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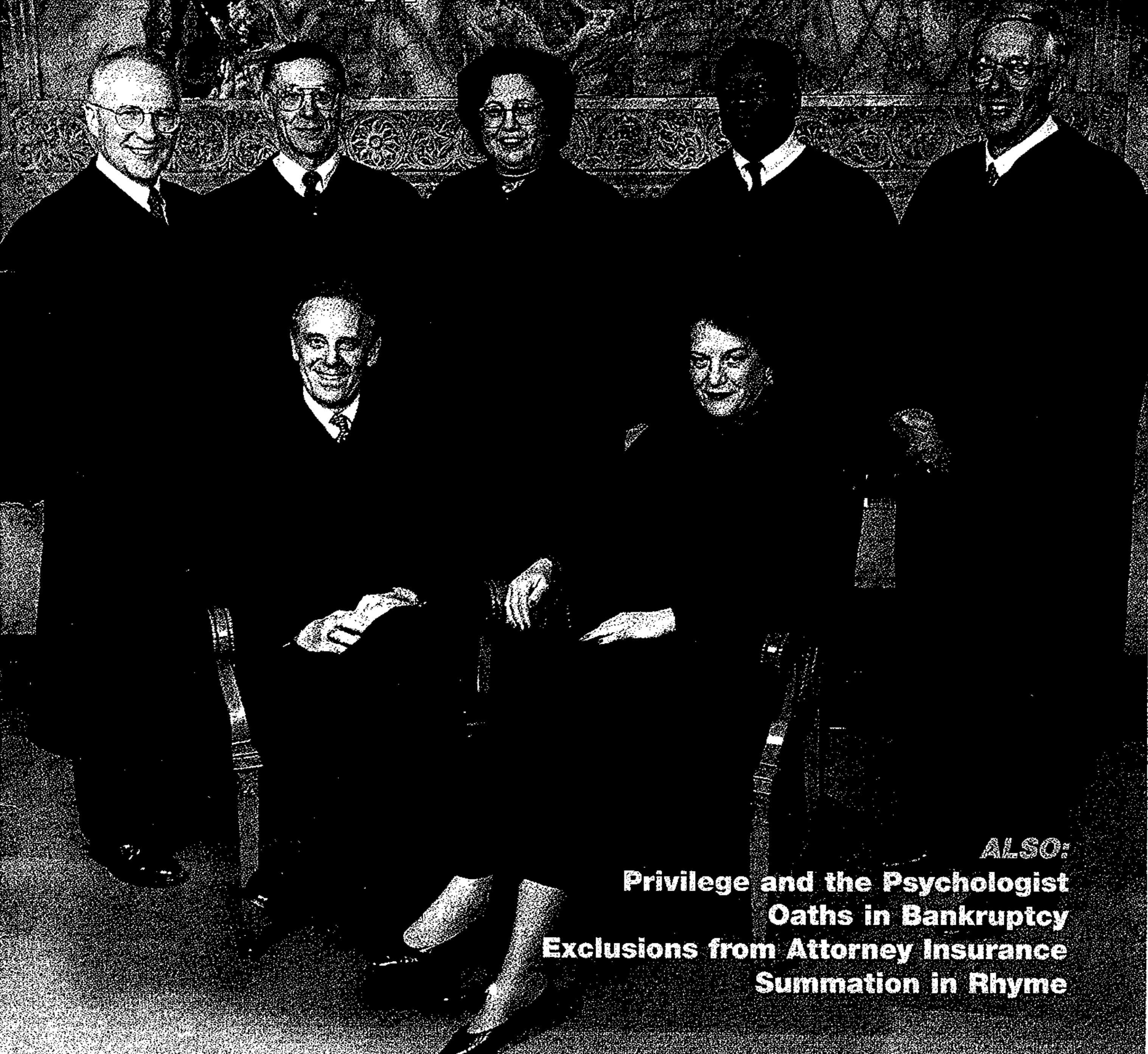

Appeals from Intermediate Courts Require Careful Adherence to Applicable Statutes and Rules

By Sanford F. Young

Although most major categories of appeals as of right to the Court of Appeals were eliminated by the 1985 amendments to N.Y. Civil Practice Law and Rules article 56 (hereinafter "CPLR"), effective advocacy and careful adherence to the applicable provisions of the CPLR and various court rules can provide the losing party with numerous options for further judicial recourse.

