State of New York

Appellate Division, Supreme Court

Second Judicial Department

Honorable Hector D. LaSalle
Presiding Justice

Office of Attorneys for Children

FAMILY COURT APPELLATE HANDBOOK

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The Family Court Appellate Handbook was created to provide you with information regarding the rules and procedures utilized in the Appellate Division, Second Judicial Department, and the duties of attorneys for children and assigned counsel at the appellate level. This is being offered as a supplement to the information regarding the administrative policies and procedures of the Attorneys for Children Program, and relevant forms provided in your Administrative Handbook.

Contained within this handbook are informational outlines and a complete index of the statutes and rules referenced in those outlines. Also, sample forms and scheduling orders are provided to further assist assigned counsel for children and adults.

As a result of our Court's Active Case Management System, appeals from Family Court are handled expeditiously in the manner described herein. The hands-on participation of the Case Managers in our Court, together with the coordinator in the local Family Court, will assist you in obtaining swift and permanent results for children and families.

The Appellate Division, Second Judicial Department, Attorneys for Children Program thanks you for your continuing service on behalf of children and families, and hopes this handbook will prove of assistance to you in your most valuable and important work.

Appellate Practice in Family Court Matters

Core Concepts, Special Duties of Counsel in the Family Court, and Taking an Appeal from an Order of the Family Court

Section One: The Basics of Appellate Jurisdiction — The Core Concepts of Aggrievement, Appealability & Reviewability

I. Preliminary Remarks

Aggrievement, appealability, and reviewability are core concepts of appellate practice. The three concepts should be considered sequentially. Aggrievement involves whether the appellant may have suffered a wrong in the court of original instance. Appealability involves whether the State Constitution or Legislature has authorized the appellant to ask another court to inquire into the correctness of the order or judgment of which he or she complains. Reviewability involves the powers of the appellate court to address the particular types of wrongs that the appellant contends are contained in the order or judgment under review.

Family Court Act § 1118 provides in relevant part that "[t]he provisions of the civil practice law and rules apply where appropriate to appeals under this article." Accordingly where the Family Court Act is silent on matters of appellate practice, practitioners must turn to the CPLR for guidance, provided that application of the provisions of the CPLR would not be inconsistent with the spirit and purpose of the Family Court Act (see, Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act § 165, at 135-136 regarding the meaning of the word "appropriate" as used in this context).

II. Aggrievement

A. The Statute – CPLR 5511

"§ 5511. Permissible appellant and respondent. An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent."

B. Statement of the Aggrievement Doctrine

1. Aggrievement broadly defined

"[T]he test [of aggrievement] is whether the person seeking to appeal has a direct interest in the controversy which is affected by the result and whether the adjudication has a binding force against the rights, person or property of the party or person seeking to appeal" (*Matter of Richmond County Soc. for Prevention of Cruelty to Children*, 11 AD2d 236, 239 [2nd Dept., 1960], *affd* 9 NY2d 913).

2. Standing and Aggrievement Distinguished

Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right" (Black's Law Dictionary 1413 [7th ed]).

Aggrievement has been defined in several ways. "In some cases, the issue has been whether the appellant has sufficient interest in the subject matter involved to be considered a 'party aggrieved', and the resolution of such an issue often depends on the applicable substantive law, though the issue is presented in procedural form. In other cases, the issue has been whether the appellant's rights or interests are adversely affected by the determination in question" (Karger, Powers of the New York Court of Appeals § 66, at 400 [3rd ed]).

3. Aggrievement in the narrow sense

"In simple terms, a party is aggrieved if relief applied for by that party, on notice to the adversary, was denied in whole or in part, or if relief was granted to the adversary [against the party] which the party opposed" (*see,* Albert M. Rosenblatt, Stuart M. Cohen, and Martin H. Brownstein, *"Civil Practice Before the Appellate Division and Other Intermediate Appellate Courts"* § 37.22 in Ostertag & Benson, General Practice in New York, vol. 24 of West's New York Practice Series).

C. Status as a Party

Although CPLR 5511 states that "[a]n aggrieved *party* or a person substituted for him may appeal," case law has expanded and explained what is meant by the use of the word "party" in the statute. It means a "party" to the order or judgment appealed from.

"It is a mistake to suppose that no one can appeal from an order made in an action unless he [or she] be a party to the action. Every one who can properly be called a party to the order, and who is aggrieved thereby, may appeal" (*Hobart v Hobart*, 86 NY 636, 637 [1881]). Where a nonparty is expressly bound by a judgment or order, and is aggrieved thereby, he or she may prosecute an appeal pursuant to CPLR 5511 (*Brady v Ottaway Newspapers*, 97 AD2d 451 [2nd Dept., 1983], *affd* 63 NY2d 1031; *see also, Stewart v Stewart,* 118 AD2d 455, 458-459 [1st Dept., 1986]; *Posen v Cowdin*, 267 App Div 158, 160 [1st Dept., 1943]; *Matter of Male Infant B.*, 96 AD2d 1055; 1056 [2nd Dept., 1983]; 12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5511.04)

D. Orders made on the default or consent of the appealing party

It has often been held that a judgment or order made on the default of the appealing party is not appealable (CPLR 5511; *Matter of Monique Tawana C. [Thomas A.]*, 246 AD2d 351 [1st Dept., 1998]; *Katz v Katz*, 68 AD2d 536, 540-541 [2nd Dept., 1979]; *Glickman v Sami*, 149 AD2d 458 [2nd Dept., 1989]). The remedy is to move to vacate the default under CPLR 5015(a)(1) and, if that motion is denied, to appeal from the order denying vacatur (*Batra v State Farm*

Fire & Cas. Co., 205 AD2d 480 [1st Dept., 1994]; *Eller v Eller*, 116 AD2d 617, 618 [2nd Dept., 1986]). The rule is the same for orders made on the consent of the appealing party (*Smith v Hooker Chem. & Plastics Co.*, 69 NY2d 1029 [1987]; *Matter of Colletti v Colletti*, 56 AD2d 845 [2nd Dept., 1977]; *Chemical Bank v Zisholtz*, 227 AD2d 580 [2nd Dept., 1996]). If an order recites that it was entered on consent but fails to conform to that consent, the remedy is a motion to vacate the portion that does not conform, and appeal will lie from the denial of the motion (*Bolles v Cantor*, 6 App Div 365 [1st Dept., 1896]).

Although the rule is almost always phrased in terms of the non-appealability of such orders or judgments, it is probably better understood as a part of the aggrievement doctrine (see, Rosenblatt, Cohen, and Brownstein, *supra*, § 37.23). It is founded on the theory that the function of appellate courts is the correction of errors. A court cannot be said to have committed an error when it was never called upon to exercise its judgment by reason of the default of one of the parties. The failure of a party to raise an objection to relief requested by an opponent is deemed acquiescence in that request. One who consents or acquiesces cannot be said to be aggrieved (*Flake v Van Wagenen*, 54 NY 25, 27-28 [1873]).

Some proof that the default judgment rule may be considered an offshoot of the aggrievement doctrine is *James v Powell* (19 NY2d 249, 256, n 3 [1969]). In *James* it was held that, contrary to the express wording of CPLR 5511, default judgments are appealable, but only "matters which were the subject of contest below" are presented for review.

E. Partial Aggrievement – Limited Appeals

Many orders aggrieve a party only in part. In such situations the appeal is often limited by the party. The limitation can be expressed in two ways, either expressly in the notice of appeal, or impliedly in the brief by failing to raise issues concerning the part of the order that does not aggrieve the appellant.

It frequently occurs that a notice of appeal is taken from the whole of an order or judgment that includes a part that does not aggrieve the appellant. A prime example of this is an appeal from the whole of an order granting reargument and adhering to the original determination. The part of that order that does not aggrieve the appellant is the grant of reargument.

F. Who are Respondents?

Respondents are those persons who have an interest in sustaining the order or judgment appealed from (*New York Trust Co. v Weaver*, 270 App Div 989 [1st Dept., 1946]; *Jones v H. Freeman, Inc.*, 249 App Div 710 [4th Dept., 1936]). In short, any party to the order or judgment that might be aggrieved by its reversal or modification is a respondent on the appeal.

III. Appealability

A. Determining Appealability is a Three-Step Process

1. Determine whether the item sought to be appealed constitutes "appealable paper"

CPLR 5512(a) defines "appealable paper," stating "[a]n initial appeal shall be taken from the judgment or order of the court of original instance." No appeal lies from a decision, verdict, report, finding of fact, or ruling.

The CPLR contemplates that all civil orders and judgments be reduced to writing (CPLR 2219[a][1]; 5011; 1 Newman, NY Appellate Prac § 3.09[1], at 3-30). An order, other than one of an appellate court, must be signed by the judge (CPLR 2219[a]) and a judgment must be signed by the clerk of the court (CPLR 5016). Some judgments are signed by both the judge and the clerk (22 NYCRR 202.48; 8B Carmody-Wait 2d, Judgments § 63:21). An order deciding a motion made on supporting papers has additional attributes. It must "be signed with the judge's signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper" (CPLR 2219[a]).

2. Determine if the State constitution or a statute authorizes an appeal from that type of item.

"There is no inherent right to appeal a court's determination. The right to appeal depends upon express constitutional or statutory authorization" (*Friedman v State of New York*, 24 NY2d 528, 535 [1969]).

3. If so, determine whether appeal lies as of right or by permission.

B. The Sources of Jurisdiction

1. Appeals to the Appellate Division

a. NY Constitution, art VI, § 4(k)

b. CPLR 5702 - Appeals to Appellate Division from other courts of original instance

c. Family Court Act § 1112(a)

This subdivision (a) of § 1112 is the general provision of the Family Court Act regarding appealability. It provides that "[a]n appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act."

Soon after the enactment of the Family Court Act questions arose as to the meaning of the term "order of disposition." Did it mean that only orders issued after dispositional hearings were appealable as

of right? No. The phrase "order of disposition" was intended to be synonymous with a final order or judgment (see, *Firestone v Firestone*, 44 AD2d 671 [1st Dept., 1974]; *Taylor v Taylor*, 23 AD2d 747 [1st Dept., 1965]), that terminates an action or proceeding by granting or denying the relief demanded in the pleadings. The second sentence of subdivision (a) of § 1112 further provides that an appeal may be taken as of right from an "intermediate or final order or decision in a case involving abuse or neglect."

Accordingly, appeals from orders of the Family Court that have the effect of granting or denying the relief demanded in the pleadings and orders made in abuse or neglect cases are appealable as of right. All other orders are appealable by permission only.

d. Family Court Act §§ 365.1 and 365.2

The Family Court Act also has specific provisions regarding appeals in juvenile delinquency proceedings under article 3. Family Court Act § 365.1 governs appeals as of right. The respondent may appeal as of right from any dispositional order. The presentment agency may appeal as of right from (1) an order dismissing the petition prior to the commencement of a fact-finding hearing, (2) an order of disposition, but only on the ground that it is invalid as a matter of law, and (3) an order suppressing evidence made before the commencement of a fact-finding hearing where the suppression of the evidence makes the sum of the proof available to the presentment agency insufficient as a matter of law or so weak in its entirety that all reasonable possibility of proving the allegations of the petition has been effectively destroyed (Family Ct Act § 330.2[9]).

Family Court Act § 365.2 provides that the respondent may appeal by permission from any other order made in the juvenile delinquency proceeding.

e. Family Court Act § 439(e)

Support Magistrates may hear and determine support proceedings. An aggrieved party may file with the court written objections to the final order of the Support Magistrate. Family Court Act § 439(e) provides that the Support Magistrate's order, after the objections and any rebuttal thereto have been reviewed by a Family Court Judge, may be appealed pursuant to Family Court Act article 11. In practice the Appellate Divisions entertain appeals from the order of the Judge determining the objections because (1) the record on such an appeal is complete and includes the material before the Support Magistrate as well as that submitted to the Judge, and (2) the schedule for submitting and reviewing objections set forth in the statute makes the taking of a timely appeal from the Support Magistrate's order almost impossible (*Matter of Dompkowski v Dompkowski*, 154 AD2d 950 [4th Dept., 1989]; see, e.g., *Matter of Bersin v Bersin*, 144 AD2d

554 [2nd Dept., 1988]).

2. Appeals to the Court of Appeals

a. NY Constitution, art VI, § 3(b) - Jurisdiction of Court of Appeals

b. CPLR 5601 - Appeals to the Court of Appeals as of right

c. CPLR 5602 - Appeals to the Court of Appeals by permission

3. Not appealable

Rulings

No appeal lies from rulings made during the course of an examination before trial (*Tri-State Pipe Lines Corp. v Sinclair Refining Co*., 26 AD2d 285, 286 [1st Dept., 1966]), even if reduced to an order and signed (*Hall v Wood*, 5 AD2d 998 [2nd Dept., 1958]; *Matter of Beeman*, 108 AD2d 1010 [3rd Dept., 1985]). Where, however, a party makes a motion on notice to reopen the examination for the purpose of permitting disputed questions to be answered or to seek a protective order against such discovery, the Second Department has held that an order determining such a motion is appealable by permission (*Rockwood Nat. Corp. v Peat, Marwick, Mitchell & Co.*, 59 AD2d 573 [2nd Dept., 1977]; *cf. Matter of Beeman, supra,* at 1011) and is not appealable as of right (*Sainz v New York City Health & Hosps. Corp*., 106 AD2d 500 [2nd Dept., 1984]). In *Caraballo v New York Hosp*. (170 AD2d 190 [1st Dept., 1991]) the First Department dismissed an appeal from such an order, holding that it was "nonappealable" (*but see, Holland v Presbyterian Hosp. in City of N.Y*. (122 AD2d 750 [1st Dept., 1986] [holding such an order appealable as of right]; *New England Mut. Ins. Co. v Kelly*, 113 AD2d 285, 289 [1st Dept., 1985] [entertaining an appeal from such an order, raising issues involving the privilege against self-incrimination, as of right]; *Tommy Hilfiger U.S.A. v Insurance Co. of N. Am.*, 239 AD2d 255 [1st Dept., 1997] [implying that such an order is appealable by permission]).

No appeal lies from evidentiary rulings made during trial, even if reduced to an order and signed (*Kopstein v City of New York*, 87 AD2d 547 [1st Dept., 1982][dismissing such an appeal taken by permission of the trial judge]; *Matter of Skyline Diner Corp. v Board of Assessors of County of Nassau*, 45 AD2d 712 [2nd Dept., 1974]), or from an order adjudicating in advance the admissibility of evidence at trial (*Cotgreave v Public Administrator of Imperial County [Cal.]*, 91 AD2d 600 [2nd Dept., 1982]).

Decisions

The general rule is that appeal does not lie from a decision, but rather only from an order or judgment entered thereon (*Cioffi v City of New York*, 14 AD2d 741 [1st Dept., 1961]; *Matter of Bloeth v Cyrta*, 21 AD2d 979 [2nd Dept., 1964]). Nor does an appeal lie from an order denying a motion to vacate or set aside a decision (*Matter of Colonial Penn Ins. Co. v Culley*, 144 AD2d 363 [2nd Dept., 1988]). An important caveat to the general rule is that Family Court Act § 1112 expressly authorizes an appeal from a decision made in an abuse or neglect case. Regardless of the wording of the statute, the best practice is to appeal from the order entered on such a decision.

A decision embodies the reasoning of a court for determining a motion, or an action tried to a judge alone, in a certain way. It contemplates the subsequent making and entry of a formal order or judgment thereon. Phrases such as "submit order" or "settle order on notice" at the foot of a judicial document are telltales that the document is a decision.

No appeal lies from a decision, whether in writing (*Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509) or oral and recorded in a transcript of proceedings in open court. An unsigned transcript of an oral decision that does not comply with the requirements of CPLR 2219(a) is not appealable (*Ojeda v Metropolitan Playhouse*, 120 AD2d 717; *Blaine v Meyer*, 126 AD2d 508). The statement in a transcript that "this shall constitute the decision and order of the court" does not make it so.

Reargument

No appeal lies from an order denying reargument (*Charney v North Jersey Trading Corp*., 184 AD2d 409 [1st Dept., 1992]; *Matter of Robinson*, 30 AD2d 702 [2nd Dept., 1968]; 12 Weinstein-Korn-Miller, NY Civ Prac ¶ 5701.23). The theory of such a motion is that the court, by overlooking or misapprehending the applicable law or facts, mistakenly arrived at its decision. Only the court that heard the original motion can judge if it failed to consider any of the points raised, and its determination on such a point must be final (*Matter of Underhill*, 193 App Div 957 [2nd Dept., 1920]).

Resettlement

No appeal lies from an order denying a motion to resettle an order or judgment in its substantive or decretal provisions (*Waltham Mfg. Co. v Brady*, 67 App Div 102 [1st Dept., 1901]; *Bergin v Anderson*, 216 App Div 844 [2nd Dept., 1926]; *Masters Inc. v White House Discounts*, 119 AD2d 639 [2nd Dept., 1982];

Foertsch v Foertsch, 187 AD2d 635 [2nd Dept., 1992]). However, appeal does lie from an order that denies resettlement so as to correct the recital of the papers read on a motion, strike factual recitals, etc. (*Farmers' Nat. Bank v Underwood*, 12 App Div 269 [1st Dept., 1896]; *American Audit Co. v Industrial Fedn. of Am.*, 87 App Div 275 [1st Dept., 1903]; *Bergin v Anderson, supra*).

IV. Reviewability

A. Issues Subject to Review

1. Issues of fact – examples:

The basic principle is that a question of fact is presented if there is a conflict either in the evidence or in the inferences that can reasonably be drawn from the evidence (Karger, Powers of the New York Court of Appeals, § 77, at 470 [3rd ed]).

2. Issues of law – examples:

Interpretation of

Statutes
Common Law
Contracts

Legal sufficiency of evidence at trial or hearing

For a court to conclude that a jury verdict is not supported by legally sufficient evidence, it must find that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] 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]).

In cases tried to a court without a jury, as in the Family Court, each of the elements of the case must be supported by some evidence in the record sufficient to permit the court to draw its findings of fact therefrom reasonably (see Karger, Powers of the New York Court of Appeals, § 77[e], at 480-482 [3rd ed])

3. Matters of discretion - examples

Making court rules

Granting leave to amend pleadings, add new parties, etc.

Granting calendar preferences or adjournments

Opening defaults

4. Mixed questions of fact and discretion – examples

Mixed questions of discretion and fact are present when the court

is required to exercise its discretion in light of the answers to questions of fact and the parties are in dispute both as to how those questions of fact are to be resolved and how the discretion is to be exercised (Karger, Powers of the New York Court of Appeals § 97, at 598-600 [3rd ed]).

Setting aside a factual determination as against the weight of the evidence

(*See, Cohen v Hallmark Cards*, 45 NY2d 493, 498, *supra* [1978]; *Nicastro v Park*, 113 AD2d 129, 132 [2nd Dept., 1985].)

Fixing child support and maintenance

Equitable distribution

B. Scope of Review

1. Depends on the powers of the court to which the appeal was taken

2. Review powers of the Court of Appeals

NY Constitution, art VI, § 3(a)

CPLR 5501(b)

3. Review powers of the Appellate Division on appeals

CPLR 5501(c) – questions of law and fact

Common law – matters of discretion

C. Standards of Review

1. De novo

Questions of law

Matters of discretion

Abuses of discretion

"Abuse" of discretion is a code word for an error in the exercise of discretion that is so bad that it amounts to an error of law (*Patron v Patron*, 40 NY2d 582, 584 [1976]; *People v Washington*, 71 NY2d 916, 918 [1988]).

