - motions for leave to appeal in matters to be considered  
during the Court's primary election session (usually late August)

## 2. practice pointers

a. If you are seeking reargument in the Appellate Division, always request leave to appeal to the Court of Appeals as alternative relief. That will re-start the time for seeking leave from the Court of Appeals to 30 days (plus any additional days for service by certain means) after service upon you of the order of the Appellate Division denying the motion with notice of its entry. A motion for reargument only will not extend the time for seeking leave at the Court of Appeals, which likely will run out during the pendency of the reargument motion at the Appellate Division.

b. It usually is a good idea to take both "bites of the apple" is possible -- pendency of the motion at the Appellate Division will give time to work on motion for the Court of Appeals, even though the chance of a grant is low; also, it is easier and quicker to prepare a motion for the Appellate Division if a motion must be filed and served quickly -- e.g., if continuation of a stay is available if a motion for leave is made within five days after service of the order to be appealed with notice of its entry.

c. In the notice of motion, don't limit the issues sought to be reviewed (*see Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P.*, 2\_\_ NY3d \_\_, 2019 NY Slip Op 01124).

d. When opposing a motion for leave, do not address only merits correctness of determination below); be sure to address, if applicable, lack of leave worthiness (certiorari factors that are listed in the Court's Civil Practice Outline) and appealability and reviewability problems

### B. Appeals -- which rules apply

#### 1. Appeals proceeding under Rule 500.11

- a. 500.1
- b. 500.2
- c. 500.3 (a)
- d. 500.5
- e. 500.6
- f. 500.7

g. 500.11

2. Appeals proceeding on the normal course of full briefing and oral argument

a. 500.1

b. 500.2

c. 500.3 (a)

d. 500.5

e. 500.6

f. 500.7

g. 500.12

h. 500.13

i. 500.14

C. Overview of processing of appeals at the Court of Appeals

office

1. Receipt of order or certificate granting leave, or notice of appeal by the Clerk's

case management)

2. Filing of Rule 500.0 preliminary appeals statement and review (differential

a. Possible jurisdictional inquiry per Rule 500.10 (SSD)

b. Possible summary treatment per Rule 500.11 (SSM)

c. If appeal tracked on normal course, setting of briefing schedule

3. Perfection

a. SSM

b. normal course

4. Readiness

5. Argument or submission

6. Deliberations, decision drafting and release of decision

#### IV. Resources and general advice

A. Court of Appeals web site for most up to date versions of:

1. Rules of Practice

2. Jurisdictional outlines

3. Annual Reports

B. Clerk's office -- after reading rules, do not hesitate to contact the Clerk's office - though they are from the government, they really are there to help

C. Karger, The Powers of the New York Court of Appeals (rev 3d ed w/current pocket part) - the "Bible" of CoA jurisdiction