The principal options are motions to the Appellate Division for permission to reargue and/or for leave to appeal to the Court of Appeals, and direct motions to the Court of Appeals for leave to appeal if a case meets the appropriate criteria. For appeals lost in the Court of Appeals, a very limited number of cases may be eligible for review by the U.S. Supreme Court if they call into question the validity of a treaty or federal statute or if a state statute is alleged to violate the U.S. Constitution,[1] but the likelihood of being granted *certiorari* is extremely small.

In cases decided by the Appellate Term, which generally hears appeals from the limited-jurisdiction Civil Court of the City of New York, a losing party may move for reargument and/or may seek leave to appeal to the Appellate Division pursuant to CPLR 5703(a).[2]

Motions for Reargument

A motion for reargument to an appellate court, whether made in the Appellate Division or Court of Appeals, is similar to a motion for reargument made to a court of original jurisdiction. It argues that legal principles were overlooked or not properly applied, and asks the court to reconsider its decision on that ground.[3] If the motion succeeds, the court will reconsider its original decision and may decide in favor of the moving party. Such a result, if not challenged by the other side, obviates the expense and uncertainty of pursuing an appeal to a higher court.

Unlike a motion to a court of original jurisdiction, however, a motion for reargument to an appellate court generally is not based on newly discovered facts, because the facts of the case are frozen in the record[4] and cannot be supplemented. Instead, a motion for reargument to the Appellate Division is usually based on specifically directed legal arguments addressed to the precedent-making power of the appellate court. Statistically, the chances of an appellate court reversing its own decision are extremely slim.

Appeals as of Right

Civil Practice Law and Rules 5601[5] identifies the few occasions when an appeal is permitted as of right from the Appellate Division to the Court of Appeals. In general, they involve the following:

1. a case in which the order or judgment being appealed from finally determines the action *and* there are at least two dissents on a question of law in favor of the party seeking to appeal;
2. a case in which the order or judgment being appealed from finally determines the action *and* the case either involves a constitutional question or the only question involved on the appeal is the validity of a statutory or constitutional provision;
3. a case in which an order of the Appellate Division has granted or affirmed the granting of a new trial or hearing and the appellant has stipulated that, upon affirmance, judgment absolute may be entered against it; and
4. a case in which the appeal is from an order or judgment that finally determined the action, where

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CPLR 5601: Appeals to the Court of Appeals as of Right

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

the Appellate Division has previously issued an order on a prior appeal that necessarily affects the final order or judgment, and on that prior appeal there were either two dissents on a question of law in favor of the party seeking to appeal or the prior appeal involved a constitutional question.[6]

When an appeal lies as of right, it is taken by serving a notice of appeal on all parties and filing it, with the required fee, in the office of the clerk of the court where the original order in the case was issued.[7] This court of original instance then sends the notice of appeal to the Court of Appeals. The Appellate Division is not formally notified.

Motions for Leave to Appeal

Section 5602(a) of the CPLR identifies the cases in which a motion for leave to appeal may first be made in the Appellate Division, and upon denial, the party may move in the Court of Appeals; CPLR 5602(b) identifies those in which the motion for leave to appeal can be made only in the Appellate Division.

Cases that allow the option of an initial motion to either the Appellate Division or the Court of Appeals, and subsequent motion to the Court of Appeals if the bid in the Appellate Division fails, generally are those that originated in Supreme Court and have had all the issues *finally determined* by the Appellate Division order being challenged.[8] In these cases, the normal, prudent course is to move initially in the Appellate Division, thereby retaining the option to take a "second bite of the apple" at the Court of Appeals if the Appellate Division ruling is unfavorable.

The type of matter where a motion for leave to appeal can be made only in the Appellate Division most frequently involves *nonfinal (interlocutory)* orders of the Appellate Division in actions that originated in Supreme Court.[9] In all appeals to the Appellate Division, the practitioner is well advised to make a combined motion for alternative relief—reargument and/or leave to appeal.