Substitution of discretion for that of Nisi Prius

The Appellate Division is vested with the same power and discretion as the Supreme Court and may substitute its discretion for that of the trial court, even in the absence of abuse (*Brady v Ottaway Newspapers*, 63 NY2d 1031, 1032 [1984]). Determinations involving the exercise of discretion with which the Appellate Division disagrees

are often termed "improvident."

2. Rule of restraint

Issues of fact

Issues tried to a jury

A jury verdict should not be set aside unless the jury could not have reached the verdict it did on any fair interpretation of the evidence (*Nicastro v Park*, 113 AD2d 129, 133-135, *supra* [2nd Dept., 1985]). Appropriate corrective action is a new trial (*Cohen v Hallmark Cards*, 45 NY2d 493, 498, *supra* [1978]).

Issues tried to a court

On an appeal from a judgment entered after a nonjury trial the power of the Appellate Division to find facts is as broad as the trial judge (*Stempel v Rosen*, 140 AD2d 326, 328-329 [2nd Dept., 1988]). The appropriate corrective action in the Appellate Division is a reversal of the erroneous findings, the making of new findings, and the award of judgment accordingly.

Where Issues of Credibility Involved

Where a verdict turns on the credibility of witnesses, the determination of the trier of fact, who saw and heard those witnesses is entitled to great weight on appeal (*Amend v Hurley*, 293 NY 587, 594 [1944]; *People v Gaimari*, 176 NY 84, 94 [1903]). "The memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by [the trier of fact] who sees and hears the witnesses than by appellate judges who simply read the printed record" (*Barnet v Cannizzaro*, 3 AD2d 745, 747 [2nd Dept., 1957]).

D. Review of other judgments, orders, and rulings

1. Review of *prior* intermediate orders and rulings on appeal from final judgment - CPLR 5501(a).

2. Review of *subsequent* order or judgment

CPLR 5517(b) – Orders granting reargument or resettlement or denying renewal are brought up for review on the appeal from the prior order.

CPLR 5501(c) – judgment entered on order granting summary judgment brought up for review on appeal from prior

order.

E. Review limited to matters actually in the record

1. Matters dehors the record

The general rule is that issues not raised in the court of original instance will not be considered for the first time on appeal.

2. Exceptions

The rule is subject to limited exceptions such as the ability of appellate courts to take judicial notice of statutes or incontrovertible documentary evidence, or to consider changes of law occurring since the making of the order or judgment under review.

F. Loss of right of review of error

1. Preservation

The general rule is that a party must preserve error for later review by calling that alleged error to the attention of the trial court in time to correct it.

2. Exception

The general rule is subject to many exceptions, chief among which is the power of the Appellate Division to reach unpreserved errors in the exercise of its interest of justice jurisdiction.

Section Two: Special Duties of Counsel in the Family Court

I. Preliminary Remarks

The work of counsel in the Family Court is not done when an order is issued determining a motion or proceeding. The Family Court Act and the Rules of the Appellate Division, Second Department, impose certain additional duties pertaining to the appellate process on many attorneys who practice in the Family Court. These include, in some cases, informing the client of the possibility of taking an appeal and the right to apply for poor person relief and the assignment of counsel on that appeal, seeking the client's instructions, filing a notice of appeal or making a motion for leave to appeal, making a motion for poor person relief and the assignment of counsel if instructed to do so, and representing the client as a respondent of an appeal by other parties.

II. Special Duties of Counsel in the Family Court

A. By Statute—Duties Imposed on All Counsel and Attorneys for Children in Certain Types of Proceedings

The Family Court Act imposes certain additional duties on all counsel in

proceedings involving juvenile delinquency under Family Court Act article 3; permanent termination of parental custody by reason of permanent neglect under Family Court Act article 6, part 1; persons in need of supervision under Family Court Act article 7; child protective proceedings under Family Court Act article 10; approval of instruments surrendering care and custody of dependent children to foster care for more than 30 days under Social Services Law § 358-a; the guardianship and custody of destitute or dependent children by court order under Social Services Law § 384-a; and periodic review of the status of children in foster care pursuant to Social Services Law § 392. The special duties are:

1. **Family Court Act § 1121 (Generally)**

   - Give written notice of the right to appeal to the appropriate Appellate Division, the time limits involved, the manner of instituting the appeal and obtaining a transcript, and the right to appeal as a poor person if the party is unable to pay the cost of an appeal;
   - Explain to the client the procedures for instituting an appeal, the possible grounds upon which an appeal might be based, and the nature and possible consequences of the appellate process;
   - Ascertain whether the party represented by the attorney wishes to appeal and, if so, to serve and file the necessary notice of appeal or motion for leave to appeal;
   - Apply for poor person relief, if necessary;
   - File a certificate attesting to the party's continued eligibility for the appointment of counsel pursuant to Family Court Act § 1118, if necessary.

2. **Family Court Act § 354.2 (Juvenile Delinquency)**

   - If the court has issued a dispositional order in a juvenile delinquency proceeding, the respondent's counsel or attorney for the child must give the notice, make the explanation and take all the appropriate actions set forth above under Family Court Act § 1121 and, in addition, give the written notice and the explanation required in the first two bulleted paragraphs to the respondent's parent or other person responsible for his or her care.

3. **Family Court Act § 760 (Persons in Need of Supervision)**

   - If the court has issued a dispositional order in a PINS proceeding, the respondent's counsel or the attorney for the child must give the notice, make the explanation and take all the appropriate actions set forth above under Family Court Act § 1121 and, in addition, if the respondent's parent or other person responsible for his or her care is not the petitioner, give the written notice and the

explanation required in the first two bulleted paragraphs to that parent or other person.

4. Family Court Act § 1052-b (Child Protective Proceedings)

- If the court has issued a dispositional order in an abuse or neglect proceeding under Family Court Act article 10, the respondent's counsel must promptly give the notice, make the explanation, and take all the appropriate actions set forth above under Family Court Act § 1121.

B. By Statute—Duty of Continuing Representation Imposed on Attorneys for Children—Family Court Act § 1120(b)

Whenever an attorney has been appointed by the Family Court pursuant to Family Court Act § 249 to represent a child in a proceeding in the Family Court, the assignment continues and the attorney for the child must continue to represent the child on appeal (1) if the attorney has filed a notice of appeal, or (2) some other party to the proceeding has filed a notice of appeal. The attorney for the child may only be relieved of this duty of continuing representation by application to the court to which the appeal has been taken for termination of the appointment.

C. By Court Rule—Duties Imposed on Assigned Counsel—22 NYCRR 671.10

Section 671.10 of the rules of the Appellate Division, Second Department, imposes certain duties on assigned counsel for both the successful and unsuccessful parties. The rule supplements the duties imposed by statute set forth above because those duties arise only in certain limited types of proceedings or with respect to attorneys for children. Section 671.10 is not limited to the types of proceedings specified in the statutes cited above; it pertains to all counsel assigned to represent indigent persons in the Family Court pursuant to Family Court Act § 262, which applies in a significantly larger universe of cases.

1. Duties of Assigned Counsel for the Unsuccessful Party

- Give written notice to the client of the right to appeal or to make application for permission to appeal and request written instructions as to whether the client desires to take the appeal or make the application. If the client gives timely written notice of his or her desire to appeal, assigned counsel must either file a notice of appeal or make a motion for permission to appeal as appropriate. Unless counsel has been retained to represent the client on the appeal, the notice of appeal may include a statement that it is being served and filed pursuant to § 671.10 and shall not constitute counsel's appearance as the appellant's attorney on the appeal.

- Counsel's written notice to the client must also set forth the applicable time limitations with respect to taking the appeal or making the application for leave to appeal, must specify the manner of instituting the appeal and of obtaining a transcript of the minutes of the proceedings, and must inform the client of his or her right, upon proof of the inability to retain counsel and pay the costs and expenses of an appeal, to apply to the Appellate Division for poor person relief and/or the assignment of counsel. The notice must also request the written instructions of the client with respect to making the motion for poor person relief and assignment of counsel.

2. Duties of Assigned Counsel for the Successful Party

- If assigned counsel represented the successful party in the Family Court, the assignment remains in effect and he or she must continue to represent the client as a respondent on the appeal until that appeal has been determined or until relieved of the assignment by order of the Appellate Division.

Section Three: Taking an Appeal from an Order of the Family Court

I. Preliminary Remarks

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

II. Starting the running of the time to appeal

A. Service with notice of entry

For actions originating in the Supreme Court, the County Court, and the Surrogate's Court, service of the appealable paper with written notice of its entry in the office of the clerk of the court of original instance starts the time to take an appeal running (CPLR 5513; SCPA 2701). The statute was amended in 1996 to specifically provide that service must be made by a party (L 1996, ch 214, § 1). It is customary for the prevailing party to take the initiative to serve the order or judgment with notice of its entry on his or her opponents. However, any party may make such service.

In the Family Court the rule is different. Service of the order upon the appellant by a party, an attorney for the child, the court, or the clerk is sufficient to start the running of the time to appeal (Family Ct Act § 1113).

B. Time Limits – Family Court

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

C. Additional time for cross appellants

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

D. Additional time based on the method of service

Pursuant to CPLR 2103(b) an appellant obtains a 5-day extension of the 30-day period in which to take an appeal if service is by regular mail (CPLR 2103[b][2]), and a 1-day extension if service is by overnight delivery service (CPLR 2103[b][6]). An appellant who served the order or judgment with notice of its entry upon an adversary by regular mail or overnight delivery service now gets the benefit of the additional time allowed by CPLR 2103(b) (*see,* CPLR 5513[d]; L 1999, ch 94, § 1; Siegel's Practice Review No. 86, at 3).

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

General Construction Law § 25-a(1) provides, in relevant part, that "[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day" (*see also,* 22 NYCRR 670.2[b]).

F. Additional time where wrong method used

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

G. Additional time for disability of attorney

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

H. Additional time for substitution of a party

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

I. No other extensions of time available

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

III. Taking an appeal

A. As of right

An appeal as of right is taken by filing a notice of appeal with the clerk of the Family Court in which the order appealed from was made and by serving it upon each adverse party and the attorney for the child, if any (Family Ct Act §§ 1115, 1120[f]). If in doubt as to who are the adverse parties, it is best to be cautious and serve the notice of appeal on all parties to the action or proceeding.

There is a special provision regarding the filing and service of a notice of appeal in juvenile delinquency proceedings under article 3 (Family Ct Act § 365.3). In juvenile delinquency cases the notice of appeal must be filed in the office of the clerk of the Family Court in which the order appealed from was entered. If the juvenile is the appellant, the notice must be served on the appropriate presentment agency. If the presentment agency is the appellant, the notice must be served on the juvenile and upon the attorney or attorney for the child who last appeared for him or her in the Family Court.

1. The notice of appeal

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

Make sure that each person named as an appellant is aggrieved by the judgment or order appealed from and that all aggrieved clients are named as appellants. A mistake in this area can lead to dismissal of the appeal. An example of this is the case of the firm of attorneys who appealed from an order imposing a sanction upon them personally by filing a notice of appeal *in the name of their client*. The appeal was

dismissed because the client was not aggrieved by the imposition of a sanction upon the attorneys (*Tuthill v Town & Country Oil Corp*., 257 AD2d 618 [2nd Dept., 1999]; *cf., Scopelliti v Town of New Castle*, 92 NY2d 944 [1998]).

Identify the order or judgment appealed from accurately. Do not limit the scope of the appeal in the notice of appeal unless absolutely certain that no other part of the paper is objectionable. When in doubt, appeal from the whole of the judgment or order. By taking an appeal from only part of an order or judgment, a party waives the right to appeal from the remainder (*Royal v Brooklyn Union Gas Co.*, 122 AD2d 132, 133 [2nd Dept., 1986]). An improvident limitation of the scope of the appeal cannot be corrected by a motion to amend the notice of appeal after the time to take the appeal has expired (*City of Mount Vernon v Mount Vernon Hous. Auth*., 235 AD2d 516 [2nd Dept., 1997]; Siegel's Practice Review No. 64, at 4).

2. Additional documentation required by the rules of the Appellate Division, Second Department

The rules of the Appellate Division, Second Department, require the appellant to file additional papers with the notice of appeal (22 NYCRR 670.3[a]). In civil cases the appellant must file the original notice of appeal and two copies thereof, to each of which copies must be annexed certain supporting documents. Although, by its terms, the rule requires that only the two copies have the additional supporting documents annexed (22 NYCRR 670.3[a]), the practice has evolved of both serving and filing the complete package. That package consists of the notice of appeal, a Request for Appellate Division Intervention (RADI), the order or judgment appealed from, and the decision of the court of original instance, if any. The clerk of the court from which the appeal is taken files the original and sends the two copies and their attachments to the Appellate Division (22 NYCRR 670.3[a]).

a. The RADI

The RADI is used only in the Second Department. It replaces the former Pre-argument Statement that is still required in the First and Third Departments. The purpose of the RADI is to acquire necessary information for entry into the court's case tracking database and for the operation of the court's Civil Appeals Management Program (CAMP). Supplemental forms are available for use when the notice of appeal covers two or more appealable papers (Form B) and, in the event the space provided on the RADI is insufficient, to record information about additional parties and their attorneys (Form C).

b. The order or judgment appealed from and decision

An accurate photocopy of the order or judgment appealed from must be annexed. If the order or judgment was made by a judge, the copy must bear his or her signature or initials. A stamped name in place of the signature or a conformed copy is not acceptable. Where the paper appealed from was entered upon a decision, it too must be annexed.

3. No filing fee for notice of appeal

Although in Supreme Court cases the county clerk is entitled to a fee upon the filing of the notice of appeal (CPLR 8022[a]), no fee is required for filing a notice of appeal with the clerk of the Family Court.

4. Paper not yet entered

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

B. By permission

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

Where leave is required in order to obtain review of an order of the Family Court, the application may be made only to the Appellate Division (Family Ct Act § 1112[a]). The rules of the Second Department require that the motion be made to the court and not a single justice (22 NYCRR 670.6[b][1]).

C. Curing errors and omissions

CPLR 5520 permits courts to cure insubstantial defects made in the course of taking an appeal. Appellate courts often reach out to correct such defects on

their own motion. An appellant facing a motion to dismiss may wish to cross-move for relief under this section.

1. Omissions

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

2. Appeal by permission instead of as of right

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

3. Defects in form

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

Misdescription of the order or judgment appealed from is also a frequent problem. If the appellant has served the notice of appeal, RADI, and copy of the order or judgment upon the respondent, there is usually no prejudice because it is clear that the appeal is intended to be from the order or judgment annexed to the notice of appeal.

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

MOTION PRACTICE IN THE APPELLATE DIVISION, SECOND DEPARTMENT

I. General Motion Information

Before the court can entertain a motion for relief of any kind, it must have jurisdiction over the case in which the relief is sought. This is achieved, principally, by taking an appeal to this court, or by commencing an original proceeding here. An appeal is taken to this court by filing a notice of appeal in the office of the clerk of the court that entered the order to be appealed, and serving a copy of the notice of appeal on the adverse party or parties. However, this court will exercise its jurisdiction and entertain a motion in those cases where the notice of appeal has not yet been filed, if a copy has been served on the adverse party or parties, and an affidavit of that service is included with the motion papers. A motion for leave to appeal may be made to this court in cases where an appeal does not lie as of right (*see* Family Court Act § 1112).

A. How to Bring on a Motion in the Second Department

A motion in the Appellate Division may be brought on either by notice of motion or order to show cause. Sections 670.5 and 670.6 of the rules of the court concern motion practice here (*see* 22 NYCRR 670.5; 670.6). Notice of Motion and Order to Show Cause forms are available on the court's website (http://nycourts.gov/courts/ad2/).

1. *Rules Applicable to All Motions*

   a. All motions must be made returnable at 9:30 A.M. at the courthouse at 45 Monroe Place, Brooklyn, NY 11201.

   b. All cross motions must be made returnable on the same day as the principal motion, and must be served and filed at least three days before the return date.

   c. Only the original motion papers need to be submitted to the court. No copies are necessary.

   d. All notices of motion or orders to show cause must contain the following information:

      i. A statement of the nature of the motion and the relief requested;

      ii. The return date; and

      iii. The names, addresses, and phone numbers of the attorneys for all parties in support of and in opposition to the motion.

   e. The papers filed in support of every motion must include the following:

      i. The notice of appeal if the appeal is taken as a matter of right; and

ii. A copy of the order or judgment sought to be reviewed, and the decision of the court, if any.

f. All motions are submitted; there is no oral argument.

g. There is no provision in the court rules for the submission of reply papers. However, reply papers generally will be accepted as long as the motion is pending and undecided.

h. There is a motion fee of $45, which may be waived in cases of indigency (*see* 22 NYCRR 670.22[a][2]).

2. *Motions Brought on by Notice of Motion*

The provisions concerning motions brought on by notice of motion are found in section 670.5(a), (b), (c), (d), and (f) of the court rules.

a. Return Date: A motion brought on by notice of motion must be made returnable on a Friday.

b. Service and Filing: Service of the notice of motion and its supporting papers must be made in accordance with CPLR 2214, which requires at least eight days notice before the return date. If service is by mail, the papers must be served at least 13 days before the return date. The motion papers must be filed in this court at least one week before the return date.

c. Opposition Papers: Opposition papers must be submitted by 4 P.M. on the business day preceding the return date.

d. Interim Relief Prohibited: Interim relief, that is, immediate relief pending the determination of the motion, such as a temporary stay of all proceedings, cannot be obtained if the motion is brought on by notice of motion. Interim relief can only be obtained in a motion brought on by order to show cause.

e. Personal Appearance Not Required: No personal appearance is required to proceed by notice of motion; in fact, such a motion can be mailed to the court.

f. Adjournment: A motion brought on by notice of motion may be adjourned upon the consent of the parties.

3. *Motions Brought on by Order to Show Cause*

The provisions concerning motions brought on by order to show cause are found in section 670.5(a), (b), (c), (d), (e), and (f) of the court rules.

a. Return Date and Service: The Justice who signs an order to show cause selects the return date and directs the method of service. An affidavit of service must be filed on or before the return date of the motion; the failure to

do so could result in the dismissal of the motion.

b. Oral Argument: Generally, the Justices do not hear oral argument on whether or not an order to show cause should be signed, or if the temporary relief sought therein should be granted.

c. Adjournment: A motion brought on by order to show cause may not be adjourned by the parties. A request for an adjournment of such a motion must be submitted in writing, on or before the return date of the motion, for presentation to the bench.

d. Filing and Service of Opposition Papers: Opposition to a motion brought on by order to show cause must be filed with the court on or before 9:30 A.M. on the return date of the motion. Section 670.5(b) requires that opposition to such a motion must be served by a method calculated to insure that the movant, and any other party to be served, will have received the papers on or before the return date. The court rules do not provide for reply papers. However, reply papers generally will be accepted as long as the motion is pending and undecided.

e. Interim Relief: Before a Justice will consider granting interim relief, that is, relief pending the determination of the motion, certain requirements must be met:

   i. Presentation: An order to show cause containing such a request must be presented in person, by the attorney for the movant or the movant pro se when he or she is not represented by counsel; a request for such relief will not be considered if the order to show cause is mailed to the court, or left in the clerk's office to be retrieved later.

   ii. Reasonable Notice: Section 670.5(e) requires that the adversary or adversaries must be given "reasonable notice" that interim relief is requested, and an affidavit or affirmation that such notice was given must be presented with the order to show cause. Generally, the court considers 24 hours notice to be "reasonable"; less than 24 hours notice may or may not constitute reasonable notice in a given case. The notice must inform the adversary of the time and the place that the application is to be made.

   iii. Inability or Unwillingness to Give Notice: A movant unwilling to give reasonable notice that interim relief will be requested must submit an affidavit or affirmation stating the reasons why he or she is unwilling to do so. Similarly, a movant who has been unable to give notice must submit an affidavit or affirmation setting forth the attempts at notice, and the reason for the lack of success.

