

New York procedural law permitting interlocutory appeal of many non-final orders reflects a particularly liberal appellate process. As a result, there is an increased likelihood a junior associate will be asked to prepare an appeal to the Appellate Division. Knowledgeable of the logistical requirements for filing an appeal and awareness of the many applicable statutory and court rules are needed when facing this responsibility. Following is a helpful guide for preparing for such an appeal, taking an appeal, and, finally, perfecting the appeal.

First, be sure that the prerequisites for the appeal have been met. The general rule in New York is that an appeal must be taken from an "appealable paper," a judgment or order that is entered with the clerk of the court. A ruling, memo or decision by a lower court is typically insufficient for taking an appeal. Likewise, an appeal prior to the formal entry of a judgment or order is premature. Therefore, before preparing an appeal, make sure the court has issued a judgment or order and that it has been filed with the clerk of the court. While an appellate court may treat a premature appeal as valid at its discretion, do not rely on this exception and risk dismissal on technical grounds.

Next, consider the issue of "appealability." That is, whether an appellate court has subject matter jurisdiction over the matter being appealed. Specifically, consult CPLR 5701, which advises which judgments are appealable to the Appellate Division, and which may be appealed as of right or by permission.

CPLR 5701 reflects New York's generosity in appeals. The rule makes all judgments, final or interlocutory, appealable. In addition, a broad range of non-final orders are appealable under this section. The order need only involve "some part of the merits" or "affect a substantial right."

Consider whether the issue is appealable as of right according to the statute. If you are unsure about whether an order falls within the statute, consider looking through McKinney's Annotations to determine which types of orders the Appellate Division has determined do not fall within the statute. If the matter is not appealable as of right, it may be appealed by permission of the judge who made the order, or by application to be filed with the appellate court.

Once the prerequisites have been met, determine to which department the appeal should be taken and consult the rules of that particular court. It is important to note that appellate courts are vested with considerable power to modify the CPLR's more general rules. As a result, an associate familiar with the rules of one appellate court should not depend on his knowledge of that court's rule when appealing

### Career Development

## PERFECTING STATE COURT APPEALS



BY MARK R. SEIDEN

to another. Indeed, there are some significant differences between the courts' rules. One example is the time requirement for the process of perfecting an appeal. Moreover, the courts themselves update their own rules as they deem appropriate. Therefore, always ensure that your knowledge of the rules of a court is current and particular to the court to which the appeal is taken.

At this point you will be prepared to begin the step of "taking an appeal." This consists of serving a notice of appeal and filing it in the office of the original court, not the appellate court. The contents of the notice of appeal are straightforward and are set forth in CPLR 5515. However, make sure that the notice clearly states what you are appealing from, because any omissions in the notice could result in forfeiting parts of the appeal.

The time requirement for taking an appeal is a statutory requirement that the individual appellate courts cannot extend or alter. Therefore, it is critical that you are knowledgeable of the time requirements and that you adhere to them. With few statutory exceptions, an appeal must be taken within 30 days after the appellant has been served with a copy of an objectionable order or judgment with notice of its entry. Service of the order or judgment is required for the time to run regardless of whether the appellant has actual notice of the order or judgment from other sources.

After the appeal has been formally taken, whether as of right or by entry of an order granting permission, you will likely be asked to assist in the process of "perfecting the appeal." The main components of this process are preparing the transcript, record or statement of the case, and briefs. Before preparing these components, consult both the CPLR and the rules of the particular court to learn the rules for their content and form. The rules of a court heavily address the perfection stage of the appeal.

The first component of the record on appeal, the transcript, is required if there was a trial or open court hearing. An appeal from an order based on motion papers alone will not require this step. Where a transcript is required, follow a court's procedures for ordering the transcript from the court stenographer. You should consider the cost saving method of not ordering the entire transcript where the parties can agree to stipulate that only a portion of the transcript is relevant.

Furthermore, in the unusual case where parties can agree on a "statement in lieu of the record on appeal," you can forego the transcript entirely. Assuming the transcript is obtained, the transcript must be settled by the parties, a process by which the parties propose changes and resolve disputes, with or without court aid. Once settled, serve the respondent with the transcript or file it with the clerk of the trial court. Bear in mind that the former is preferred because it saves respondent the trouble of having to go to the courthouse to obtain the transcript.

Lastly, you will likely be asked to prepare the record and briefs for the case, which are usually filed at the same time. While the CPLR sets forth time requirements for perfecting an appeal, in many cases the individual court will extend the time needed to prepare these documents. Therefore, remember to pay attention to the individual court rules when considering the time frame for preparing the record and the appellant's briefs.

When preparing the record, make sure to adhere to the requirements and formatting guidelines in the CPLR and the individual court. Ensure that the record includes exhibits, orders, judgments and any other papers and exhibits on which the judgment or order was based. Additionally, check the statute and court rules to determine whether other inclusions are required. Most importantly, confirm that the record is adequate for appellate review of the question of the case.

Similarly, when preparing the briefs, check the requirements of CPLR and the particular appellate court for content and form. Specifically, research whether the court has a page limit on the brief. While New York does not impose any limits, appellate courts are free to do so, and do. As always, make sure that your arguments are concise and relevant, and that they are supported by good research.

Preparing an appeal is a rules driven process, requiring timeliness and organization around several important steps. However, with an awareness of the required steps, and with close attention to the rules that guide these steps, you will be well prepared to manage this important responsibility.

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