In the Appellate Division, a majority of the panel (*i.e.*, three justices out of a panel of four or five) is required for a successful leave to appeal.[10] At the Court of Appeals, leave to appeal is granted if two of the judges concur.[11]

When leave is granted, the appealing party usually perfects the appeal by serving and filing a record and an appellant's brief with the Court of Appeals. The Court of Appeals may opt to hear the appeal under an expedited procedure wherein it reviews the record and briefs previously submitted to the Appellate Division, along with additional written submissions by counsel.[12]

CPLR 5602: Appeals to the Court of Appeals by Permission

(a) **Permission of appellate division or court of appeals.** An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. 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,
   (i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or
   (ii) from a final judgment of such court, final determination of such agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award and the final judgment, determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and
2. 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, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) **Permission of appellate division.** An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;
2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,
   (i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or
   (ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or
   (iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

Time Limits on Motions to Reargue

The time limit for moving for reargument is not found in the CPLR; it is based on local court rules and/or case law. The Second Department recently amended its rules so that the time limit for a motion to reargue is established in the same manner as the time limit for a motion seeking leave to appeal (see below).[13] This conforms to practice in the Third and Fourth Departments.[14]

In the First Department, however, a motion for reargument must be made "within 30 days after the appeal has been decided."[15] For all practical purposes, the time period begins to run on the date of the court order, which means that the practitioner cannot afford to wait for service of the order with notice of entry but must be vigilant in tracking the court decision so that the date of the order is known as early as possible.

Time Limits for Appeals

The time period for making a motion for leave to appeal, whether in the Appellate Division or in the Court of Appeals, is similar to the time limit for serving and filing a notice of appeal. It is set by CPLR 5513(b):

> **(b) Time to move for permission to appeal.** The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has served a copy of such judgment or

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> order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

Thus, the 30-day time limit for the motion seeking leave to appeal begins when the order is served with notice of entry. If the order and notice are served by ordinary mail, CPLR 2103(b)(2) provides that the 30-day period begins five days from the date of the mailing. If the order and notice are served by an overnight delivery service, CPLR 2103(b)(6) provides that the 30-day period begins one *business* day after the order and notice were given to the carrier.

If a motion for leave to appeal that has been denied by the Appellate Division is eligible for a new motion to the Court of Appeals, the 30-day period for seeking leave from the Court of Appeals is measured from the time the Appellate Division order denying the motion is served with notice of entry.

Appeals as of Right: When a case is eligible for an appeal as of right, CPLR 5513(a) provides that the notice of appeal must be served *and* filed within 30 days from the date of service of the order with a notice of entry. If the order and notice are sent by mail or overnight carrier, the same five-day or one-business-day extension applicable to motions for leave to appeal comes into play.

Because timeliness is critical, a motion for leave to appeal or a notice of appeal should be served in a manner that provides irrefutable proof of effective service.

Time Limits and Strategies

The timely filing and service of a motion for leave to appeal or, when applicable, a notice of appeal, is critical notwithstanding the pendency of any motions (such as for reargument) made in the Appellate Division, because such a motion will not preserve or extend the time to appeal. Although CPLR 5513(a) and 5515(1) provide that a notice of appeal (along with the required fee and annexed papers) must be *served and filed* on a timely basis,[16] CPLR 2211 provides that a motion is considered made *when served.*

Because timeliness is critical, a motion for leave to appeal or a notice of appeal should be served in a manner that provides irrefutable proof of effective service such as by obtaining a certificate of mailing at the post office. For filing, the prudent practitioner should submit an extra copy of the motion or notice of appeal and have it date-stamped by the court.[17]

The time limit for making a motion for leave to appeal, or filing a notice of appeal if applicable, is strictly construed,[18] although the CPLR allows the time to be extended in several specific circumstances. Pursuant to CPLR 5514(b), the time may be extended 60 days if the attorney for the party dies, is removed or suspended, or becomes physically or mentally incapacitated *before* the time limit has run out. If a substitute attorney takes the case, CPLR 1022 and 5520(a) permit the time to be extended for 15 days after substitution takes place, *provided* the substitution occurs *before* the initial 30-day time limit has run out.

The result of this tight deadline is that the party who chooses to challenge or "take up" an Appellate Division decision has only a short period of time to prepare a motion persuasive enough to convince the court to either change its opinion or grant leave to appeal.

In a rare case when the stakes are extremely high or an immediate stay or other emergent relief is sought (stays are discussed below), counsel may prepare much of the motion for leave to appeal in advance so it will be ready if the Appellate Division issues an adverse decision. More likely, however, the tactical decision to challenge the Appellate Division order will not be made until after the order is issued and time is running out to prepare the motion. Although many of counsel's previous arguments will need to be repeated, the emphasis should be on attempting to frame them in terms that will be more persuasive than they were below.