4. *Presentation of Orders to Show Cause*

If no interim relief is requested, an order to show cause may be mailed to the courthouse at 45 Monroe Place, Brooklyn, N.Y. 11201, where it will be presented to the reserve Justice for signature. A Deputy Clerk will inform the movant of the return date, and the method and date by which service must be accomplished.

Only an order to show cause that requests interim relief *must* be presented in person. Such an order to show cause may be brought to the courthouse at 45 Monroe Place in Brooklyn, or, by prior arrangement, to an individual Justice of the court in his or her outside chambers. As a filing fee is now required for motions, it may be necessary to bring an order to show cause that has been signed in outside chambers to the Brooklyn courthouse for filing.

a. In Brooklyn: A Deputy Clerk examines the moving papers and hears the parties' positions. The papers are then presented to the Justice of the court who is assigned as the reserve, or duty, Justice for the day. The Justices are assigned on a rotating basis to sit as reserve Justice. With certain limited exceptions in criminal cases, a movant cannot apply to a specific Justice to hear an order to show cause.

b. In Outside Chambers: Many of the Justices of the Appellate Division, Second Department, have chambers in their home counties, as well as in the Monroe Place courthouse in Brooklyn. When in their outside chambers, these Justices may be available to sign an order to show cause bringing on a motion. A movant wishing to present an order to show cause for signature to a Justice in his or her outside chambers must contact the Justice's chambers to schedule an appointment. A motion brought on by order to show cause that is signed in outside chambers must still comply with all of the rules of the court, and is always made returnable at the courthouse in Brooklyn. As a motion fee is now required, and cannot be paid in outside chambers, it may be necessary to bring the order to show cause signed in outside chambers and the supporting papers to the Monroe Place courthouse in Brooklyn for filing.

5. *Rejection of Motion Papers*

Section 670.5(f) provides that the clerk may reject motion papers that do not comply with the rules.

II. Common Types of Motions

A. Stay Pending Appeal

In general, a stay may be requested by a motion brought on either by order to show

cause or notice of motion, although, as previouslystated, interim relief pending the determination of the motion can only be obtained in an order to show cause. In certain cases, a brief stay is automatically provided pursuant to Family Court Act § 1112(b).

B. Leave to Appeal to the Appellate Division

Some papers are appealable as of right, and some are only appealable with the permission of the court. If permission is necessary, it should be requested as early as possible. An appeal purportedly taken as of right from an interlocutory or non-dispositional order runs the risk of dismissal, even if the appeal is perfected (*see Matter of Galeano v Delaney*, 35 AD3d 858).

It should be noted that any order issued in a case involving abuse or neglect may be appealed as a matter of right.

C. Motion for Leave to Prosecute the Appeal as a Poor Person

In certain cases, the assignment of counsel in the Family Court continues for the duration of the appeal (Family Court Act § 1120; 22 NYCRR 671.10). Where the assignment does not continue, assigned counsel may now, pursuant to Family Court Act § 1118, file with this court a certification of the client's continued indigence for the purposes of the appeal. The certification of continued indigency form is available on the court's website. It requires, among other things, that assigned counsel provide an address for the appellant, and indicate that the appellant is interested in pursuing the appeal. Assigned counsel must indicate whether he or she wishes to be assigned to the appeal, or wishes the assignment of new counsel for the appellant. The form is not to be used in those cases where after the Family Court has assigned counsel, the Family Court issues an order finding that the appellant is of sufficient means to pay spousal or child support, or arrearages thereof.

Where a motion for leave to prosecute an appeal as a poor person is necessary, it must be based on a financial affidavit of the client in accordance with CPLR 1101, and it is important to indicate whether or not poor person relief was granted in the Family Court.

D. Motion to be Relieved as Counsel

Where the obligation of assigned counsel continues, but the law guardian or other assigned counsel cannot or is not willing to perfect the appeal, or if, for any reason, assigned counsel wishes to be relieved as the attorney on appeal, he or she must make a formal motion to be relieved of the assignment, and for the assignment of new counsel, if appropriate. Such a motion should be made as soon as possible after the appeal process has started. To wait until a brief is filed on an appeal before requesting to be relieved of an assignment results in unnecessary delay. The motion must be based upon good cause, and should include an affidavit or affirmation of the appellant that he or she

wishes to perfect the appeal, and desires the assignment of new counsel. If no such affidavit is included, that part of the motion that requests new counsel may be denied with leave to renew upon the submission of such an affidavit. Assigned counsel will be directed to serve his or her client with a copy of the order denying the assignment of new counsel and to file proof of such service with the Appellate Division.

E. Enlargements of Time

Appellants, respondents, and law guardians may all need enlargements of time to serve and file their briefs. Reasonable enlargements may be available for cases in the Active Case Management Program, but it must be kept in mind that it is the intention of the court to expedite these cases. Repeated requests for enlargements will not be granted. An enlargement order stating that no further enlargement will be granted is considered final, and a brief submitted after the date granted by the enlargement order will not be accepted. The case will be calendared without the brief, and a formal motion will be required before a brief can be accepted.

1. *Rules 670.8(d) (22 NYCRR 670.8[d]) and 670.4(a)(3) (22 NYCRR 679.4[a][3]*)

Pursuant to section 670.8(d) of the court rules (*see* 22 NYCRR 670.8[d]), an enlargement of time to perfect an appeal or to file a respondent's or other brief may be obtained by letter application, provided the letter is copied to the adversary, or by the stipulation of the parties. Only one stipulation per filing is accepted, but there may be multiple letter applications. Applications or stipulations that are rejected may be reviewed by formal motion to the court. Although section 670.8(d) cannot be used in those cases under the Active Case Management Program where a scheduling order has been issued, section 670.4(a)(3) provides that a scheduling order may be amended, and a party relieved from an obligation imposed by the order, by letter application to the clerk of the court, based upon good cause. The letter application must also be copied to the adversary or adversaries, and the failure to do so may result in the rejection of the application, and needless delay. Stipulations are not accepted.

F. Applications Pursuant to CPLR 5704

An order of the Family Court that grants or denies relief ex parte is reviewable by the Appellate Division under CPLR 5704. Pursuant to that section, one Justice of the Appellate Division may strike a provision of an order to show cause that grants temporary relief pending the determination of the motion by the Family Court, or may sign an order to show cause that was declined. Four Justices of the Appellate Division may grant temporary relief which was denied by the Family Court Judge who signed the order to show cause. No papers in addition to those presented to the Family Court Judge need be presented at the Appellate Division. However, the applicant for such relief must give reasonable notice to the adversary or adversaries of the time and place of the application.

ACTIVE CASE MANAGEMENT PROGRAM

I. Overview

The Active Case Management Program in the Appellate Division, Second Department, instituted by Presiding Justice A. Gail Prudenti in January 2003, is intended to expedite appeals by coordinating the efforts of those involved in the appeal process. The principal focus of the Program is the hands-on management of appeals arising out of the Family Court.

The Program was the result of a year-long study by the Committee to Expedite Family Court Appeals of the Appellate Division, Second Department, chaired by the Honorable Sondra Miller, who was then an Associate Justice of the court. The Committee examined the difficulties often encountered in perfecting Family Court appeals. Input was received from, among other sources, the Judges and staff of the Family Courts located in the Second Department.

Through the Committee's efforts, a uniform system for the processing of Family Court appeals was established in the various clerks' offices. Each Family Court now has an appeals coordinator, who is responsible for cases in the appeal process. These coordinators work directly with their counterparts in the Appellate Division, the Case Managers. The Appellate Division Case Managers are clerks with years of experience in the court. It is their job to shepherd through the appeal process the appeals assigned to them, and to provide attorneys and pro se litigants on Family Court appeals with expert assistance and technical help.

A. Definition of the Active Case Management Program: The Administrative Order and the Relevant Court Rules

1. *Administrative Order*

Administrative Order ADM 2002-124.2 creating the Active Case Management Program was signed by Presiding Justice A. Gail Prudenti on December 24, 2002, effective January 1, 2003. The Order recites that the program was created "for the purpose of expediting the prosecution of designated causes or classes of causes."

2. *Causes Covered by the Program*

The Administrative Order creating the Program has a very broad scope. It specifies five classes of causes and permits the court to exercise its discretion over other causes as well. The specified classes of causes subject to the Active Case Management Program are:

a. Appeals from the Family Court;

b. Appeals from orders and judgments of the Supreme Court in which an issue of the custody and/or visitation of children is raised;

c. Appeals from orders or decrees of the Surrogate's Court concerning the termination of parental rights or the adoption of children;

d. Appeals in criminal cases in which the court has assigned counsel to represent the defendant;

e. Cases entitled to a preference by law, or for which a preference has been granted; and

f. Any such cause (hereinafter appeal) "as the court may specifically designate."

3. *Court Rules*

At the same time that Administrative Order ADM 2002-1224.2 took effect, the Court amended its rules of procedure to provide for the functioning of the new program. Rule 670.4 (22 NYCRR 670.4; Appendix B) authorizes the Clerk of the court to issue scheduling orders in appeals that are to be actively managed. Scheduling orders are the principal means by which an actively-managed appeal moves through the appeal process. Compliance with scheduling orders and related orders is required, and the consequences for the failure to do so may be serious.

B. Program Structure

1. *In the Appellate Division*

Each Family Court appeal in the Active Case Management Program is assigned to a Case Manager, who is directly responsible for its progress through the court. Upon the assignment of the appeal to the Active Case Management Program, an initial scheduling order sent to the attorney or the appellant pro se. Among other things, the initial scheduling order contains the Case Manager's name and telephone number. Thus, the appellant pro se or counsel has, at the earliest possible stage, someone to contact with questions, or for help with any difficulty that may arise. The Case Managers also act as liaison with the various Family Court Clerk's offices, court reporters, and transcription agencies, as well as with the Office of Court Administration.

2. *In the Family Court*

The Supervising Judge of each Family Court in the Second Department has assigned a clerk to be the Family Court Appeals Coordinator. It is the responsibility of the Appeals Coordinator to compile the record on the appeal, keep track of transcript

production, provide the Appellate Division with periodic progress reports, and transmit the complete record to the Appellate Division. The Case Manager and Appeals Coordinator are in frequent contact.

II. Process of Active Case Management in the Appellate Division

A. Incoming Appeals

All notices of appeal from the Family Court, and all notices of appeal from other courts that indicate the presence of issues concerning children, are reviewed to determine appealability.

1. *An appeal from an order that is not appealable*

An appeal that is taken from an order that is not appealable, such as an order entered on the default of the appealing party, will be dismissed on the court's own motion.

2. *An appeal from an order that is not appealable as of right, but only with leave*

If a notice of appeal is filed purporting to take an appeal from an order that is not appealable as of right, but only with leave of court, such as a non-dispositional order in a proceeding pursuant to article 7 of the Family Court Act, the court may issue an order to show cause why the appeal should not be dismissed.

3. *An appeal from an appealable paper*

If it is determined that an appeal has been properly taken from a Family Court order or from an order of another court involving children, the appeal is assigned to a Case Manager and a scheduling order is issued.

B. Scheduling Orders Under Section 670.4

1. *Authority of the Clerk of the Court*

Section 670.4(a)(2) authorizes the Clerk of the court to issue orders directing the parties to an appeal assigned to the Active Case Management Program "to take specific action to expedite the prosecution thereof, *including but not limited to*" the following:

a. Ordering the transcript of the proceedings, if any;

b. Filing of proof of payment for the transcript;

c. Making necessary motions (such as a motion for leave to prosecute the appeal as a poor person);

d. Perefecting the appeal; and

e. Filing a brief or briefs.

2. *Mandatory Nature of the Order*

Section 670.4(a) also provides that notwithstanding any other provision of the Rules, including, for example, the time limits for perfection set forth in section 670.8, it is the scheduling order issued in an appeal under the Active Case Management program that governs when certain actions "*shall* be taken."

3. *Purpose of the Initial Scheduling Order*

The initial scheduling order directs that the appeal be perfected within 60 days of the receipt of the transcripts of the Family Court proceedings, or if there are no transcripts, within 60 days of the date of its issuance (*compare* Family Ct Act 1121[7]).

4. *Form of the Initial Scheduling Order and Time Requirements*

The initial scheduling order has three separate sections. The first, the introductory paragraph, identifies the appellant, the date of the order or judgment appealed from, and the court that issued it. The second section directs that the appeal be perfected within 60 days following the receipt of the transcript, and recites the action or actions that the attorney for an appellant or an appellant pro se must take within 30 days of the date of the scheduling order. The initial scheduling order requires:

a. The submission of an affidavit or affirmation stating that there are no minutes to be transcribed for the appeal, or

b. If, in fact, there are minutes to be transcribed, the submission of an affidavit or affirmation indicating that the transcript has been received, and the date of receipt, or

c. An affidavit or affirmation that the transcript has not been received, but that it has been ordered and paid for, the date thereof,and the date of anticipated receipt, or

d. If the appellant is indigent, the submission of a motion for leave to prosecute the appeal as a poor person, or

e. An affidavit or affirmation withdrawing the appeal.

The third section of the initial scheduling order sets forth the consequence of the failure to perform one of the required acts within the 30 days: the court will issue an order to show cause why the appeal should not be dismissed.

At the foot of each scheduling order is the name and telephone number of the

Appellate Division Case Manager.

5. *Responding to the Initial Scheduling Order*

The initial scheduling order directs counsel, or the appellant pro se, to respond to it, in writing.

a. Where the assignment continues and counsel intends to perfect: Where the assignment in the Family Court continues, and the assigned counsel intends to perfect the appeal, he or she must file an affidavit or affirmation with the court informing it as to the status of the minutes, if any. The affidavit or affirmation should be directed to the attention of the Case Manager whose name appears on the scheduling order, and who is responsible for tracking the case through the appeals process.

b. Where the assignment continues and counsel does not intend to perfect: An assigned counsel whose obligation to the appellant continues but who cannot perfect the appeal must promptly move to be relieved and for the assignment of new counsel. The motion must be served on the client and all of the parties to the appeal, and the affidavit or affirmation in support of the motion to be relieved must indicate the reason for the request. The court should be made aware, for example, if the client cannot be found; note that in such case, the motion must still be served on the client at his or her last known address.

If a law guardian who is not an appellant, or an assigned counsel for a respondent, cannot or is unwilling to continue to represent the client on the appeal, a motion to be relieved should be made as soon as possible after the notice of appeal is filed. To wait until a brief has been filed before making such a motion results in the unnecessary delay of an appeal that is intended to be expedited.

c. Where the assignment does not continue, but counsel files a notice of appeal at the request of the client: Pursuant to Family Court Act § 1118, an attorney who has been assigned in the Family Court may file with this court an affidavit or affirmation of the client's continued indigence for the purposes of the appeal. The form is available on the website (http://nycourts.gov/courts/ad2/), and it requires, among other things, that the assigned counsel provide an address for the client, indicate that the client is interested in pursuing the appeal, and indicate whether or not the assigned counsel wishes to be assigned to the appeal, or have another attorney assigned. The form is not to be used in those cases where the assignment of counsel continues, or where, after the assignment of counsel, the Family Court issues an order finding that the client is of sufficient means to pay spousal or child support, or arrearages thereof.

Upon receipt of a certificate of continued indigency, the court issues an order on

certification that either assigns the certifying attorney to the appeal, or assigns a new attorney. A new attorney is directed to contact the client and determine whether or not he or she is interested in pursuing the appeal, and to advise the court in writing of the results of the inquiry. If the appellant inform the assigned counsel that he or she wishes to pursue the appeal, the assigned counsel is then authorized to order any necessary transcripts. If, however, the new assigned counsel informs the court that the appellant is not interested in the appeal, or cannot be found, the court issues an order to show cause why the appeal should not be dismissed.

d. Poor Person Motion: Should it be necessary to move for leave to prosecute the above-entitled appeal as a poor person, subparagraph (4) of the initial scheduling order requires that the motion be made within 30 days of the date of the scheduling order, and sets forth the information that should be included in any such motion.

e. Review of the Family Court File: It is no longer necessary for assigned counsel to review the Family Court file and determine which days of proceedings should be transcribed for the appeal. At an early stage of the appeals process, the Case Manager contacts the Family Court Appeals Coordinator to request that record on the appeal be compiled. The Case Manager forwards a form, or checklist, to be used by the Appeals Coordinator in putting the appeals record together. As a result of the Active Case Management Program, there is now general agreement as to the papers to be included in the record on appeal from the various types of Family Court orders. It should be noted that retained counsel must continue to review the file, and is obligated to order all transcripts that form part of the record on the appeal (*see* CPLR 5525).

f. Obtaining Transcripts: Under the Active Case Management Program, the minutes of all of the proceedings that form a part of the record shall be transcribed. The Appeals Coordinator of the Family Court monitors the production of the transcripts, and keeps the Case Manager informed of the progress. The Appeals Coordinator marks one copy of the transcript as the "original," and that copy, plus the minutes of any *in camera* hearing, is set aside for the Appellate Division. The Clerk of the Family Court also forwards a copy of the transcript to the assigned counsel.

g. Selection of a Transcription Company: It is the obligation of assigned counsel for the appellant to select a transcription company and inform the Case Manager of the choice.

As needless delay is caused by the failure of assigned counsel to promptly choose a transcription company, the designation should be made within 30 days of the date of the scheduling order.

h. Subpoenas: Assigned counsel need not subpoena the original Family Court file to the Appellate Division. The Family Court Appeals Coordinator now sends the complete Family Court file to the Appellate Division upon its request.

6. *Perfection of the Appeal*

Pursuant to the terms of the scheduling order, perfection of the appeal is required within 60 days of the receipt of the transcript, and counsel is obligated to inform the court, in writing, of the date he or she receives the transcript.

a. Enlargements of time to perfect cannot be obtained by letter or stipulation under 670.8(d). Pursuant to 670.4(a)(3), a request may be made to the clerk upon good cause shown, to permit additional time. Counsel for the appellant should contact the Case Manager to discuss any difficulty in meeting the deadline.

b. Assigned counsel is obligated to make copies of the transcripts for all parties who are to be served with the brief on the appeal, and to serve a copy of the transcript at the same time that the brief is served. Assigned counsel will be reimbursed for the copying costs. **The failure to comply with this obligation results in needless delay**.

7. *Briefs of the Respondent and the Law Guardian, if any*

Upon the receipt of the appellant's brief, a scheduling order is issued to all of the respondents and the law guardian on the appeal, all of whom are required to serve and file their respective briefs at the same time, within 30 days from the date of the scheduling order. Enlargements of time may be granted upon good cause shown pursuant to 670.4(a)(3), and the Case Manager should be contacted. As the intent is to expedite these appeals, requests for enlargements of time are not favored. The failure to comply with the scheduling order may preclude a respondent or law guardian from filing a brief. The court may grant an enlargement but specify that no further enlargements will be granted. The Clerk cannot thereafter extend the time pursuant to 670.4, and any additional time must be requested by motion.