Grounds for Obtaining Leave to Appeal

Over the years, statistics from the courts have shown that fewer than one out of ten applications for leave to appeal are granted. Accordingly, the papers in support of the application need to be persuasive, convincing the court that the matter deserves its special attention because novel and important issues are involved.

Civil Practice Law and Rules 5501(b) sets forth the basic rule regarding the scope of jurisdiction by the Court of Appeals: "The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."[19]

Unlike an initial appeal to the Appellate Division, which often emphasizes factual questions such as whether the weight of the credible evidence supports a trial verdict or whether a court abused its discretion in making a

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Appeals from the Appellate Term to the Appellate Division

For cases decided by the Appellate Term of the Supreme Court, which generally hears appeals from the limited-jurisdiction Civil Court of the City of New York, a further appeal can be taken to the Appellate Division, but the appeal can only be obtained by permission.[1]

Permission must first be obtained by a motion to the Appellate Term, and if refused by that court, then by motion to the Appellate Division. There generally are no restrictions on the types of orders and judgments (whether interlocutory, final, etc.) for which permission to appeal may be sought.[2]

The Appellate Division that is asked to grant leave for an appeal is generally the one in the department for the county where the order or judgment appealed from was entered and heard.[3] The timing of these motions is the same as those described in the main article—the motion for leave must be made within 30 days after service of the order of judgment with notice of entry (plus whatever additional time is applicable for the manner of service). Likewise, although some of the details are different, many of the strategies set forth in the main article for motions for leave to the Court of Appeals are applicable to motions for leave to the Appellate Division.

Typical of most courts, the Appellate Term also provides for motions to reargue. As discussed in the main article, the normal strategy is to make the initial motion in the Appellate Term a combined motion for reargument and/or leave. However, as with motions to reargue made in the Appellate Division, First Department, motions for reargument in all the Appellate Terms must be made within 30 days from the date of the order.[4] A motion to reargue, if not combined with a motion for leave, is not appealable and does not extend the time to seek leave to appeal.

For motions made in the various Appellate Terms, there are few requirements for the form and content of the motion. The Appellate Term, First Department requires that the moving papers set forth the questions to be reviewed.[5] Suggestions in the main article for the form and content of the motions would also apply, however.

When the motion is made to the Appellate Division, both the First and Second Departments (which together cover all Appellate Terms) require that the motion contain a copy of the lower court order and opinion, a copy of the Appellate Term order denying leave, a copy of the Appellate Term record, if any, and "a concise statement of the grounds of the alleged error."[6]

In all courts, if the appeal is from a determination granting or affirming the granting of a new trial or hearing, the moving papers must also contain a stipulation by the appellant consenting to the entry of judgment absolute in the event of an affirmance by the Appellate Division.[7]

1. CPLR 5703(a). *See also* New York City Civil Court Act § 1706.
2. *See also* New York City Civil Court Act § 1706.
3. CPLR 5711.
4. 22 N.Y.C.R.R. § 640.9(a) (App. Term., 1st Dep't); 22 N.Y.C.R.R. §§ 731.11, 732.11 (App. Term., 2d Dep't).
5. 22 N.Y.C.R.R. § 640.9(b)(2) (App. Term., 1st Dep't).
6. 22 N.Y.C.R.R. § 600.3(b)(2) (App. Div., 1st Dep't); 22 N.Y.C.R.R. § 670.6(b)(2) (App. Div., 2d Dep't).
7. CPLR 5703(a); 22 N.Y.C.R.R. § 600.3(b)(2) (App. Div., 1st Dep't), 670.6(b)(2) (App. Div., 2d Dep't), 640.9(b)(2) (App. Term., 1st Dep't), 731.11(d) (App. Term., 2d Dep't), 732.11(d) (App. Term., 2d Dep't).

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ruling, the papers seeking leave from the Court of Appeals must identify issues of law, unless the appeal involves a decision where the Appellate Division, in reversing or modifying a judgment, has made a new finding of facts.

To distinguish a matter from the many others that compete for the Court's attention, there is a premium on demonstrating that the case involves factors such as

- novel or unique issues of law,
- issues of public importance,

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- a ruling that fails to follow a Court of Appeals precedent,
- conflicting rulings among the Appellate Divisions,
- issues that may help to explain or define a recent high court ruling,
- an issue that may draw an important distinction from a high court ruling,
- a recent statute that needs to be interpreted,
- new or emerging legal issues, or
- new or emerging technologies.