8. *Failure to Comply with a Scheduling Order*

Some response must be made to a scheduling order, and the failure to respond carries with it certain consequences.

a. Appellant: The Case Manager should be made aware of any difficulty in complying with the initial or other scheduling order as soon as possible. If the appellant, or his or her assigned counsel, fails to comply with the initial scheduling order, the court will issue an order to show cause why the appeal should not be dismissed.

b. Respondent(s) and Law Guardian: The failure to comply with a scheduling order setting the date to serve and file the respondent's and the law guardian's respective briefs could result in the submission of the appeal without such a brief. Upon the passing of the time limit set forth in the scheduling order, the Case Manager forwards the completed appellate record to the Chief Court Attorney to be placed on the court's calendar. The Case Manager should be made aware of the need for an enlargement as soon as possible after the receipt of the scheduling order, and any request for additional time should be made in writing, and copied to all parties to the appeal.

9. *Calendar and Release*

Family Court appeals are given a preference, and are placed on the calendar as soon as they are received by the Chief Court Attorney, and the release of Family Court appeals decisions is expedited by the court's Decision Department.

Family Court Appeals
Perfection through Decision

Family Court Appeals
Perfection through Decision

I. Perfecting a Family Court Appeal

A The Record on Appeal

An appeal is perfected when all the acts necessary to place the matter on the court's calendar have been performed (22 NYCRR 670.2[a][4]). With regard to Family Court appeals, perfection generally occurs when the appellant files nine copies of his brief, with proof of service, with the Appellate Division. The original record is then obtained from Family Court by the Appellate Division.

The Family Court Act and Rules of the Appellate Division, Second Department (*see* handout) provide that appeals from orders of the Family Court may be perfected on the original record (Family Ct Act § 1116; 22 NYCRR 670.9[d][1][ii]). However, this does not relieve counsel of the obligation of ensuring that the Appellate Division is provided with the complete record on appeal (*see e.g.,* 22 NYCRR 670.9[d][2]). Pursuant to the Active Case Management Program, this court and the Family Courts take an active role in compiling the record on appeal for assigned counsel. In furtherance of the Program, the Supervising Judge of each Family Court has appointed an Appeals Coordinator, whose responsibilities include compiling the record on appeal without consultation with assigned counsel.

1. *Defining the Record on Appeal*

In general, the record on appeal consists of all the papers and transcripts of the proceedings that the court relied upon in reaching a determination (*see* CPLR 5526).

The record on appeal from a *dispositional order* consists of all of the papers filed from the commencement of the proceeding until the issuance of the dispositional order from which the appeal is taken. Additionally, transcripts of all proceedings at which testimony was taken or applications were made and/or decided are part of the record on appeal.

The record on appeal from a *nondispositional order* generally consists of all papers filed from the commencement of the proceeding until the issuance of the order from which the appeal is taken. If the order from which the appeal is taken disposes of a motion made by one of the parties, the record on appeal generally consists of the papers filed in support of and in opposition to the motion. In both cases transcripts

of all proceedings at which testimony was taken or applications were made and/or decided are part of the record on appeal.

The record on appeal from an *order issued in a supplementary proceeding* consists of all papers filed from the issuance of the previous order, and transcripts of all proceedings at which testimony was taken or applications were made and/or decided since the issuance of the previous order.

In camera proceedings are part of the record on appeal and must be transcribed immediately pursuant to the order of assignment. Retained counsel are obligated to have the in camera minutes transcribed when the other transcripts are prepared and to make sure that those minutes are forwarded directly to the Appellate Division. Of course, the transcript of an in camera proceeding cannot be released to the parties. Instead, it should be forwarded by the Family Court Appeals Coordinator directly to the Appellate Division upon the completion of transcription.

Whenever prepared, *reports of Forensic Evaluations, Mental Health Studies (MHS) and Probation Reports (I&R)* are properly part of the record on appeal. These items are not always forwarded to the court along with the Family Court file, so if you have copies and rely upon them you should file them as an exhibit when you file your brief.

2. *Compiling the Record on Appeal*

As previously indicated, the Appeals Coordinator in each Family Court compiles the record on appeal for the Appellate Division. Counsel's obligation is to make sure that he or she has everything that constitutes the record on appeal BEFORE preparing the brief, and that the record on appeal, including transcripts of in camera proceedings, if any, is forwarded to the Appellate Division. The Appellate Division case managers will be performing this function as well, but counsel's intervention is helpful. In cases where the appellant is not represented by assigned counsel, the appellant must make sure that a copy of the relevant transcripts is filed with the Appellate Division.

The Appellate Division's scheduling orders (*see* handout) will set forth a time table regarding when the transcripts must be ordered and when the appeal must be perfected.

B. Preparing the Appellant's Brief

At this point the attorney representing the appellant has received all of the transcripts relevant to the appeal and has consulted the Family Court file and obtained all relevant documents. He has made sure that he really has received ALL of the transcripts of the proceedings which culminated in the order appealed from. He has made sure that the minutes of any in camera

proceedings have been transcribed and forwarded to the Appellate Division by the Family Court. He has carefully read the assignment order, so that he knows who he represents and to which orders or judgments his representation applies. He has familiarized himself with the record, consulted with his client, and determined which nonfrivolous, non-academic issues he wishes to raise on appeal. He then sets about writing the brief.

1. *Contents of the Appellant's Brief*

Before preparing a brief, counsel should always consult CPLR §§ 5526, 5528, and 5529, as well as sections 670.10.1, 670.10.2 and 670.10.3 of the Rules of the Appellate Division, Second Department. They contain rules regarding paper size, binding and page numbering, margins and type size, and the length of briefs. It is important to note that the clerk may refuse to accept for filing any brief which does not comply with these rules, even if it is being submitted on the last day that it may be filed under the terms of the scheduling order (22 NYCRR 670.10.1[f]). What follows are some selected highlights.

(a) The Cover

The cover of all of the briefs must bear the title of the proceeding, the Family Court docket number(s), and the Appellate Division docket number(s). As a general rule of thumb, one may consult any prior order of this court issued in the proceeding or the order appealed from, to ascertain the appropriate title of the proceeding, bearing in mind that the parties' appellate status must also be reflected in the title of the brief and that many Family Court proceedings are confidential (*see* Family Ct Act § 166; 22 NYCRR 205.5), and therefore the parties' full names should not be used.

If counsel wishes to argue the appeal orally, a request for argument must be made on the cover of the brief in the upper right hand corner. This applies to briefs for the respondent and the attorney for the child as well. The amount of time requested and the name of the attorney who will argue must also appear in the upper right hand corner (22 NYCRR 670.10.3[g][1]). If the amount of time requested is not specified, the appeal will be deemed to have been submitted without oral argument (22 NYCRR 670.20[f]).

(b) The Body of the Brief

The body of the brief should be prepared in accordance with 22 NYCRR 670.10.3(g)(2).

Each record, separately- bound appendix, and appellant's brief must contain a statement pursuant to CPLR 5531 at the front thereof. An additional copy of this statement must be filed at the time of perfection (22 NYCRR 670.8[a]). That statement is designed to provide the court with a description of the proceeding.

Your brief must inform the court of any stays that have been issued in the proceeding (22 NYCRR 670.10.3[g][2][iv]).

Your statement of facts must contain references to the papers constituting the record on appeal. It is often helpful to the court to state the dates upon which the hearings, if any, were held.

In choosing which arguments to raise, you should consider the effect that success would have upon your client. There may be a meritorious issue presented by the record, but your client may not be pleased with the consequence that would flow from successfully arguing that point.

(c) The Conclusion

In a related vein, your brief should contain a concluding paragraph in which you clearly indicate to the court the relief you are seeking.

(d) Certification of Compliance

Pursuant to section 670.10.3(f) of the rules of the court, a certificate of compliance with section 670.10.3 must be placed at the end of your brief. Specifically, the certificate must state whether the brief was prepared on a typewriter or computer, or by some other specified means. If the brief is typewritten, the certificate must indicate the size and pitch of type, as well as the line spacing used. If the brief is computer-generated, the certificate must specify the name of the typeface, point size, line spacing, and word count. In this regard, the word count of the word processing system you used to prepare the brief may be relied upon. Remember that pursuant to our rules, the length of computer-generated briefs is measured by the word count, not by the page count (*see*, 22 NYCRR 670.10.3[a]).

The original brief must be signed by counsel, in ink, in accordance with 22 NYCRR 130-1.1-a (22 NYCRR 670.2[i]).

(e) Addenda

In general, addenda to briefs are permitted only in the limited circumstances outlined in section 670.10.3(h)(1) of the rules of the court. However, an appellant's brief filed on an appeal which is prosecuted on the original record MUST include an addendum containing a copy of the notice of appeal, the order(s) or judgment appealed from, and the decision of the court, if any.

2. *Submitting an Anders Brief*

If, as assigned counsel, you determine that there are no nonfrivolous issues which

could be raised on appeal, because, for example, the passage of time has rendered the appeal academic or the order appealed from was issued on the consent of your client or upon your client's admissions, you should consult with your client regarding withdrawing the appeal. If your client does not agree to withdraw the appeal, and you have concluded that there are no nonfrivolous issues which could be raised on appeal, then you should file a brief pursuant to *Anders v California* (386 US 738, 744 [1967]). In *Anders*, the Court stated "if [assigned] counsel finds his case to be wholly frivolous, after conscientious examination of it, he should so advise the court and request permission to withdraw [as counsel]. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous" (*see also, Matter of Dominic J.,* 264 AD2d 845; *Matter of H. Children,* 232 AD2d 560). Attached to your brief should be a copy of a letter previously sent to your client which should comply with section 670.12(g)(2)(*see,* handout).

C. Filing and Serving the Appellant's Brief

1. *Filing*

Papers are deemed filed with the Second Department as of the time that they are actually received in the clerk's office; they must be accompanied by proof of service on all necessary parties (22 NYCRR 670.2[d]). The business hours of the clerk's office are from 9:00 AM to 5:00 PM, Monday through Friday, except public holidays.

Nine copies (the original plus eight) of the appellant's brief, and the record or appendix, if any, must be filed. If there are any other documents that you have relied upon and that you consider to be of particular importance, you may wish to file those separately as an exhibit at the time that you file your brief. In that event you would also serve copies of those documents upon all of the parties.

In addition to your brief, you must file proof of service for all required documents on all of the parties. Your brief will not be accepted without it.

Unless the appellant has been granted poor person relief (CPLR 1102[d]) or is the State or one of its agencies or officers (CPLR 8017), the appellant must pay a filing fee of $315 at the time of perfection (CPLR 8022[d]).

2. *Service*

In contrast to filing, service is complete when made, not when the document served is received.

While generally two copies of the brief must be served on each of the parties, if the

original record method of perfection is used only one copy of the brief need be served (22 NYCRR 670.8[a]). In addition to the briefs, the appellant is required, by the terms of our scheduling order, to serve EACH of the parties with a copy of any transcripts.

Bear in mind that where a party is represented by assigned counsel, new counsel may have been assigned for the appeal. Thus it is important to make certain that you serve the CURRENT attorneys of all of the parties. If there is any question as to the identities of those attorneys, please contact the Appellate Division case manager.

II. Briefs of Respondent and the Attorney for the Child

A. Filing and Service

1. *When to file and serve; the scheduling order*

All respondents and law guardians on appeals from orders issued by the Family Court will receive a scheduling order (see handout), which provides that their briefs are due 30 days from its date of the scheduling order. The scheduling order is issued by the court when the appellant's brief is served and filed. Bear in mind that if the 30-day period ends on a Saturday, Sunday, or public holiday, your brief may be filed on the next business day (see, General Construction Law 25-a[1]; 22 NYCRR 670.2[b]).

The scheduling order contains the name and telephone number of the case manager assigned to the appeal. If you have questions regarding the order, or any other aspect of the appeal, you should contact the case manager immediately.

Where the court has previously issued a stay, generally no scheduling order will be issued. Instead you will be called and given a date by which to file your brief.

As with appellant's briefs, nine copies (original plus eight) must be filed with the court, with proof of service, and one copy must be served on all parties to the appeal.

2. *Whom to serve*

All of the parties to the appeal, as well as your client, should be served with a copy of the briefs of the respondent and attorney for the child.

B. Motion Practice

Generally, assigned counsel representing the appellant on appeal is not the same as counsel who represented that party in the Family Court, as the assignment of counsel for an unsuccessful party does not continue for purposes of appeal. However, the assignment of counsel for the successful party in the Family Court, that is, the respondent, and the assignment of the attorney for the child, do continue for purposes of appeal. Thus those attorneys provide some continuity for the court. By the same token, those attorneys may be

familiar with what has happened in Family Court subsequent to the taking of the appeal, and the appellant's attorney may not be. The Appellate Division relies upon those attorneys to advise it of any subsequent developments which may bear on the viability of the appeal. Thus, for example, if a subsequent order has been issued which may render the appeal academic, counsel for the respondent or the attorney for the child should promptly move to dismiss the appeal on those grounds. Similarly, where the attorney for the child possesses information which arose subsequent to the issuance of the order appealed from which may bear upon the Appellate Division's determination as to what is in the best interests of the child or children who are the subject of the appeal, that attorney should make a motion to enlarge the record so that this information can be presented to the court. Finally, if the respondent or the attorney for the child is unable to comply with the provisions of a scheduling order, counsel may make a written request, in the form of a letter served upon all parties, to the clerk of the court (22 NYCRR 670.4[a][3]). The clerk may amend the order upon a showing of good cause and consistent with the objective of insuring expedited prosecution of the case. The determination of the clerk in amending or declining to amend a scheduling order may be reviewed by motion to the court on notice (22 NYCRR 670.4[a][3]; see, generally, 22 NYCRR 670.5).

C. Contents of Brief

The requirements regarding the contents of a respondent's brief are found at 22 NYCRR 670.10.3(g)(3). The brief of the attorney for the child should also comply with those requirements. We have, on occasion, been contacted by an attorney for the child who does not wish to file a brief. Sometimes these attorneys are not comfortable writing briefs because they do not normally engage in appellate practice. The Appellate Division considers the input of the attorney who represented the children in the Family Court to be of enormous value. Thus the court urges those attorneys to remain on the case for purposes of appeal and to file a document, in brief form, reflecting their client's point of view.

III. Calendaring Appeals and Oral Argument

A. Calendaring Family Court Appeals

Most perfected appeals appear on the court's day calendar, which is called in the courtroom in the courthouse in Brooklyn at 10 AM on Monday, Tuesday, Thursday and Friday. The court occasionally schedules sittings in White Plains, Mineola, and Central Islip.

1. *How expeditiously will my appeal be calendared?*

In the case of Family Court appeals, as soon as the case manager certifies that the court has all that it needs to decide the appeal, the briefs and supporting documentation are sent to the Chief Court Attorney, who places the appeal on a calendar, usually for a day approximately four to six weeks after the date that he received the case, and assigns it to a court attorney to be worked on. It is not uncommon for a calendar date to be set before the last brief is received. Thus, it is very important that you notify the court of any impediments to calendaring immediately upon learning of them.

2. *Notification of calendar date*

The only official notification of the date on which an appeal will be heard is provided by publication of the court's calendar in the *New York Law Journal.* Publication usually begins about three to four weeks in advance. Attorneys may provide a stamped, self-addressed postcard bearing the title of the case and its Appellate Division docket number to the calendar clerk who will note the calendar date upon it and place it in the mail as soon as the matter is calendared. Such postcard notification is unofficial and the court assumes no responsibility that the card will not miscarry in the mail. Additionally, the calendars of the court may be found on our website (www.nycourts.gov/courts/ad2/calendar). Of course, you may call the court at any time to see if an appeal has been calendared. Such inquiries should be directed to the office of the calendar clerk.

B. Oral Argument

The rules relating to oral argument are found at 22 NYCRR 670.20**.** Please consult them regarding, among other things, whether oral argument is permitted on the issues raised on your appeal and how much time is allowed for oral argument.

1. *Requests for argument*

As previously indicated, requests for oral argument must appear on the upper right hand corner of your brief. Your request should indicate the amount of time requested and the name of the attorney who will be arguing. If no request is made, or if no particular amount of time is indicated, the case will be deemed submitted (22 NYCRR 670.20[f]). If you have inadvertently neglected to request argument time, or if the appeal is one on which argument is generally not permitted, you may make an application for permission to argue at the call of the calendar. However, notice of the intention to make such an application must be given to the court and to the other parties at least seven days before the appeal appears on the calendar (22 NYCRR 670.20[c]). A party who has requested argument time but subsequently decides to submit the appeal without argument does not need to appear on the day of oral argument. A party who has not filed a brief on appeal may not orally argue (22 NYCRR 670.20 [e]).

2. *Adjournments*

In general, the Second Department is reluctant to adjourn an appeal once the calendar date has been set. The court works in advance of the calendar, and the bench has expended substantial time and effort prior to the calendar date. Additionally, it is the Second Department's procedure that an adjourned case will be calendared at a later date with the same bench. Since the Second Department is not a resident court, and the only day that the same bench may convene is on a Wednesday. Thus, we must keep the rescheduling of cases to a minimum. The court is even more reluctant to

adjourn the calendaring of a Family Court appeal, as its calendaring is expedited. Therefore, it is imperative that you advise the court well in advance of any days that you will not be able to attend oral argument**.** Adjournments in these cases should not be requested unless something serious and unanticipated has arisen which makes it impossible for you or anyone on your behalf to argue the appeal.

3. *Lateness*

On the day set for argument it sometimes occurs that an attorney is delayed in traffic and is unable to reach the courthouse by the time of the calendar call. Where that happens, the attorney should call the courthouse prior to 10 A.M. and ask to speak to a deputy clerk. The deputy clerk will advise the Justices and the adversary that the attorney is delayed and wishes to argue. Attorneys may not merely show up late for argument. The matter will have been marked submitted and argument will not be permitted.

C. Decisions

Generally a decision is handed down by the court four to six weeks after the calendar date. In the case of Family Court appeals, decisions, like every other part of the process, are expedited. The decision will be mailed to you if you provide the court with a self-addressed, stamped envelope. Additionally, court's motion and appeal decisions are posted on the New York State Reporter's website (http://www.nycourts.gov/slipidx/aidxtable2.htm).

Additional Duties of Counsel
Upon the Determination
of an Appeal

Additional Duties of Counsel upon the Determination of an Appeal

I. In General

At present, there is no statute and there are no rules governing the duties of assigned counsel upon the determination of an appeal to the Appellate Division of an order of the Family Court. However, counsel would be well advised to adopt certain practices to inform his or her client of the outcome of the appeal, and the further proceedings that may be possible.

Client Notification: In all cases, counsel should notify the client of the determination of the Appellate Court, provide the client with a copy of the court's decision, and explain its effect on the Family Court proceeding. Counsel should then explain to his or her client, in writing, the possibility of further appeal, if any, what the process of the appeal or application for leave to appeal would entail, assess the potential issues that might be raised, and seek to know the client's wishes.

II. Counsel for the Unsuccessful Party in the Appellate Division:

In addition to advising his or her client of the Appellate Division determination and its consequences, counsel for the unsuccessful party to an appeal in the Appellate Division should advise the client as to the possibility of any further appeal. The Court of Appeals is a court of limited jurisdiction. Only a limited number of orders of the Appellate Division are appealable to that court as a matter of right. In the majority of cases, leave to appeal must first be obtained, and even then, the issues that may be raised in that court are constrained by its limited powers of review. Certain determinations will not be subject to review by that court at all.

A. Appeal to the Court of Appeals as of Right

1. CPLR 5601

CPLR 5601 lists those orders that may be appealed to the Court of Appeals as of right. The most common are:

a.. Where the order of the Appellate Division finally determines the action and contains a dissent by at least two Justices on a question of law in favor of counsel's client (CPLR 5601[a]);

b. Where the order of the Appellate Division which finally determines the action directly involves the construction of the Constitution, of the State or of the United States (CPLR 5601[b]); and

c. Where the order of the Appellate Division grants or affirms the granting of a

new trial or hearing, and the appellant stipulates that, upon affirmance, judgment absolute may be entered against him or her (CPLR 5601[c]).

2. Time Within Which to Seek Leave to Appeal

A motion for leave to appeal to the Court of Appeals must be made within 30 days after service of the order upon the unsuccessful party with notice of its entry (CPLR 5613[b]).

If a motion for leave to appeal to the Court of Appeals is made to the Appellate Division and is denied, a motion addressed to the Court of Appeals must be made within 30 days after service upon the unsuccessful party of the order of the Appellate Division denying leave, with notice of its entry (CPLR 5513[b]).

III. Counsel for the Successful Party in the Appellate Division

Upon learning of a favorable decision on an appeal to the Appellate Division, counsel for the successful party should:

A. Send a letter informing his or her client of the favorable decision, and enclose a copy of it. The letter should note that an opponent may seek to appeal the decision to the Court of Appeals; and

B. Serve a copy of the Appellate Division decision and order with notice of its entry upon the other parties to the appeal.

Upon receiving information that one or more of the unsuccessful parties is appealing the Appellate Division order as a matter of right, or has moved for leave to appeal, counsel should notify his or her client, in writing:

A. That a notice of appeal to the Court of Appeals has been filed, or a leave application has been made;

B. That the client has the right to retain counsel to defend the appeal or respond to the motion, or to proceed pro se; and

C. That the client, if indigent, may make an application to either the Appellate Division or the Court of Appeals for the assignment of counsel to represent him or her on the appeal to the Court of Appeals. Upon timely written notice that the client wishes such an application to be made, counsel should make the application on his or her behalf.

RELEVANT RULES OF COURT

RELEVANT RULES OF COURT

BACK TO TOC

Rules of the Chief Judge
22 NYCRR § 130-1.1-a. Signing of Papers

(a) Signature. Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

(b) Certification. By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

(1) the presentation of the paper or the contentions therein are not frivolous as defined in section **130**-1.1(c) of this Subpart, and;

(2) where the paper is an initiating pleading:

(i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom, and

(ii) the matter was not obtained in violation of 22 NYCRR 1200.41-A [DR 7-111].

Uniform Rules of the Trial Court
22 NYCRR § 202.48. Submission of Orders, Judgments and Decrees for Signature

(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.

(b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown.

(c) (1) When settlement of an order or judgment is directed by the court, a copy of the proposed order or judgment with notice of settlement, returnable at the office of the clerk of the court in which the order or judgment was granted, or before the judge if the court has so directed or if the clerk is unavailable, shall be served on all parties either:

(i) by personal service not less than five days before the date of settlement; or

(ii) by mail not less than 10 days before the date of settlement.

(2) Proposed counter-orders or judgments shall be made returnable on the same date and at the same place, and shall be served on all parties by personal service, not less than two days, or by mail, not less than seven days, before the date of settlement. Any proposed counter-order or judgment shall be submitted with a copy clearly marked to delineate each proposed change to the order or judgment to which objection is made.

22 NYCRR § 205.5. Privacy of Family Court Records

Subject to limitations and procedures set by statute and case law, the following shall be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, subject to the provisions of CPLR 8002, transcribed minutes of any hearing held in the proceeding:

(a) the petitioner, presentment agency and adult respondent in the Family Court proceeding and their attorneys;

(b) when a child is either a party to, or the child's custody may be affected by, the proceeding:

(1) the parents or persons legally responsible for the care of that child and their attorneys;

(2) the guardian, guardian ad litem and law guardian or attorney for that child;

(3) an authorized representative of the child protective agency involved in the proceeding or the probation service;

(4) an agency to which custody has been granted by an order of the Family Court and its attorney; and

(5) an authorized employee or volunteer of a Court Appointed Special Advocate program appointed by the Family Court to assist in the child's case in accordance with Part ~~44~~ of the Rules of the Chief Judge.

(c) a representative of the State Commission on Judicial Conduct, upon application to the appropriate Deputy Chief Administrator, or his or her designee, containing an affirmation that the commission is inquiring into a complaint under article 2-A of the Judiciary Law, and that the inquiry is subject to the confidentiality provisions of said article;

(d) in proceedings under articles 4, 5, 6 and 8 of the Family Court Act in which temporary

or final orders of protection have been issued:

(1) where a related criminal action may, but has not yet been commenced, a prosecutor upon affirmation that such records are necessary to conduct an investigation of prosecution; and

(2) where a related criminal action has been commenced, a prosecutor or defense attorney in accordance with procedures set forth in the Criminal Procedure Law provided, however, that prosecutors may request transcripts of Family Court proceedings in accordance with section 815 of the Family Court Act, and provided further that any records or information disclosed pursuant to this subdivision must be retained as confidential and may not be redisclosed except as necessary for such investigation or use in the criminal action; and

(e) another court when necessary for a pending proceeding involving one or more parties or children who are or were the parties in, or subjects of, a proceeding in the Family Court pursuant to article 4, 5, 6, 8 or 10 of the Family Court Act. Only certified copies of pleadings and orders in, as well as information regarding the status of, such Family Court proceeding may be transmitted without court order pursuant to this section. Any information or records disclosed pursuant to this subdivision may not be redisclosed except as necessary to the pending proceeding.

Where the Family Court has authorized that the address of a party or child be kept confidential in accordance with Family Court Act, section 154-b(2), any record or document disclosed pursuant to this section shall have such address redacted or otherwise safeguarded.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

22 NYCRR § 670.2. General Provisions and Definitions

(a) Unless the context requires otherwise, as used in this Part:

(1) The word cause includes an appeal, a special proceeding transferred to this court pursuant to CPLR 7804(g), a special proceeding initiated in this court, and an action submitted to this court pursuant to CPLR 3222 on a case containing the agreed statement of facts upon which the controversy depends.

(2) Any reference to the court means this court; any reference to a justice means a justice of this court; any reference to the clerk means the clerk of this court.

(3) Wherever reference is made to a judgment, order, or determination it shall also be deemed to include a sentence.

(4) The word perfection refers to the requirements for placing a cause on the court's calendar, e.g., the filing of a record and brief.

(5) The word consolidation refers to combining two or more causes arising out of the same action or proceeding in one record and one brief.

(6) The word concurrent, when used to describe appeals, is intended to refer to those appeals which have been taken separately from the same order or judgment by parties whose interests are not adverse to one another. The term cross appeal refers to an appeal taken by a party whose interests are adverse to a party who previously appealed from the same order or judgment.

(b) Unless the context requires otherwise, if a period of time prescribed by this Part for the performance of an act ends on a Saturday, Sunday or holiday, the act will be deemed timely if performed before 5 p.m. on the next business day.

(c) If a period of time prescribed by this Part is measured from the service of a record, brief, or other paper and service is by mail, five days shall be added to the prescribed period. If service is by overnight delivery, one day shall be added to the prescribed period.

(d) All records on appeal, briefs, appendices, motions, affirmations, and other papers will be deemed filed in this court only as of the time they are actually received by the clerk and they shall be accompanied by proof of service upon all necessary parties pursuant to CPLR 2103.

(e) An Appellate Division docket number will be assigned to every cause. All papers and correspondence thereafter filed shall prominently display the docket number or numbers in the upper right-hand corner of the first page opposite the title of the action or proceeding. In the event of concurrent and/or cross appeals from a judgment or order, all parties shall use the docket number first assigned to the appeal from that judgment or order.

(f) In any civil cause, and in any criminal cause where the defendant appears by retained counsel, the clerk will send to the party a copy of the decision on an appeal or a motion, if the party provides the clerk with a self- addressed, stamped envelope.

(g) If a cause or the underlying action or proceeding is wholly or partially settled or if any issues are wholly or partially rendered moot, or if any cause should not be calendared because of bankruptcy or death of a party, inability of counsel to appear, an order of rehabilitation, or for some other reason, the parties or their counsel shall immediately notify the court. Any attorney or party who, without good cause shown, fails to comply with the requirements of this subdivision shall be subject to the imposition of such costs and/or sanctions as the court may direct.

(h) Any attorney or party to a civil cause who, in the prosecution or defense thereof, engages in frivolous conduct as the term is defined in section 130- 1.1(c) of this Title, shall be subject to the imposition of such costs and/or sanctions authorized by Subpart 130-1 of this Title as the court may direct.

(i) The original of every paper submitted for filing in the office of the clerk of this court shall be signed in ink in accordance with the provisions of section 130-1.1-a(a) of this Title. Copies of the signed original shall be served upon all opposing parties and shall be filed in the office of the clerk whenever multiple

copies of a paper are required to be served and filed by this Part.

(j) Pursuant to CPLR 5525(a), in all causes the petitioner or appellant may request that the court reporter or stenographer prepare only one copy of the transcript of the stenographic record of the proceedings. When the appendix method or original record method of prosecuting an appeal is being used, the copy prepared by the court reporter, or one of equal quality, shall be filed in the office of the clerk of the court in which the action or proceeding was commenced, prior to the issuance of a subpoena for the original papers as required by section 670.9(b)(1) or (d)(2) of this Part.

22 NYCRR § 670.3. Filing of Notice of Appeal, Request for Appellate Division Intervention, Order of Transfer

(a) Where an appeal is taken in a civil action or proceeding, the notice of appeal, or the order of the court of original instance granting permission to appeal, shall be filed by the appellant in the office in which the judgment or order of the court of original instance filed. Two additional copies of the notice of appeal or order granting permission to appeal shall be filed by the appellant, to each of which shall be affixed a completed Request for Appellate Division Intervention--Civil (Form A), a copy of the order of judgment appealed from, and a copy of the opinion or decision, if any. In the event that the notice of appeal covers two or more judgments or orders, the appellant shall also complete and affix to each Form A an Additional Appeal Information form (Form B) describing the additional judgments or orders appealed from, and affix copies of the judgments or orders and the opinions or decisions upon which they were based, if any. Thereupon, the clerk of the court of original instance shall endorse the filing date upon such instruments and transmit the two additional copies to the clerk of this court.

(b) Where an appeal is taken in a criminal action, the notice of appeal shall be filed by the appellant in duplicate in the office in which the judgment or order of the court of original instance filed. Thereupon the clerk of the court of original instance shall endorse the filing date upon such instruments, shall execute a Request for Appellate Division Intervention-- Criminal (Form D) and shall transmit it together with the duplicate notice of appeal to the clerk of this court.

(c) In any case in which an order is made transferring a proceeding to this court, the petitioner shall file forthwith in the office of the clerk of this court two copies of such order, to each of which shall be affixed a copy of a Request for Appellate Division Intervention--Civil (Form A) and a copy of any opinion or decision by the transferring court.

(d) A Request for Appellate Division Intervention--Attorney Matters (Form E) shall be filed in connection with attorney disciplinary proceedings instituted in this court and applications made to this court pursuant to sections 690.17 and 690.19 of the rules of this court.

(e) In all other actions or proceedings instituted in this court, and applications pursuant to CPLR 5704, a Request for Appellate Division Intervention--Civil (Form A) shall be filed.

22 NYCRR § 670.4. Management of Causes

(a) Active Management.

(1) The court may, in the exercise of discretion, direct that the prosecution of any cause or class of causes be actively managed.

(2) The clerk shall issue a scheduling order or orders directing the parties to a cause assigned to the active management program to take specified action to expedite the prosecution thereof, including but not limited to the ordering of the transcript of the proceedings and the filing of proof of payment therefor, the making of motions, the perfection of the cause, and the filing of briefs. Notwithstanding any of the time limitations set forth in this part, a scheduling order shall set forth the date or dates on or before which such specified action shall be taken.

(3) If any party shall establish good cause why there cannot be compliance with the provisions of a scheduling order, the clerk may amend the same consistent with the objective of insuring expedited prosecution of the cause. An application to amend a scheduling order shall be made by letter, addressed to the clerk, with a copy to the other parties to the cause. The determination of the clerk in amending or declining to amend a scheduling order shall be reviewable by motion to the court on notice pursuant to section 670.5 of this Part.

(4) No filing directed by a scheduling order shall be permitted after the time to do so has expired unless the order is amended in accordance with paragraph (3) of subdivision (a) of this section.

(5) Upon the default of any party in complying with the provisions of a scheduling order, the clerk shall issue an order to show cause, on seven days notice, why the cause should not be dismissed or such other sanction be imposed as the court may deem appropriate.

(b) Civil Appeals Management Program.

(1) The court, in those cases in which it deems it appropriate, will issue a notice directing the attorneys for the parties and/or the parties themselves to attend a pre-argument conference before a designated Justice of this court or such other person as it may designate, to consider the possibility of settlement, the limitation of the issues, and any other matters which the designated Justice or other person determines may aid in the disposition of the appeal or proceeding.

(2) Any attorney or party who, without good cause shown, fails to appear for a regularly

scheduled pre-argument conference, or who fails to comply with the terms of a stipulation or order entered following a pre-argument conference, shall be subject to the imposition of such costs and/or sanctions as the court may direct.

22 NYCRR § 670.5. Motions and Proceedings Initiated in this Court–Generally

(a) Unless otherwise required by statute, rule or order of the court or any justice, every motion and every proceeding initiated by this court shall be made returnable at 9:30 a.m. on any Friday. Cross motions shall be made returnable on the same day as the original motion and shall be served and filed at least three days before the return date. Motions shall be on notice prescribed by CPLR 2214 and CPLR article 78 proceeding shall be on notice prescribed by CPLR 7804(c).

(b) All motions and proceedings initiated by notice of motion or notice of petition, shall be filed with the clerk at least one week before the return date. All papers in opposition shall be filed with the clerk before 4 p.m. of the business day preceding the return date. All papers in opposition to any motion or proceeding initiated in this court by an order to show cause shall be filed with the clerk on or before 9:30 a.m. of the return date, and shall be served by a method calculated to place the movant and other parties to the motion in receipt thereof on or before that time. The originals of all such papers shall be filed. On the return date the motion or proceeding will be deemed submitted to the court without oral argument. Counsel will not be required to attend and a note of issue need not be filed.

(c) Every notice, petition or order to show cause instituting a motion or proceeding must state, inter alia:

(1) the nature of the motion or proceeding;

(2) the specific relief sought;

(3) the return date; and

(4) the names, addresses and telephone numbers of the attorneys and counsel for all parties in support of and in opposition to the motion or proceeding.

(d) The papers in support of every motion or proceeding must contain a copy of:

(1) the order, judgment or determination sought to be reviewed and the decision, if any; and

(2) the notice of appeal or other paper which first invoked the jurisdiction of this court.

(e) Except as hereinafter provided, when an order to show cause presented for signature makes provision for a temporary stay or other interim relief pending determination of the motion, or when an application is presented pursuant to CPLR 5704, the party seeking such relief must give reasonable notice

to his or her adversary of the day and time when, and the location where, the order to show cause or CPLR 5704 application will be presented and the relief being requested. If notice has been given, the order to show cause or the application pursuant to CPLR 5704 must be accompanied by an affidavit or affirmation stating the time, place, by whom given, the manner of such notification, and to the extent known, the position taken by the opposing party. If notice has not been given, the affidavit or affirmation shall state whether the applicant has made an attempt to give notice and the reasons for the lack of success. If the applicant is unwilling to give notice, the affidavit or affirmation shall state the reasons for such unwillingness. An order to show cause providing for a temporary stay or other interim relief or an application pursuant to CPLR 5704 must be personally presented for signature by the party's attorney or by the party if such party is proceeding pro se.

(f) The clerk may reject papers or deem a motion or proceeding to be withdrawn or abandoned for the failure to comply with any of these rules.

22 NYCRR § 670.6. Motions–Reargue; Resettle; Amend; Leave to Appeal; Admission Pro Hac Vice

(a) Motions to reargue, resettle or amend. Motions to reargue a cause or motion, or to resettle or amend a decision and order, shall be made within 30 days after service of a copy of the decision and order determining the cause or motion, with notice of its entry, except that for good cause shown, the court may consider any such motion when made at a later date. The papers in support of every such motion shall concisely state the points claimed to have been overlooked or misapprehended by the court, with appropriate references to the particular portions of the record or briefs and with citation of the authorities relied upon. A copy of the order shall be attached.

(b) Motions for leave to appeal to Appellate Division.

(1) Motions for leave to appeal to the Appellate Division pursuant to CPLR 5701(c) and Family Court Act, §1112 shall be addressed to the court and shall contain a copy of the order or judgment and the decision of the lower court.

(2) Motions for leave to appeal from an order of the Appellate Term shall contain a copy of the opinions, decisions, judgments and orders of the lower courts, including: a copy of the Appellate Term order denying leave to appeal; a copy of the record in the Appellate Term if such record shall have been printed or otherwise reproduced; and a concise statement of the grounds of alleged error. If the application is to review an Appellate Term order which either granted a new trial or affirmed the trial court's order granting a new trial, the papers must also contain the applicant's stipulation consenting to the entry of judgment absolute against him or her in the event that this court should affirm the order appealed from.

(c) Motions for leave to appeal to the Court of Appeals 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 or of any separable portion within it. A copy of this court's order shall be attached.

(d) Motions for leave to appeal to the Court of Appeals pursuant to CPL 460.20 shall be made to any justice who was a member of the panel which decided the matter. A copy of this court's order shall be attached.

(e) Motions for admission pro hac vice. An attorney and counselor-at-law or the equivalent may move for permission to appear pro hac vice with respect to a cause pending before this court pursuant to section 520.11(a)(1) of this Title. An affidavit in support of the motion shall state that the attorney and counselor-at-law is a member in good standing in all the jurisdictions in which he or she is admitted to practice and is associated with a member in good standing of the New York Bar, which member shall appear with him or her on the appeal or proceeding and shall be the person upon whom all papers in connection with the cause shall be served. Attached to the affidavit shall be a certificate of good standing from the bar of the state in which the attorney and counselor-at-law maintains his or her principal office for the practice of law.

22 NYCRR § 670.7. Calendar; Preferences; Consolidation

(a) There shall be a general calendar for appeals. Appeals will be placed on the general calendar in the order perfected and, subject to the discretion of the court, will be heard in order.

(b) Preferences.

(1) Any party to an appeal entitled by law to a preference in the hearing of the appeal may serve and file a demand for a preference which shall set forth the provision of law relied upon for such preference and good cause for such preference. If the demand is sustained by the court, the appeal shall be preferred.

(2) A preference under CPLR 5521 may be obtained upon good cause shown by a motion directed to the court on notice to the other parties to the appeal.

(c) Consolidation.

(1) A party may consolidate appeals from civil orders and/or judgments arising out of the same action or proceeding provided that each appeal is perfected timely pursuant to section 670.8(e)(1) of this Part; and

(2) Appeals from orders or judgments in separate actions or proceedings cannot be consolidated but may, upon written request of a party, be scheduled by the court to be heard together on the same day.