Motions for Leave to Appeal

Generally, the form of the motion papers is similar to that for other types of motions, consisting of a notice of motion (or in special situations, an order to show cause), a supporting affirmation and exhibits. The legal arguments may be incorporated into the affirmation (sometimes called a "speaking affirmation") or set forth in a separate memorandum of law.

Although the Appellate Division rules do not add many special requirements for motions made to that court, Rule 500.11(d) of the Court of Appeals does specify several technical details that must be covered in motions. In any event, the local rules of the court where the motion will be filed should be consulted for specific requirements affecting the form and the filing of the papers.

Notice of Motion or Order to Show Cause: Although the notice of motion format is appropriate for most motions for leave to appeal, the situations that call for an order to show cause involve a legitimate need to accelerate the return date of the motion and/or to seek some interim relief, typically a stay.

When using a notice of motion for a motion returnable in the Appellate Division, the time frame for setting the return date of the motion is determined in accordance with CPLR 5516:

> A motion for permission to appeal shall be noticed to be heard at a motion day at least eight days and not more than fifteen days after notice of the motion is served, unless there is no motion day during that period, in which case at the first motion day thereafter.[20]

More importantly, CPLR 2214(b) sets forth the time for the notice to be given to the other parties:

> Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits shall be served at least seven days before such time if a notice of motion served at least twelve days before such time so demands; whereupon any reply affidavits shall be served at least one day before such time.

Significantly, Rule 500.11(c) of the Court of Appeals does not allow for reply papers; therefore, the motion should be served on eight days' notice.[21] Also, as with other motion practice, one should be sure to add five days if serving by mail, or one day if serving by overnight delivery.[22]

Stays and Accelerated Motions: If there is a need to accelerate the time period for the motion and/or seek interim relief such as a stay pending determination of the motion, the motion may include a request for such relief. Such relief is usually sought via an order to show cause,[23] except in the First Department where the practice is to submit a notice of motion with a blank return date. That date is later provided by a brief order appended to the notice.[24]

The rules in some departments provide greater detail than others for the advance notice that must be given to adversaries when seeking interim relief. The Second Department's rules are the most detailed, and should be used as a guideline if the rules of another department do not cover special circumstances.

The Second Department requires (1) that the other side be given reasonable notice of the day, time and location that the application will be made and that an affidavit be given stating that such notice was given and the position, if known, of the other side; or (2) that if the party attempted to give notice but was unsuccessful in doing so, it submit an affidavit explaining those circumstances; or (3) that if the party seeking the application is unwilling to give the other side advance notice, it submit an affidavit stating the reasons for the unwillingness.[25] This same rule also requires that the attorney for the party seeking the interim relief (or party if there is no attorney) personally present the application to the court.

Cross-motions: A cross-motion may be possible where another party who is not satisfied with the result in the Appellate Division wants to seek or preserve its own cross-appeal or, in very unusual circumstances, obtain interim relief.[26]

Contents of Motion: The necessary contents of the notice of motion are similar to those required in typical motion practice, *i.e.,* the nature of the motion and the relief being sought, the return date, and the names, addresses and telephone numbers of the attorneys for all parties in support and those entitled to notice.[27]

For motions made in the Appellate Division, the moving papers will be assembled in a manner typical of most motion practice: a notice of motion followed by a sup-

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porting affidavit or affirmation, followed by the exhibits, fastened inside a legal back or binding. The Court of Appeals requirements are more exacting: "The moving papers shall be a single document, bound on the left,"[28] and "[p]ages shall be numbered consecutively."[29]

Adjournments: The rules of the Court of Appeals do not allow for adjournments except under special circumstances.[30] The First and Fourth Departments allow for at least one adjournment on consent or by court order.[31] The local rules or the clerk of the court should be consulted.

No Oral Argument: These motions are returnable without oral argument.[32] The only circumstances in which some oral presentation can be made, albeit informally and usually only before one judge and/or a law secretary, is when an interim application is being made.

Court of Appeals Service Requirements: The Court of Appeals requires that each party be served with three copies of the motion papers and that ten copies be filed with the Court with proof of service.[33] The motion must be filed with the Court by noon of the Friday preceding the return date, which generally will be on a Monday.[34] Responsive papers must be filed on or before the return date.[35]

As is typical in New York practice, the argument may be set forth in the attorney's moving affirmation (often called a "speaking affirmation") if a separate memorandum of law is not provided.