22 NYCRR § 670.8. Placing Civil or Criminal Causes on Calendar; Time Limits for Filing

(a) Placing cause on general calendar. An appeal may be placed on the general calendar by filing with the clerk the record on appeal pursuant to one of the methods set forth in section 670.9 of this Part by filing nine copies of a brief, with proof of service of two copies upon each of the other parties. Unless the court shall otherwise direct, when an appeal is prosecuted upon the original record, only one copy of the brief need by served. An extra copy of the statement required by CPLR 5531 shall be filed together with the record or appendix. If an appeal is taken on the original record, the extra copy of the statement shall be filed with the appellant's brief.

(b) Answering and reply briefs. Not more than 30 days after service of the appellant's brief, each respondent or opposing party shall file nine copies of the answering brief with proof of service of two copies upon each of the other parties. Not more than 10 days after service of respondent's brief, the appellant may file nine copies of a reply brief with proof of service of two copies upon each of the other parties. If one copy of the appellant's brief was served, only one copy of answering and reply briefs need be served.

(c) Concurrent and cross appeals.

(1) Unless otherwise ordered by the court, all parties appealing from the same order or judgment shall consult and thereafter file a joint record or joint appendix which shall include copies of all notices of appeal. The cost of the joint record or the joint appendix, and the transcript, if any, shall be borne equally by the appealing parties.

(2) The joint record or joint appendix and the briefs of concurrent appellants shall be served and filed together. The time to do so in accordance with subdivision (e) of this section shall be measured from the latest date on the several concurrent notices of appeal.

(3) The answering brief on a cross appeal shall be served and filed not more than 30 days after service of the appellant's brief or briefs and the joint record or joint appendix, and it shall include the points of argument on the cross appeal. An appellant's reply brief may be served and filed not more than 30 days after service of the answering brief. A cross appellant's reply brief may be served and filed not more than 10 days after service of the appellant's reply brief.

(d) Enlargements of time. Except where a scheduling order has been issued pursuant to section 670.4(a)(2) of this Part or where the court has directed that a cause be perfected or that a brief be served and filed by a date certain, an enlargement of time to perfect or to serve and file a brief may be obtained as follows:

(1) By stipulation. The parties may stipulate to enlarge the time to perfect a cause by up to 60 days, to file an answering brief by up to 30 days, and to file a reply brief by up to 10 days. Not more than one such stipulation per perfection or filing shall be permitted. Such a stipulation shall not be effective unless so ordered by the clerk.

(2) For cause. Where a party shall establish a reasonable ground why there cannot or could not be compliance with the time limits prescribed by this section, or such time limits as extended by stipulation pursuant to paragraph (1) of this subdivision, the clerk or a justice

may grant reasonable enlargements of time to comply. An application pursuant to this paragraph shall be made by letter, addressed to the clerk, with a copy to the other parties to the cause. Orders made pursuant to this paragraph shall be reviewable by motion to the court on notice pursuant to section 670.5 of this Part.

(e) Notwithstanding any of the provisions of this Part, a civil appeal, action, or proceeding shall be deemed abandoned unless perfected:

(1) within six months after the date of the notice of appeal, order granting leave to appeal, or order transferring the proceeding to this court; or

(2) within six months of the filing of the submission with the county clerk in an action submitted facts pursuant to CPLR 3222, unless the time to perfect shall have been extended pursuant to subdivision (d) of this section. The clerk shall not accept any record or brief for filing after the expiration of such six-month period or such period as extended.

(f) Notwithstanding any of the provisions of this Part, an unperfected criminal appeal by a defendant shall be deemed abandoned in all cases where no application has been made by the defendant for the assignment of counsel to prosecute the appeal within nine months of the date of the notice of appeal unless the time to perfect shall have been extended pursuant to subdivision (d) of this section.

(g) Notwithstanding any of the provisions of this Part, an appeal by the People pursuant to CPL 450.20(1), (1-a) or (8) shall be deemed abandoned unless perfected within three months after the date of the notice of appeal unless the time to perfect shall have been extended pursuant to subdivision (d) of this section. All other appeals by the People shall be deemed abandoned unless perfected within six months after the date of the notice of appeal unless the time to perfect shall have been extended pursuant to subdivision (d) of this section.

(h) The clerk shall periodically prepare a calendar of all civil causes which have been ordered to be perfected by a date certain and which have not been perfected and a calendar of all civil causes which have been assigned an Appellate Division docket number and have not been perfected within the time limitations set forth in subdivision (e) of this section. Such calendars shall be published in the New York Law Journal for five consecutive days. Upon the failure of the appellant to make an application to enlarge time to perfect within 10 days following the last day of publication, an order shall be entered dismissing the cause.

22 NYCRR § 670.9. Alternate Methods of Prosecuting Appeals

An appellant may elect to prosecute an appeal upon a reproduced full record (CPLR 5528[a][5]); by the appendix method (CPLR 5528[a][5]), upon an agreed statement in lieu of record (CPLR 5527); or, where authorized by statute or this Part or order of the court, upon a record consisting of the original papers.

(a) Reproduced full record. If the appellant elects to proceed on a reproduced full record on appeal as authorized by CPLR 5528(a)(5), the record shall be printed or otherwise reproduced as provided in sections 670.10-a and 670.10-b of this Part. Nine copies of the record, one of which shall be marked "original," duly certified as provided in section 670.10-b(f) of this Part, shall be filed with proof of service of two copies upon each of the other parties.

(b) Appendix method.

(1) If the appellant elects to proceed by the appendix method, the appellant shall subpoena from the clerk of the court from which the appeal is taken all the papers constituting the record on appeal and cause them to be filed with the clerk of this court prior to the filing of the appendix.

(2) The clerk from whom the papers are subpoenaed shall compile the original papers constituting the record on appeal and transmit them to the clerk of this court, together with a certificate listing the papers constituting the record on appeal and stating whether all such papers are included in the papers transmitted.

(3) If a settled transcript of the stenographic minutes, or an approved statement in lieu of such transcript, or any relevant exhibit is not included in the papers so filed with the clerk of this court, the appellant shall cause such transcript, statement or exhibit to be filed together with the brief.

(4) The appendix shall be printed or otherwise reproduced as provided in sections 670.10-a and 670.10-b of this Part and may be bound with the brief or separately. Nine copies of the appendix, one of which shall be marked "original," duly certified as provided in section 670.10-b(f) of this Part shall be filed with proof of service of two copies upon each of the other parties.

(c) Agreed statement in lieu of record method. If the appellant elects to proceed by the agreed statement method in lieu of record (CPLR 5527), the statement shall be reproduced as provided in sections 670.10-a and 670.10-b of this Part as a joint appendix. The statement required by CPLR 5531 shall be appended. Nine copies of the statement shall be filed with proof of service of two copies upon each of the other parties.

(d) Original record.

(1) The following appeals may be prosecuted upon the original record, including a properly settled transcript of the trial or hearing, if any:

(i) appeals from the Appellate Term;

(ii) appeals from the Family Court;

(iii) appeals under the Election Law;

(iv) appeals under the Human Rights Law (Executive Law, §298);

(v) appeals where the sole issue is compensation of a judicial appointee;

(vi) other appeals where an original record is authorized by statute;

(vii) appeals where permission to proceed upon the original record has been authorized by order of this court;

(viii) appeals in criminal causes; and

(ix) appeals under Correction Law, §§168-d(3) and 168-n(3).

(2) When an appeal is prosecuted upon the original record the appellant shall subpoena from the clerk of the court from which the appeal is taken all the papers constituting the record on appeal and cause them to be filed with the clerk of this court prior to the filing of the briefs.

22 NYCRR § 670.10.1 Form and Content of Records, Appendices, and Briefs-- Generally

(a) Compliance with Civil Practice Law and Rules. Briefs, appendices and to the extent practicable, reproduced full records, shall comply with the requirements of CPLR 5528 and 5529 and reproduced full records shall, in addition, comply with the requirements of CPLR 5526.

(b) Method of Reproduction. Briefs, records, and appendices shall be reproduced by any method that produces a permanent, legible, black image on white paper. To the extent practicable, reproduction on both sides of the paper is encouraged.

(c) Paper Quality, Size, and Binding. Paper shall be of a quality approved by the chief administrator of the courts and shall be opaque, unglazed, white in color, and measure 11 inches along the bound edge by 81/2 inches. Records, appendices, and briefs shall be bound on the left side in a manner that shall keep all the pages securely together; however, binding by use of any metal fastener or similar hard material that protrudes or presents a bulky surface or sharp edge is prohibited. Records and appendices shall be divided into volumes not to exceed two inches in thickness.

(d) Designation of Parties. The parties to all appeals shall be designated in the record and briefs by adding the word "Appellant," "Respondent," etc., as the case may be, following the party's name, e.g., "Plaintiff-Respondent," "Defendant-Appellant," "Petitioner-Appellant," "Respondent-Respondent," etc. Parties who have not appealed and against whom the appeal has not been taken, shall be listed separately and designated as they were in the trial court, e.g., "Plaintiff," "Defendant," "Petitioner," "Respondent." In appeals from the Surrogate's Court or from judgments on trust accountings, the caption shall contain the title used in the trial court including the name of the decedent or grantor, followed by a listing of all parties to the appeal, properly designated. In proceedings and actions originating in this court, the parties shall be designated "Petitioner" and "Respondent" or "Plaintiff" and "Defendant."

(e) Docket Number. The cover of all records, briefs, and appendices shall display the appellate division docket number assigned to the cause in the upper right-hand portion opposite the title.

(f) Rejection of Papers. The clerk may refuse to accept for filing any paper that does not comply with these rules, is not legible, or is otherwise unsuitable.

§ 670.10.2 Form and Content of Records and Appendices

(a) Format. Records and appendices shall contain accurate reproductions of the papers submitted to

the court of original instance, formatted in accordance with the practice in that court, except as otherwise provided in subdivision (d) of this section. Reproductions may be slightly reduced in size to fit the page and to accommodate the page headings required by CPLR 5529(c), provided, however, that such reduction does not significantly impair readability.

(b) Reproduced Full Record. The reproduced full record shall be bound separately from the brief, shall contain the items set forth in CPLR 5526, and shall contain in the following order so much of the following items as shall be applicable to the particular cause:

(1) A cover which shall contain the title of the action or proceeding on the upper portion and, on the lower portion, the names, addresses, and telephone numbers of the attorneys, the county clerk's index or file number, and the indictment number;

(2) The statement required by CPLR 5531;

(3) A table of contents which shall list and briefly describe each paper included in the record. The part of the table relating to the transcript of testimony shall separately list each witness and the page at which direct, cross, redirect and recross examinations begin. The part of the table relating to exhibits shall concisely indicate the nature or contents of each exhibit and the page in the record where it is reproduced and where it is admitted into evidence. The table shall also contain references to pages where a motion to dismiss the complaint or to direct or set aside a verdict or where an oral decision of the court appears;

(4) The notice of appeal or order of transfer, judgment or order appealed from, judgment roll, corrected transcript or statement in lieu thereof, relevant exhibits and any opinion or decision in the cause;

(5) An affirmation, stipulation or order, settling the transcript pursuant to CPLR 5525;

(6) A stipulation or order dispensing with reproducing exhibits.

(i) Exhibits which are relevant to a cause may be omitted upon a stipulation of the parties which shall contain a list of the exhibits omitted and a brief description of each exhibit or, if a party unreasonably refuses to so stipulate, upon motion directed to the court. Exhibits thus omitted, unless of a bulky or dangerous nature, shall be filed with the clerk at the same time that the appellant's brief is filed. Exhibits of a bulky or dangerous nature (cartons, file drawers, ledgers, machinery, narcotics, weapons, etc.) thus omitted need not be filed but shall be kept in readiness and delivered to the court on telephone notice. A letter, indicating that a copy has been sent to the adversary, listing such exhibits and stating that they will be available on telephone notice, shall be filed with the clerk at the same time that the appellant's brief is filed.

(ii) Exhibits which are not relevant to a cause may be omitted upon stipulation of the parties which shall contain a list of the exhibits omitted, a brief description of each exhibit, and a statement that the exhibits will not be relied upon or cited in the briefs of the parties. If a party unreasonably refuses to so stipulate, a motion to omit the exhibits may be directed to the court. Such exhibits need not be filed; and

(7) The appropriate certification or stipulation pursuant to subdivision (f) of this section.

(c) Appendix.

(1) The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent including, where applicable, at least the following:

(i) notice of appeal or order of transfer;

(ii) judgment, decree, or order appealed from;

(iii) decision and opinion of the court or agency, and report of a referee, if any;

(iv) pleadings, if their sufficiency, content or form is in issue or material; in a criminal case, the indictment, or superior court information;

(v) material excerpts from transcripts of testimony or from papers in connection with a motion. Such excerpts must contain all the testimony or averments upon which the appellant relies and upon which it may be reasonably assumed the respondent will rely. Such excerpts must not be misleading or unintelligible by reason of incompleteness or lack of surrounding context;

(vi) copies of critical exhibits, including photographs, to the extent practicable; and

(vii) The appropriate certification or stipulation pursuant to subdivision (f) of this section.

(2) If bound separately from the brief, the appendix shall have a cover complying with subdivision (b)(1) of this section and shall contain the statement required by CPLR 5531 and a table of contents.

(d) Condensed Format of Transcripts Prohibited. No record or appendix may contain a transcript of testimony given at a trial, hearing, or deposition that is reproduced in condensed format such that two or more pages of transcript in standard format appear on one page.

(e) Settlement of Transcript or Statement. Regardless of the method used to prosecute any civil cause, if the record contains a transcript of the stenographic minutes of the proceedings or a statement in lieu of such transcript, such transcript or statement must first be either stipulated as correct by the parties or their attorneys or settled pursuant to CPLR 5525.

(f) Certification of Record. A reproduced full record or appendix shall be certified either by: (1) a certificate of the appellant's attorney pursuant to CPLR 2105; (2) a certificate of the proper clerk; or (3) a stipulation in lieu of certification pursuant to CPLR 5532. The reproduced copy containing the signed certification or stipulation shall be marked "Original."

22 NYCRR § 670.10.3 Form and Content of Briefs

(a) Computer-generated briefs. Briefs prepared on a computer shall be printed in either a serifed, proportionally spaced typeface such as Times Roman, or a serifed, monospaced typeface such as Courier. Narrow or condensed typefaces and/or condensed font spacing may not be used. Except in headings,

words may not be in bold type or type consisting of all capital letters.

(1) **Briefs set in a proportionally spaced typeface.** The body of a brief utilizing a proportionally spaced typeface shall be printed in 14-point type, but footnotes may be printed in type of no less than 12 points.

(2) **Briefs set in a monospaced typeface.** The body of a brief utilizing a monospaced typeface shall be printed in 12-point type containing no more than 101/2 characters per inch, but footnotes may be printed in type of no less than 10 points.

(3) **Length.** Computer-generated appellants' and respondents' briefs shall not exceed 14,000 words, and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc.

(b) Typewritten briefs. Typewritten briefs shall be neatly prepared in clear type of no less than elite in size and in a pitch of no more than 12 characters per inch. The ribbon typescript of the brief shall be signed and filed as one of the number of copies required by section 670.8 of this Part. Typewritten appellants' and respondents' briefs shall not exceed 70 pages and reply briefs and amicus curiae briefs shall not exceed 35 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc.

(c) Margins, line spacing, and page numbering of computer-generated and typewritten briefs. Computer-generated and typewritten briefs shall have margins of one inch on all sides of the page. Text shall be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Pages shall be numbered consecutively in the center of the bottom margin of each page.

(d) Handwritten briefs. Pro se litigants may serve and file handwritten briefs. Such briefs shall be neatly prepared in cursive script or hand printing in black ink. Pages shall be numbered consecutively in the center of the bottom margin of each page. The submission of handwritten briefs is not encouraged. If illegible or unreasonably long, handwritten briefs may be rejected for filing by the clerk.

(e) Application for permission to file oversized brief. An application for permission to file an oversized brief shall be made to the clerk by letter stating the number of words or pages by which the brief exceeds the limits set forth in this section and the reasons why submission of an oversize brief is necessary. The letter shall be accompanied by a copy of the proposed brief, including a certificate if required by subdivision (f) hereof to the effect that the brief is in all other respects compliant with this section. The determination of the clerk may be reviewed by motion to the court on notice in accordance with section 670.5 of this Part.

(f) Certification of compliance. Every brief, except those that are handwritten, shall have at the end thereof a certificate of compliance with this rule, stating that the brief was prepared either on a typewriter, a computer, or by some other specified means. If the brief was typewritten, the certificate shall further specify the size and pitch of the type and the line spacing used. If the brief was prepared on a computer, the certificate shall further specify the name of the typeface, point size, line spacing, and word count. A party preparing the

certificate may rely on the word count of the processing system used to prepare the brief. The signing of the brief in accordance with section 130-1.1-a(a) of this Title shall also be deemed the signer's representation of the accuracy of the certificate of compliance.

(g) Content of Briefs.

(1) Cover. The cover shall set forth the title of the action or proceeding. The upper right hand section shall contain a notation stating; whether the cause is to be argued or submitted; if it is to be argued, the time actually required for the argument; and the name of the attorney who will argue (see § 670.20). The lower right hand section shall contain the name, address, and telephone number of the attorney filing the brief and shall indicate whom the attorney represents.

(2) Appellant's Brief. The appellant's brief shall contain, in the following order:

(i) the statement required by CPLR 5531;

(ii) a table of contents including the titles of the points urged in the brief;

(iii) a concise statement of the questions involved without names, dates, amounts, or particulars. Each question shall be numbered, set forth separately, and followed immediately by the answer, if any, of the court from which the appeal is taken;

(iv) a concise statement of the nature of the action or proceeding and of the facts which should be known to determine the questions involved, with supporting references to pages in the record or the appendix, including, if such be the case, a statement that proceedings on the judgment or order appealed from have been stayed pending a determination of the appeal;

(v) the appellant's argument, which shall be divided into points by appropriate headings distinctively printed;

(vi) if a civil cause is perfected on the original papers, the brief shall include either a copy of the order or judgment appealed from, the decision, if any, and the notice of appeal, or a copy of any order transferring the proceeding to this court;

(vii) if the appeal is from an order involving pendente lite relief in a matrimonial action, the brief shall state whether issue has been joined and, if so, the date of joinder of issue, and whether the case has been noticed for trial;

(viii) in criminal causes, the appellant's brief at the beginning shall also set forth

(A) whether an order issued pursuant to CPL 460.50 is outstanding, the date of such order, the name of the judge who issued it and whether the defendant is free on bail or on his or her own recognizance, and

(B) whether there were co-defendants in the trial court, the disposition with respect to such co-defendants, and the status of any appeals by such co-defendants; and

(ix) a certificate of compliance, if required by subdivision (f) of this section.

(3) Respondent's Brief. The respondent's brief shall contain, in the following order;

(i) a table of contents including the titles of points urged in the brief;

(ii) a counterstatement of the questions involved or of the nature and facts of the action or proceeding, if the respondent disagrees with the statement of the appellant;

(iii) the argument for the respondent, which shall be divided into points by appropriate headings distinctively printed; and

(iv) a certificate of compliance, if required by subdivision (f) of this section.

(4) Appellant's Reply Brief. The appellant's reply brief, unless otherwise ordered by the court, shall not contain an appendix, but shall contain, in the following order:

(i) a table of contents;

(ii) the reply for the appellant to the points raised by the respondent, without repetition of the arguments contained in the main brief, which shall be divided into points by appropriate headings distinctively printed; and

(iii) a certificate of compliance, if required by subdivision (f) of this section.

(h) Addenda to Briefs.