Contents of Affidavit or Memorandum

A memorandum of law is optional when filing a leave to appeal. As is typical in New York practice, the argument may be set forth in the attorney's moving affirmation[36] (often called a "speaking affirmation") if a separate memorandum of law is not provided. When a memorandum of law is used, the affirmation typically deals with factual and procedural matters and may contain a very short introduction to the legal basis for the motion followed by a reference to the memorandum, where the legal arguments are then developed.

In the Appellate Division, the respective departments set forth only a few specific requirements regarding the form or content of the affirmation. Rule 500.11(d)(1) of the Court of Appeals is more exacting, requiring a particular order of presentation: notice of motion, questions presented, procedural history, a showing of the court's jurisdiction and the legal argument.[37]

Because most of the motion will be based upon the record on appeal or the appendix that was filed in the Appellate Division, in addition to references to the several exhibits annexed to the affirmation, the affirmation should refer to pages of the record or appendix (typically by references to "R" or "App" pages). The motion papers must be accompanied by a full record of what was considered by the Appellate Division.[38]

As a general rule, an affirmation should contain, at a minimum, the following elements:

1. An introduction identifying the attorney representing the moving party and the relief being sought (reargument and/or leave to appeal) and identifying the order or judgment in question.

2. A summary covering the grounds of the application, a nutshell explanation of why the Court should grant the motion. This is the best opportunity to attract the Court's attention and convince it that the case warrants further consideration.

3. The legal questions that the Court is being asked to consider. As succinctly stated by Rule 500.11(d)(1)(ii) of the Court of Appeals, papers should set forth a "concise statement of the questions presented."[39]

4. A brief description of what the lawsuit is seeking such as recovery for personal injuries, breach of contract, injunctive relief, etc.

5. A brief procedural chronology as it relates to what is being appealed and where, when and how decided. The chronology should refer to the exhibits needed to establish the jurisdiction and timeliness of the motion. These elements are usually to satisfy the respective court's requirements for the content of the affirmation (see below).

The technical requirements of the Appellate Divisions are minimal. Generally, the motion should include a copy of the notice of appeal or other paper that first invoked the Appellate Division's jurisdiction, the order or judgment that was appealed from and the order or opinion of the Appellate Division that is the subject of the motion for leave to appeal.[40] As a matter of practice, it is a good idea to attach copies of the notices of entry[41] to the respective orders or judgments, thereby demonstrating the timeliness of the motion.

The requirements of the Court of Appeals are more detailed, calling for a procedural history and exhibits that demonstrate the timeliness of every step in the appellate practice. Hence, the rules of that Court require

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that the moving affirmation set forth when the party was served with the order or judgment from the lower court with notice of entry, when the notice of appeal to the Appellate Division was served and filed, when served with the Appellate Division order for which leave is being sought to appeal with notice of entry and, if a motion for leave was first made to the Appellate Division, when that motion was served and when served with the order deciding that motion with notice of its entry.

Copies of each of the orders and any opinions, together with the respective notices of entry, must be annexed to the papers. It is a good idea to also include a copy of the original notice of appeal.[42] The moving papers must also demonstrate that the Court of Appeals has jurisdiction to grant the motion in that either the order or judgment being appealed from finally determines the action[43] or comes within the class of nonfinal orders for which the Court of Appeals can grant leave, as set forth in CPLR 5602(a)(2).[44]

6. The court's jurisdiction, which would be based upon the order being either a final order or another specified determination covered by CPLR 5602(a) and 5611, or certain other determination covered by CPLR 5602(b). Although the Appellate Division rules do not specifically require a jurisdictional statement, Rule 500.11(d)(iv) of the Court of Appeals does require one.[45]

7. A summary of the legal argument, identifying the issues that set the case apart from others vying for review. Rule 500.11(d)(1)(v) of the Court of Appeals requires that the papers contain

> a direct and concise argument showing why the questions presented merit review by this court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this court, or there is a conflict among the Appellate Divisions. The particular portions of the record where the questions sought to be reviewed are raised and preserved shall be identified.[46]

8. The "wherefore" or conclusion followed by the attestation (date and signature).

Because Rule 500.11(c) of the Court of Appeals does not allow reply papers,[47] the moving party's papers should attempt to anticipate and discuss potentially troublesome opposing arguments. If the responding party does present unanticipated arguments, Rules 500.11(c)[48] and

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500.12[49] provide that permission can be sought for filing reply and post-submission papers.

Stays Pending Appeal

If a stay pending appeal is already in effect, it automatically continues for five days after service of the decision with notice of entry. If the motion for leave is made within that five-day period, CPLR 5519(e) provides for the stay to continue automatically until five days after service of the decision on that motion and any ultimate appeal. Section 5519(a) of the CPLR provides for various automatic stays that commence upon service of the notice of appeal or an affidavit of intention to move for leave to appeal when certain specific conditions are met; CPLR 5519(c) provides for stays that may be given in the Court's discretion.

Motions to Reargue in the Court of Appeals

Finally, the Court of Appeals provides for what is generally the last of the last resorts—a motion to reargue, which must be served within 30 days of the order.[50]

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1. 28 U.S.C. § 1257; *see also* Supreme Court Rule 10.
2. *See* "Appeals from the Appellate Term to the Appellate Division" (sidebar) on p. 14.
3. *See* N.Y. Comp. Codes R. & Regs. tit. 22, §§ 500.11(g) (Court of Appeals), 600.14(a) (1st Dep't), 670.6(a) (2d Dep't), 1000.13(p)(3) (4th Dep't) (hereinafter "N.Y.C.R.R.").
4. Typically, the record consists of a printed and bound presentation of the order or judgment appealed from and the papers and other proceedings upon which that order or judgment is based (*e.g.*, the pleadings, affidavits, exhibits and transcript, if applicable).
5. See the reproduction that accompanies this article on p. 9.
6. *See* N.Y. Const. art. 6, § 3(b)(1)-(3).
7. CPLR 5515; *see also* Practice Commentary C5515:3. Fee requirements are found in CPLR 8022(a).
8. CPLR 5602(a)(1)(i). *See also* CPLR 5611 ("If the appellate division disposes of all the issues in the action its order shall be considered a final one.").
9. CPLR 5602(b)(1). For a full description of appeal options, see the reproduction of CPLR 5602 that accompanies this article on p. 10.
10. *See* CPLR 5602; 22 N.Y.C.R.R. § 800.2(a) (3d Dep't).
11. CPLR 5602; 22 N.Y.C.R.R. § 500.11(d).
12. *See* 22 N.Y.C.R.R. § 500.4.
13. 22 N.Y.C.R.R. § 670.6(a) (2d Dep't). The Second Department rule also provides that "for good cause shown" the court may consider a motion to reargue when made at a later date (22 N.Y.C.R.R. § 670.6(a)).
14. 22 N.Y.C.R.R. § 1000.13(p) (4th Dep't). The deadline for the Third Department is not set forth in any rule, but is the subject of case law. *See, e.g., Schwartzberg v. Axelrod*, 159 A.D.2d 807, 808, 552 N.Y.S.2d 694, 695-96 (3d Dep't 1990) ("motion to reargue . . . was required to have been brought within the statutory appeal period").
15. 22 N.Y.C.R.R. § 600.14(a) (1st Dep't).
16. *See* CPLR 5520; *Perry v. Costa*, 61 N.Y.2d 756, 472 N.Y.S.2d 923 (1984); *Messner v. Messner*, 42 A.D.2d 889, 347 N.Y.S.2d 589 (1st Dep't 1973).
17. *Cf.* 22 N.Y.C.R.R. § 600.2(a)(6) (1st Dep't).
18. *See Ressis v. Herman*, 69 N.Y.2d 1017, 517 N.Y.S.2d 937 (1987); *Paradies v. Benedictine Hosp.*, 51 N.Y.2d 1006, 435 N.Y.S.2d 982 (1980).
19. *See also* N.Y. Const. art. 6, § 3(a).
20. *See also* 22 N.Y.C.R.R. §§ 600.14 (1st Dep't), 1000.13(p)(4)(iv) (4th Dep't).
21. *See* 22 N.Y.C.R.R. § 500.11(a). See the full reproduction of § 500.11 that accompanies this article on p. 18.
22. *See also* CPLR 2103(b); 22 N.Y.C.R.R. § 500.11(a).
23. 22 N.Y.C.R.R. §§ 500.11(a) (Court of Appeals), 670.5(e) (2d Dep't), 800.2(d) (3d Dep't), 1000.13(b)(1) (4th Dep't).
24. *See* 22 N.Y.C.R.R. § 600.2(a)(7).
25. 22 N.Y.C.R.R. § 670.5(e).
26. *See generally* CPLR 2215. *See* 22 N.Y.C.R.R. §§ 600.2(a)(2) (1st Dep't), 670.5(a) (2d Dep't), 1000.13(a)(3) (4th Dep't). The cross-motion should be served at least three days prior to the return date (at least four days in the Fourth Department) and be returnable the same date as the original motion. Remember that five days must be added for service by mail or one day for overnight delivery. If circumstances do not allow for that added time, the practitioner may need to use personal service.
27. *See* 22 N.Y.C.R.R. §§ 600.2(a)(3) (1st Dep't), 670.5(c) (2d Dep't); *cf.* 22 N.Y.C.R.R. § 500.11(d) (Court of Appeals).
28. 22 N.Y.C.R.R. § 500.11(d)(1).
29. 22 N.Y.C.R.R. § 500.1. The Court of Appeals rules also require that pages be 8½-by-11 inches with margins conforming to CPLR 5529; that there be an index or table of contents; that corporations list their parents, subsidiaries and affiliates; and that citations be made to the Official Law Reporter (Rule 500.1). Using the services of an experienced appellate printer for the motion is advised.
30. 22 N.Y.C.R.R. § 500.11(a). Those rules refer to the special circumstances set forth in CPLR 321(c) (death, removal or disability) and CPLR 1022 (substitution).
31. 22 N.Y.C.R.R. §§ 600.2(d)(2) (1st Dep't), 1006.13(a)(1) (4th Dep't).
32. 22 N.Y.C.R.R. §§ 500.11(a) (Court of Appeals), 600.2(d)(1) (1st Dep't), 670.5(b) (2d Dep't), 1000.13(a)(6) (4th Dep't); *cf.* 22 N.Y.C.R.R. §§ 800.2(a), 800.3 (3d Dep't) (motion may not be argued except by permission or as directed by the court).
33. 22 N.Y.C.R.R. § 500.11(d).
34. 22 N.Y.C.R.R. § 500.11(a).
35. *Id.*