(1) Briefs may contain an addendum composed of decisions, statutes, ordinances, rules, regulations, local laws, or other similar matter, cited therein that were not published or that are not otherwise readily available.

(2) Unless otherwise authorized by order of the court, briefs may not contain maps, photographs, or other addenda.

(i) Constitutionality of State Statute. Where the constitutionality of a statute of the State is involved in an appeal in which the State is not a party, the party raising the issue shall serve a copy of the brief upon the Attorney General of the State of New York who will be permitted to intervene in the appeal.

22 NYCRR § 670.20. Oral Argument

(a) Not more than 30 minutes shall be allowed for argument to each attorney who has filed a brief on:

(1) appeals from judgments, orders or decrees made after a trial or hearing;

(2) appeals from orders of the Appellate Term; and

(3) special proceedings transferred to or instituted in this court to review administrative determinations made after a hearing.

(b) Not more than 15 minutes shall be allowed for argument to each attorney who has filed a brief on all other causes except as set forth in subdivision (c) of this section.

(c) Argument is not permitted on issues involving maintenance; spousal support; child support; counsel fees; the legality, propriety or excessiveness of sentences; determinations made pursuant to the sex offender registration act; grand jury reports; and calendar and practice matters, including but not limited to preferences, bills of particulars, correction of pleadings, examinations before trial, physical examinations, discovery of records, interrogatories, change of venue, and transfers of actions to and from the Supreme Court. Applications for permission to argue such issues shall be made at the call of the calendar on the day the cause appears on the calendar. Notice of intention to make such an application shall be given to the court and the other parties at least seven days before the cause appears on the calendar.

(d) The court, in its discretion, may deny oral argument of any cause.

(e) Where the total time requested for argument by the attorneys on each side exceeds 30 minutes on appeals under subdivision (a) of this section or 15 minutes on appeals under subdivision (b) of this section, the court may, in its discretion, reduce the argument time requested. Not more than one attorney will be heard for each brief unless, upon application made before the beginning of the argument, the court shall have granted permission to allow more than one attorney to argue. A party who has not filed a brief may not argue.

(f) In the event that any party's main brief shall fail to set forth the appropriate notations indicating that the cause is to be argued and the time required for argument (see section 670.10-c[g][1] of this Part), the cause will be deemed to have been submitted without oral argument by that party.

(g) If any party shall have filed the main brief late and such late brief be accepted, the court or any justice may deem that the party has waived oral argument and has submitted the cause without argument.

(h) A party who originally elected to argue may notify the clerk of the intention to submit the cause without argument and need not appear on the calendar call.

(i) No briefs, letters or other communications in connection with a cause will be accepted after the argument or submission of a cause unless permission is granted by the court.

22 NYCRR PART 671

ADDITIONAL DUTIES OF COUNSEL AND THE COURT CLERK IN CRIMINAL ACTIONS, IN HABEAS CORPUS AND CPLR ARTICLE 78 PROCEEDINGS, IN PROCEEDINGS INSTITUTED BY MOTION MADE PURSUANT TO CPL 440.10 OR 440.20 AND FAMILY COURT ACT PROCEEDINGS

Section 671.4. Additional Duties of Defendant's Counsel in the Appellate Division or Other Intermediate Appellate Court

(a) Immediately after entry of the order of the Appellate Division or other intermediate appellate court affirming the judgment of conviction or sentence or the order denying a motion made pursuant to CPL 440.10 or 440.20 or the order or judgment denying or dismissing a habeas corpus or CPLR Article 78 application or proceeding, it shall be the duty of the counsel for the defendant, to give, either by mail or personally, written notice to his client advising him:

> (1) of his right to make application for permission to take a further appeal or for a certificate granting leave to appeal to the Court of Appeals; and
> (2) in the event such permission is granted or such certificate is issued, of his additional right, upon proof of his financial inability to retain counsel and to pay the costs and expenses of such further appeal, to make a concurrent application to the Court of Appeals for the assignment of counsel and for leave to prosecute such further appeal as a poor person and to dispense with printing. In such notice counsel shall also request the written instructions of his client. If the client thereafter gives to counsel timely written notice of his desire to make either or both of such applications, counsel shall proceed promptly to do so.

(b) In a habeas corpus or CPLR article 78 proceeding, however, if any two judges shall have dissented from the affirmance and if the dissent is on a stated question of law in relator's or petitioner's favor, counsel in his said written notice shall advise his client of his absolute right, without permission, to take a further appeal to the Court of Appeals. Upon receiving from the client written notice of his desire to prosecute such appeal, counsel shall file and serve promptly a formal notice of appeal accordingly. Unless counsel shall have been retained to prosecute the appeal, the notice of appeal shall contain the additional statement that it is being served and filed on appellant's behalf pursuant to this rule and that it shall not be deemed counsel's appearance as appellant's attorney upon the appeal.

(c) In the event the People are the appellant and they elect to serve a copy of their notice of appeal upon the defendant pursuant to their authority to do so under CPL 460.10, subdivision 5(c), they shall also serve a copy thereof upon the attorney who appeared for the defendant in the intermediate court.

(d) If, pursuant to said CPL 460.10, subdivision 5(c), the People as appellant elect in the first instance to serve a copy of their notice of appeal on the attorney who appeared for the defendant in the intermediate appellate court, or, if they serve the attorney as required in subdivision (c) of this section, it shall be the duty of counsel for the defendant to give, either by mail or personally, written notice to his

client confirming the fact that such appeal has been taken by the People. Such notice shall also advise him of his right (1) to retain counsel to represent him as respondent on the appeal, or (2) to respond to the appeal, pro se, or (3) upon proof of his financial inability to retain counsel and to pay the costs and expenses of responding to such appeal, to apply to the Court of Appeals for the assignment of counsel, for leave to respond to the appeal as a poor person and to dispense with printing. In such notice counsel shall also request the written instructions of his client. If the client thereafter gives counsel timely written notice of his desire to make such application, counsel shall proceed promptly to do so.

(e) In the event the appeal by the People results in an order of an intermediate appellate court adverse or partially adverse to the defendant- respondent, it shall be the duty of counsel to comply with the written notice provisions of subdivision (a) of this section applicable to an affirmance on an appeal by the defendant except that the term "further appeal" in paragraphs (1) and (2) thereof shall be deemed to read "appeal."

22 NYCRR Section 671.10 Duties of Assigned Counsel in the Surrogate's Court and the Family Court

(a) Upon the entry of an order in the Surrogate's Court and Family Court from which an appeal may be taken, it shall be the duty of assigned counsel for the unsuccessful party, immediately after the entry of the order, to give either by mail or personally, written notice to the client advising of the right to appeal or to make application for permission to appeal, and request written instructions as to whether he or she desires to take an appeal or to make such application. Thereafter, if the client gives to counsel timely written notice of his or her desire to appeal or to make such application, counsel shall promptly serve and file the necessary formal notice of appeal, or make application to this court for permission to appeal. Unless counsel shall have been retained to prosecute the appeal, the notice of appeal may contain the additional statement that it is being served and filed on appellant's behalf pursuant to this rule and that it shall not be deemed to be counsel's appearance as appellant's attorney on the appeal.

(b) In counsel's written notice to the client advising of the right to appeal or to make application for permission to appeal, counsel shall also set forth:

(1) the applicable time limitations with respect to the taking of the appeal or the making of the application for permission to appeal;

(2) the manner of instituting the appeal and, if a trial or hearing was held and stenographic minutes taken, the manner of obtaining a typewritten transcript of such minutes;

(3) the client's right, upon proof of his or her financial inability to retain counsel and to pay the costs and expenses of the appeal, to make application to this court for the assignment of counsel to prosecute the appeal; and, if stenographic minutes were taken, for a direction to the clerk and the stenographer of the trial court that a typewritten transcript of such minutes be furnished without charge to assigned counsel or, if the client prosecutes the appeal *pro se*, to the client; and

(4) in such notice counsel shall also request the written instructions of his client, and if the client thereafter gives counsel timely written notice of his or her desire to make application for permission to appeal or to apply for the relief provided in paragraph (3) of this section, or to make any one or all of these applications,

counsel shall proceed promptly to do so.

(c) Counsel shall also advise the client that in those cases where permission to appeal is required, applications for the foregoing relief will be considered only if such permission is granted.

(d) If the assigned counsel represented the successful party in the court in which the order being appealed was entered, such assignment shall remain in effect and counsel shall continue to represent the successful party as the respondent on the appeal until entry of the order determining the appeal and until counsel shall have performed any additional applicable duties imposed upon him or her by these rules, or until counsel shall have been otherwise relieved of his assignment.

PART 679. FAMILY COURT LAW GUARDIAN PLAN

22 NYCRR § 679.11. Assignment of Counsel

Assignments of counsel by the Family Court, Supreme Court or Surrogate's Court to represent children in proceedings wherein compensation is paid privately by one or more of the parties, or is authorized pursuant to Judiciary Law, section 35 shall be made from the law guardian panels designated pursuant to these rules. This section shall not apply to institutional providers appointed pursuant to Family Court Act § 243(a).

ADMINISTRATIVE ORDER

DECEMBER 24, 2002

BACK TO TOC

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

ADM 2002-1224.2

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, pursuant to the authority vested in it,

DOES HEREBY, effective January 1, 2003:

1. ESTABLISH an Active Management Program for the purpose of expediting the prosecution of designated causes or classes of causes;

2. ORDER that the following classes of causes shall be actively managed:

   a) Appeals from orders of the Family Court;

   b) Appeals from orders and judgments of the Supreme Court in which an issue of the custody and/or visitation of children is raised;

   c) Appeals from orders and decrees of the Surrogate's Court concerning the termination of parental rights and/or the adoption of children;

   d) Appeals in criminal actions in which the court has assigned counsel to represent the appellant;

   e) Causes entitled to a preference by law, or to which a preference has been granted pursuant to § 670.7(b) of Part 670 of Title 22 of the New York Code of Rules and Regulations; and does further,

3. ORDER that such other individual causes as the court may specifically designate shall be actively managed.

Dated: Brooklyn, New York
December 24, 2002

A. GAIL PRUDENTI
Presiding Justice

BACK TO TOC

THE FAMILY COURT ACT

FAMILY COURT ACT

ARTICLE 1

§ 166. Privacy of Records

The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record.

FAMILY COURT ACT

ARTICLE 2

§ 249. Appointment of Law Guardian

(a) In a proceeding under article three, seven or ten of this act or where a revocation of an adoption consent is opposed under section one hundred fifteen- b of the domestic relations law or in any proceeding under section three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, three hundred eighty-four-b or three hundred ninety-two of the social services law or when a minor is sought to be placed in protective custody under section one hundred fifty-eight of this act, the family court shall appoint a law guardian to represent a minor who is the subject of the proceeding or who is sought to be placed in protective custody, if independent legal representation is not available to such minor. In any proceeding to extend or continue the placement of a juvenile delinquent or person in need of supervision pursuant to section seven hundred fifty-six or 353.3 of this act or any proceeding to extend or continue a commitment to the custody of the commissioner of mental health or the commissioner of mental retardation and developmental disabilities pursuant to section 322.2 of this act, the court shall not permit the respondent to waive the right to be represented by counsel chosen by the respondent, respondent's parent, or other person legally responsible for the respondent's care, or by a law guardian. In any other proceeding in which the court has jurisdiction, the court may appoint a law guardian to represent the child, when, in the opinion of the family court judge, such representation will serve the purposes of this act, if independent legal counsel is not available to the child. The family court on its own motion may make such appointment.

(b) In making an appointment of a law guardian pursuant to this section, the court shall, to the extent practicable and appropriate, appoint the same law guardian who has previously represented the child. Notwithstanding any other provision of law, in a proceeding under article three following an order of removal made pursuant to article seven hundred twenty-five of the criminal procedure law, the court shall, wherever practicable, appoint the counsel representing the juvenile offender in the criminal proceedings as law guardian.

§ 262. Assignment of Counsel for Indigent Persons

(a) Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the judge shall advise such person before proceeding that he has the right to be represented by counsel of his own choosing, of his right to have an adjournment to confer with counsel, and of his right to have counsel assigned by the court in any case where he is financially unable to obtain the same:

(i) the respondent in any proceeding under article ten of this act and the petitioner in any proceeding under part eight of article ten of this act;
(ii) the petitioner and the respondent in any proceeding under article eight of this act;

(iii) the respondent in any proceeding under part three of article six of this act;

(iv) the parent, foster parent, or other person having physical or legal custody of the child in any proceeding under section three hundred fifty-eight- a, three hundred eighty-four, three hundred eighty-four-b, or three hundred ninety-two of the social services law, and a non-custodial parent or grandparent served with notice pursuant to paragraph (e) of subdivision two of section three hundred eighty-four-a of the social services law;

(v) the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody;

(vi) any person in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court, except for a contempt which may be punished summarily under section seven hundred fifty-five of the judiciary law;

(vii) the parent of a child in any adoption proceeding who opposes the adoption of such child.

(viii) the respondent in any proceeding under article five of this act in relation to the establishment of paternity.

(b) **Assignment of counsel in other cases.** In addition to the cases listed in subdivision (a) of this section, a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the state of New York or of the United States, and includes such determination in the order assigning counsel;

(c) **Implementation.** Any order for the assignment of counsel issued under this part shall be implemented as provided in article eighteen-B of the county law.

§ 352.2. Order of Disposition

1. Upon the conclusion of the dispositional hearing, the court shall enter an order of disposition:

(a) conditionally discharging the respondent in accord with section 353.1; or

(b) putting the respondent on probation in accord with section 353.2; or

(c) continuing the proceeding and placing the respondent in accord with section 353.3; or

(d) placing the respondent in accord with section 353.4; or

(e) continuing the proceeding and placing the respondent under a restrictive placement in accord with section 353.5.

2. (a) In determining an appropriate order the court shall consider the needs and best interests of the respondent as well as the need for protection of the community. If the respondent has committed a designated felony act the court shall determine the appropriate disposition in accord with section 353.5. In all other cases the court shall order the least restrictive available alternative enumerated in subdivision one which is consistent with the needs and best interests of the respondent and the need for protection of the community.

(b) In an order of disposition entered pursuant to section 353.3 or 353.4 of this chapter, or where the court has determined pursuant to section 353.5 of this chapter that restrictive placement is not required, which order places the respondent with the commissioner of social services or with the office of children and family services for placement with an authorized agency or class of authorized agencies or in such facilities designated by the office of children and family services as are eligible for federal reimbursement pursuant to title IV-E of the social security act, the court in its order shall determine (i) that continuation in the respondent's home would be contrary to the best interests of the respondent; or in the case of a respondent for whom the court has determined that continuation in his or her home would not be contrary to the best interests of the respondent, that continuation in the respondent's home would be contrary to the need for protection of the community; (ii) that where appropriate, and where consistent with the need for protection of the community, reasonable efforts were made prior to the date of the dispositional hearing to prevent or eliminate the need for removal of the respondent from his or her home, or if the child was removed from his or her home prior to the dispositional hearing, where appropriate and where consistent with the need for safety of the community, whether reasonable efforts were made to make it possible for the child to safely return home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, or consistent with the need for protection of the community, or both, the court order shall include such a finding; and (iii) in the case of a child who has attained the age of sixteen, the services needed, if any, to assist the child to make the transition from foster care to independent living.

(c) For the purpose of this section, when an order is entered pursuant to section 353.3 or 353.4 of this article, reasonable efforts to prevent or eliminate the need for removing the respondent from the home of the respondent or to make it possible for the respondent to return safely to the home of the respondent shall not be required where the court determines that:

(1) the parent of such respondent has subjected the respondent to aggravated circumstances, as defined in subdivision fifteen of section 301.2 of this article;

(2) the parent of such child has been convicted of (i) murder in the first degree as defined in section 125.27 or murder in the second degree as defined in section 125.25 of the penal law and the victim was another child of the parent; or (ii) manslaughter in the first degree as defined in section 125.20 or manslaughter in the second degree as defined in section 125.15 of the penal law and the victim was another child of the parent, provided, however, that the parent must have acted voluntarily in committing such crime;

(3) the parent of such child has been convicted of an attempt to commit any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent; or has been convicted of criminal solicitation as defined in article one hundred, conspiracy as defined in article one hundred five or criminal facilitation as defined in article one hundred fifteen of the penal law for conspiring, soliciting or facilitating any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent;

(4) the parent of such respondent has been convicted of assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10 or aggravated assault upon a person less than eleven years old as defined in section 120.12 of the penal law, and the commission of one of the foregoing crimes resulted in serious physical injury to the respondent or another child of the parent;

(5) the parent of such respondent has been convicted in any other jurisdiction of an offense which includes all of the essential elements of any crime specified in subparagraph two, three or four of this paragraph, and the victim of such offense was the respondent or another child of the parent; or

(6) the parental rights of the parent to a sibling of such respondent have been involuntarily terminated;

unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future. The court shall state such findings in its order.

If the court determines that reasonable efforts are not required because of one of the grounds set forth above, a permanency hearing shall be held pursuant to section 355.5 of this article within thirty days of the finding of the court that such efforts are not required. The social services official or the office of children and family services, where the respondent was placed with such office, shall subsequent to the permanency hearing make reasonable efforts to place the respondent in a timely manner and to complete whatever steps are necessary to finalize the permanent placement

of the respondent as set forth in the permanency plan approved by the court. If reasonable efforts are determined by the court not to be required because of one of the grounds set forth in this paragraph, the social services official may file a petition for termination of parental rights in accordance with section three hundred eighty- four-b of the social services law.

(d) For the purposes of this section, in determining reasonable efforts to be made with respect to the respondent, and in making such reasonable efforts, the respondent's health and safety shall be the paramount concern.

(e) For the purpose of this section, a sibling shall include a half-sibling.

3. The order shall state the court's reasons for the particular disposition, including, in the case of a restrictive placement pursuant to section 353.5, the specific findings of fact required in such section.

§ 354.2. Duties of Counsel or Law Guardian

1. If the court has entered a dispositional order pursuant to section 352.2, it shall be the duty of the respondent's counsel or law guardian to promptly advise such respondent and his parent or other person responsible for his care in writing of his right to appeal to the appropriate appellate division of the supreme court, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony and the right to apply for leave to appeal as a poor person if he is unable to pay the cost of an appeal. It shall be the further duty of such counsel or law guardian to explain to the respondent and his parent or person responsible for his care the procedures for instituting an appeal, the possible reasons upon which an appeal may be based and the nature and possible consequences of the appellate process.

2. It shall also be the duty of such counsel or law guardian to ascertain whether the respondent wishes to appeal and, if so, to serve and file the necessary notice of appeal.

3. If the respondent has been permitted to waive the appointment of a law guardian pursuant to section two hundred forty-nine-a, it shall be the duty of the court to provide the notice and explanation pursuant to subdivision one and, if the respondent indicates that he wishes to appeal, the clerk of the court shall file and serve the notice of appeal.

§ 365.1. Appeal; Authorized as of Right

1. An appeal to the appropriate appellate division may be taken as of right by the respondent from any order of disposition under this article in accordance with article eleven.

2. An appeal to the appropriate appellate division may be taken as of right by the presentment agency from the following orders of the family court:

(a) an order dismissing a petition prior to the commencement of a fact-finding hearing; or

(b) an order of disposition, but only upon the ground that such order was invalid as a matter of law; or

(c) an order suppressing evidence entered before the commencement of the fact-finding hearing pursuant to section 330.2, provided that such presentment agency files a statement pursuant to subdivision nine of section 330.2.