36. The CPLR provides that an attorney admitted to practice in New York (and other specified professionals), who is not a party, may utilize an affirmation made under penalties of perjury (CPLR 2106).

37. 22 N.Y.C.R.R. § 500.11(d)(1).

38. Rule 500.11(d).

39. 22 N.Y.C.R.R. § 500.11(d)(1)(ii). The Second Department rules require that motions for leave "shall set forth the questions of law to be reviewed by the Court of Appeals and, where appropriate, the proposed questions of law decisive of the correctness of this court's determination." Rule 670.6(c). *See also* 22 N.Y.C.R.R. §§ 600.14(b) (1st Dep't), 800.2(a) (3d Dep't), 1000.13(p)(4)(i) (4th Dep't).

40. *See* 22 N.Y.C.R.R. §§ 600.2(a)(3), 600.14 (1st Dep't). The Second Department requirements are similar. Rule 670.5(d), 670.6(a), (b). *See also* 22 N.Y.C.R.R. § 1000.13(p)(2) (4th Dep't); *cf.* Rule 1000.13(a)(5).

41. It may also be a good idea to attach a copy of the postmark of the envelope in which the notice of entry was served, as it indicates the actual date and manner of service. The originals of envelopes and other proof of service and receipt of the notice of entry should be saved, as they may become invaluable should the timeliness of the motion for leave be called into question.

42. *See* 22 N.Y.C.R.R. § 500.11(d)(1)(iii).

43. CPLR 5602(a)(1), 5611.

44. The jurisdiction of the Court of Appeals *to grant a motion* for leave should not be confused with the question of whether the Court can acquire jurisdiction *to hear the appeal*. Hence, there is a wide variety of nonfinal orders which can be appealed to the Court of Appeals, but only upon permission of the Appellate Division. CPLR 5602(b).

45. 22 N.Y.C.R.R. § 500.11(d)(1)(iv).

46. 22 N.Y.C.R.R. § 500.11(d)(1)(v).

47. 22 N.Y.C.R.R. § 500.11(c).

48. *Id.*

49. 22 N.Y.C.R.R. § 500.12.

50. 22 N.Y.C.R.R. § 500.11(g)(3).

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Bart was one of them himself, working his butt off and getting nowhere. Sure he was making money and paying his bills, but he wasn't socking away any real money. He was always working on client files where the clients were doing better than he was. Their kids attended private school, they spent Christmas vacation in Hawaii or Vail, and they were members of country clubs. At the same time they were stuffing money in retirement accounts. These clients didn't look any different from Bart... but they were a heck of a lot more successful in living the good life and saving money.

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