§ 365.2. Appeal by Permission

An appeal may be taken by the respondent, in the discretion of the appropriate appellate division, from any other order under this article.

§ 365.3. Notice of Appeal

1. An appeal shall be taken by filing a written notice of appeal, in duplicate, with the clerk of the family court in which the order was entered.

2. If the respondent is the appellant, he must also serve a copy of such notice of appeal upon the appropriate presentment agency.

3. If the presentment agency is the appellant, it must serve a copy of such notice of appeal upon the respondent and upon the attorney or law guardian who last appeared for him in the family court.

4. Following the filing with him of the notice of appeal in duplicate, the clerk of the family court must endorse upon such instruments the filing date and must transmit the duplicate notice of appeal to the clerk of the appropriate appellate division of the supreme court.

FAMILY COURT ACT

ARTICLE 4

§ 439. Support Magistrates

(c) The support magistrate, in any proceeding in which issues specified in section four hundred fifty-five of this act, or issues of custody, visitation including visitation as a defense, orders of protection or exclusive possession of the home are present or in which paternity is contested on the grounds of equitable estoppel, shall make a temporary order of support and refer the proceeding to a judge. Upon determination of such issue by a judge, the judge may make a final determination of the issue of support, or the proceeding shall be returned to a support magistrate for a final determination upon the issue of support payments or other matters within the authority of the support magistrate.

(e) The determination of a support magistrate shall include findings of fact and, except with respect to a determination of a willful violation of an order under subdivision three of section four hundred fifty-four of this article where commitment is recommended as provided in subdivision (a) of this section, a final order which shall be entered and transmitted to the parties. Specific written objections to a final order of a support magistrate may be filed by either party with the court within thirty days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, thirty-five days after mailing of the order to such party or parties. A party filing objections shall serve a copy of such objections upon the opposing party, who shall have thirteen days from such service to serve and file a written rebuttal to such objections. Proof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal. Within fifteen days after the rebuttal is filed, or the time to file such rebuttal has expired, whichever is applicable, the judge, based upon a review of the objections and the rebuttal, if any, shall (i) remand one or more issues of fact to the support magistrate, (ii) make, with or without holding a new hearing, his or her own findings of fact and order, or (iii) deny the objections. Pending review of the objections and the rebuttal, if any, the order of the support magistrate shall be in full force and effect and no stay of such order shall be granted. In the event a new order is issued, payments made by the respondent in excess of the new order shall be applied as a credit to future support obligations. The final order of a support magistrate, after objections and the rebuttal, if any, have been reviewed by a judge, may be appealed pursuant to article eleven of this act.

§ 760. Duties of Counsel or Law Guardian

1. If the court has entered a dispositional order pursuant to section seven hundred fifty-four it shall be the duty of the respondent's counsel or law guardian to promptly advise such respondent and if his parent or other person responsible for his care is not the petitioner, such parent or other person responsible for his care, in writing of his right to appeal to the appropriate appellate division of the supreme court, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony and the right to apply for leave to appeal as a poor person if he is unable to pay the cost of an appeal. It shall be the further duty of such counsel or law guardian to explain to the respondent and if his parent or other person responsible for his care is not the petitioner, such parent or person responsible for his care, the procedures for instituting an appeal, the possible reasons upon which an appeal may be based and the nature and possible consequences of the appellate process.

2. It shall also be the duty of such counsel or law guardian to ascertain whether the respondent wishes to appeal and, if so, to serve and file the necessary notice of appeal.

3. If the respondent has been permitted to waive the appointment of a law guardian pursuant to section two hundred forty-nine-a, it shall be the duty of the court to provide the notice and explanation pursuant to subdivision one and, if the respondent indicates that he wishes to appeal, the clerk of the court shall file and serve the notice of appeal.

§ 1016. Appointment of Law Guardian

The court shall appoint a law guardian to represent a child who has been allegedly abused or neglected upon the earliest occurrence of any of the following: (i) the court receiving notice, pursuant to paragraph (iv) of subdivision (b) of section ten hundred twenty-four of this act, of the emergency removal of the child; (ii) an application for an order for removal of the child prior to the filing of a petition, pursuant to section one thousand twenty-two of this act; or (iii) the filing of a petition alleging abuse or neglect pursuant to this article.

Whenever a law guardian has been appointed by the family court pursuant to section two hundred forty-nine of this act to represent a child in a proceeding under this article, such appointment shall continue without further court order or appointment during (i) an order of disposition issued by the court pursuant to section one thousand fifty-two of this act directing placement, supervision, protection or suspending judgment, or any extension thereof or (ii) an adjournment in contemplation of dismissal as provided for in section one thousand thirty-nine of this act or any extension thereof. All notices and reports required by law shall be provided to such law guardian. Such appointment shall terminate upon the expiration of such order, unless a petition has been filed pursuant to subdivision (b) of section one thousand fifty-five or one thousand fifty-five-a of this article, or unless another appointment of a law guardian has been made by the court or unless such law guardian makes application to the court to be relieved of his or her appointment. Upon approval of such application to be relieved, the court shall immediately appoint another law guardian to whom all notices and reports required by law shall be provided.

A law guardian shall be entitled to compensation pursuant to applicable provisions of law for services rendered up to and including disposition of the petition. The law guardian shall, by separate application, be entitled to compensation for services rendered subsequent to the disposition of the petition.

Nothing in this section shall be construed to limit the authority of the court to remove a law guardian from his or her assignment.

§ 1052-b. Duties of Counsel

1. If the court has entered a dispositional order pursuant to section one thousand fifty-two it shall be the duty of the respondent's counsel promptly to advise such respondent in writing of his or her right to appeal to the appropriate appellate division of the supreme court, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony and the right to apply for leave to appeal as a poor person if the respondent is unable to pay the cost of an appeal. It shall be the further duty of such counsel to explain to the respondent the procedures for instituting an appeal, the possible reasons upon which an appeal may be based and the nature and possible consequences of the appellate process.

2. It also shall be the duty of such counsel to ascertain whether the respondent wishes to appeal and, if so, to serve and file the necessary notice of appeal.

§ 1112. Appealable Orders

a. An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act. An appeal from an intermediate or final order or decision in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court and shall have preference over all other matters. Pending the determination of such appeal, such order or decision shall be stayed where the effect of such order or decision would be to discharge the child, if the family court or the court before which such appeal is pending finds that such a stay is necessary to avoid imminent risk to the child's life or health.

b. In any proceeding pursuant to article ten of this act where the family court issues an order which will result in the return of a child previously remanded or placed by the family court in the custody of someone other than the respondent, such order shall be stayed until five p.m. of the next business day after the day on which such order is issued unless such stay is waived by all parties to the proceeding by written stipulation or upon the record in family court. Nothing herein shall be deemed to affect the discretion of a judge of the family court to stay an order returning a child to the custody of a respondent for a longer period of time than set forth in this subdivision.

§ 1113. Time of Appeal

An appeal under this article must be taken no later than thirty days after the service by a party or the law guardian upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest.

All such orders shall contain the following statement in conspicuous print: "Pursuant to section 1113 of the family court act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or law guardian upon the appellant, whichever is earliest." When service of the order is made by the court, the time to take an appeal shall not commence unless the order contains such statement and there is an official notation in the court record as to the date and the manner of service of the order.

§ 1114. Effect of Appeal; Stay

(a) The timely filing of a notice of appeal under this article does not stay the order from which the appeal is taken.

(b) Except as provided in subdivision (d) of this section, a justice of the appellate division to which an appeal is taken may stay execution of the order from which the appeal is taken on such conditions, if any, as may be appropriate.

(c) If the order appealed from is an order of support under articles four or five, the stay may be conditioned upon the giving of sufficient surety by a written undertaking approved by such judge of the appellate division, that during the pendency of the appeal, the appellant will pay the amount specified in the order to the family court from whose order the appeal is taken. The stay may further provide that the family court (i) shall hold such payments in escrow, pending determination of the appeal or (ii) shall disburse such payments or any part of them for the support of the petitioner or other person for whose benefit the order was made.

(d) Any party to a child protective proceeding, or the law guardian, may apply to a justice of the appellate division for a stay of an order issued pursuant to part two of article ten of this chapter returning a child to the custody of a respondent. The party applying for the stay shall notify the attorneys for all parties and the law guardian of the time and place of such application. If requested by any party present, oral argument shall be had on the application, except for good cause stated upon the record. The party applying for the stay shall state in the application the errors of fact or law allegedly committed by the family court. A party applying to the court for the granting or continuation of such stay shall make every reasonable effort to obtain a complete transcript of the proceeding before the family court.
If a stay is granted, a schedule shall be set for an expedited appeal.

§ 1115. Notices of Appeal

(a) An appeal shall be taken by filing the original notice of appeal with the clerk of the family court in which the order was made and from which the appeal is taken, upon the corporation counsel of the city of New York, if the family court involved is in a county within the city of New York, upon the county attorney of the county in which the family court is located, if not within the city of New York, and upon the appellee.

(b) A notice of appeal shall be served on any adverse party as provided for in subdivision one of section five thousand five hundred fifteen of the civil practice law and rules. Additionally, the appellant shall file two copies of such notice with the clerk of the family court who shall forthwith transmit one copy of such notice to the clerk of the appropriate appellate division.

§ 1116. Printed Case and Brief Not Required

In appeals under this article, a printed case on appeal or a printed brief shall not be required.

§ 1117. Costs

When costs and disbursements on an appeal in a proceeding instituted by a social services official are awarded to the respondent, they shall be a county charge and be paid by the county.

§ 1118. Applicability of Civil Practice Law and Rules

The provisions of the civil practice law and rules apply where appropriate to appeals under this article, provided, however, that the fee required by section eight thousand twenty-two of the civil practice law and rules shall not be required where the appellant or attorney certifies that the appellant has been assigned counsel pursuant to section two hundred forty-nine, two hundred sixty- two or eleven hundred twenty of

this act or section seven hundred twenty-two of the county law, or is represented by a legal aid society or a federally-funded legal services program for indigents.

§ 1120. Counsel or Law Guardian on Appeal

(a) Upon an appeal in a proceeding under this act, the court to which such appeal is taken, or is sought to be taken, shall assign counsel to any person upon a showing that such person is one of the persons described in section two hundred sixty-two of this act and is financially unable to obtain independent counsel. The court to which such appeal is taken, or is sought to be taken, may in its discretion assign counsel to any party to the appeal. Counsel assigned under this section shall be compensated and shall receive reimbursement for expenses reasonably incurred in the same manner provided by section seven hundred twenty-two-b of the county law.

(b) Whenever a law guardian has been appointed by the family court pursuant to section two hundred forty-nine of this act to represent a child in a proceeding described therein, the appointment shall continue without further court order or appointment where (i) the law guardian on behalf of the child files a notice of appeal, or (ii) where a party to the original proceeding files a notice of appeal. The law guardian may be relieved of his representation upon application to the court to which the appeal is taken for termination of the appointment. Upon approval of such application the court shall appoint another law guardian.

(c) An appellate court may appoint a law guardian to represent a child in an appeal in a proceeding originating in the family court where a law guardian was not representing the child at the time of the entry of the order appealed from or at the time of the filing of the motion for permission to appeal and when independent legal representation is not available to such child.

(d) Nothing in this section shall be deemed to relieve law guardians of their duties pursuant to subdivision one of sections 354.2 and seven hundred sixty of this act.

(e) Law guardians appointed or continuing to represent a person under this section shall be compensated and shall receive reimbursement for expenses reasonably incurred in the same manner provided by section thirty-five of the judiciary law.

(f) In any case where a law guardian is or shall be representing a child in an appellate proceeding pursuant to subdivision (b) or (c) of this section, such law guardian shall be served with a copy of the notice of appeal.

§ 1121. Special Procedures

1. Consistent with the provisions of sections 354.2, seven hundred sixty and one thousand fifty-two-b of the family court act the provisions of this section shall apply to appeals taken in proceedings brought from an order issued pursuant to articles three, seven and ten and part one of article six of this act, and pursuant to sections three hundred fifty-eight-a, three hundred eighty-four-b and three hundred ninety-two of the social services law.

2. Upon the filing of such order, it shall be the duty of counsel to the parties and the law guardian to promptly advise the parties in writing of the right to appeal to the appropriate appellate division of the

supreme court, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony and the right to apply for leave to appeal as a poor person if the party is unable to pay the cost of an appeal. It shall be the further duty of such counsel or law guardian to explain to the client the procedures for instituting an appeal, the possible reasons upon which an appeal may be based and the nature and possible consequences of the appellate process.

3. It shall also be the duty of such counsel or law guardian to ascertain whether the party represented by such attorney wishes to appeal and, if so, to serve and file the necessary notice of appeal and, as applicable, to apply for leave to appeal as a poor person.

4. If the party has been permitted to waive the appointment of a law guardian or counsel appointed pursuant to section two hundred forty-nine-a or two hundred sixty-two of this act, it shall be the duty of the court to advise the party of the right to the appointment of a law guardian or counsel for the purpose of filing an appeal.

5. Where a party wishes to appeal, it shall also be the duty of such counsel or law guardian to apply for, when appropriate, assignment of counsel for such party pursuant to applicable provisions of this act, the judiciary law and the civil practice law and rules.

6. (a) Except as provided for herein, counsel for the appellant shall, no later than ten days after filing the notice of appeal, request preparation of the transcript of the proceeding appealed therefrom.

(b) Counsel assigned or appointed pursuant to article eleven of the civil practice law and rules or section eleven hundred twenty of this act shall, no later than ten days after receipt of notice of such appointment, request preparation of the transcript of the proceeding appealed from.

(c) In any case where counsel is assigned or appointed pursuant to paragraph (b) of this subdivision subsequent to the filing of the notice of appeal, such counsel shall, within ten days of such assignment or appointment, request preparation of the transcript of the proceeding appealed from.

(d) Where the appellant is seeking relief to proceed as a poor person pursuant to article eleven of the civil practice law and rules, the transcript of the proceeding appealed from shall be requested within ten days of the order determining the motion.

7. Such transcript shall be completed within thirty days from the receipt of the request of the appellant, where practicable. Where such transcript is not completed within such time period, the court reporter responsible for the preparation of the transcript shall notify the administrative judge of the appropriate judicial district. Such administrative judge shall establish procedures to assist in the timely preparation of such transcript.

The appellant shall perfect the appeal within sixty days of receipt of the transcript of the proceeding appealed from or within any different time that the appellate division has by rule prescribed for perfecting such appeals under subdivision (c) of rule five thousand five hundred thirty of the civil practice law and rules. Such sixty day or other prescribed period may be extended by order of the appellate division for good cause shown upon written application to the appellate division showing merit to the appeal and a reasonable ground for an extension of time. An order granting such an extension of time may impose a schedule for the filing and service of the appellant's brief, the answering brief and any reply brief.

BACK TO TOC

CIVIL PRACTICE LAW AND RULES

CIVIL PRACTICE LAW AND RULES

ARTICLE 10 - PARTIES GENERALLY

1021. Substitution Procedure; Dismissal for Failure to Substitute; Presentation of Appeal

A motion for substitution may be made by the successors or representatives of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate. If the event requiring substitution occurs after final judgment, substitution may be made in either the court from or to which an appeal could be or is taken, or the court of original instance, and if substitution is not made within four months after the event requiring substitution, the court to which the appeal is or could be taken may dismiss the appeal, impose conditions or prevent it from being taken. Whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further, shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed.

1022. Substitution: Extension of Time for Taking Procedural Steps

Unless the court orders otherwise, if the time for making a motion for a new trial or for taking an appeal or for making a motion for permission to appeal or for taking any other procedural step in the action has not expired before the occurrence of an event permitting substitution of a party, the period is extended as to all parties until fifteen days after substitution is made, or, in case of dismissal of the action under section 1021, is extended as to all parties until fifteen days after such dismissal

CIVIL PRACTICE LAW AND RULES

ARTICLE 11 - POOR PERSONS

1101. Motion for Permission to Proceed as a Poor Person; Affidavit; Certificate; Notice; Waiver of Fee; When Motion Not Required

(a) **Motion; affidavit.** Upon motion of any person, the court in which an action is triable, or to which an appeal has been or will be taken, may grant permission to proceed as a poor person. Where a motion for leave to appeal as a poor person is brought to the court in which an appeal has been or will be taken, such court shall hear such motion on the merits and shall not remand such motion to the trial court for consideration. The moving party shall file an affidavit setting forth the amount and sources of his or her income and listing his or her property with its value; that he or she is unable to pay the costs, fees and expenses necessary to prosecute or defend the action or to maintain or respond to the appeal; the nature of the action; sufficient facts so that the merit of the contentions can be ascertained; and whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such costs, fees and expenses. An executor, administrator or other representative may move for permission on behalf of a deceased, infant or incompetent poor person.

(b) **Certificate.** The court may require the moving party to file with the affidavit a certificate of an attorney stating that the attorney has examined the action and believes there is merit to the moving party's contentions.

(c) **Notice.** Except as provided in subdivisions (d) and (e) of this section, if an action has already been commenced, notice of the motion shall be served on all parties, and notice shall also be given to the county attorney in the county in which the action is triable or the corporation counsel if the action is triable in the city of New York.

(d) **Waiver of fee in certain cases.** Except as otherwise provided in subdivision (f) of this section, if applicable, a plaintiff may seek to commence his or her action without payment of the fee required by filing the form affidavit, attesting that such plaintiff is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, which shall be available in the clerk's office along with the summons and complaint or summons with notice or third-party summons and complaint. The case will be given an index number, or, in courts other than the supreme or county courts, any necessary filing number and the application will be submitted to a judge of the court. If the court approves the application, the plaintiff will by written order be given notice that all fees and costs relating to the filing and service shall be waived. If the court denies the application the plaintiff will by written order be given notice that the case will be dismissed if the fee is not paid within one hundred twenty days of the date of the order. [Eff. until Sept. 1, 2005, pursuant to L.1999, c. 412, pt. D, § 4. See, also, subd. (d) below.]

(d) **Waiver of fee in certain cases.** A plaintiff may seek to commence his or her action without payment of the fee required by filing the form affidavit, attesting that such plaintiff is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, which shall be available in the clerk's office along with the summons and complaint or summons with notice or third-party summons and complaint. The case will be given an index number, or, in courts other than the supreme or county courts, any necessary filing number and the application will be submitted to a judge of the court. If the court approves the application,

the plaintiff will by written order be given notice that all fees and costs relating to the filing and service shall be waived. If the court denies the application the plaintiff will by written order be given notice that the case will be dismissed if the fee is not paid within one hundred twenty days of the date of the order. [Eff. Sept. 1, 2005. See, also, subd. (d) above.]

(e) **When motion not required.** Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization, all fees and costs relating to the filing and service shall be waived without the necessity of a motion and the case shall be given an index number, or, in a court other than the supreme or county court, an appropriate filing number, provided that a determination has been made by such society, organization or attorney that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that an attorney's certification that such determination has been made is filed with the clerk of the court along with the summons and complaint or summons with notice or third-party summons and complaint or otherwise provided to the clerk of the court.

1102. Privileges of Poor Person

(a) **Attorney.** The court in its order permitting a person to proceed as a poor person may assign an attorney.

(b) **Stenographic transcript.** Where a party has been permitted by order to appeal as a poor person, the court clerk, within two days after the filing of said order with him, shall so notify the court stenographer, who, within twenty days of such notification shall make and certify two typewritten transcripts of the stenographic minutes of said trial or hearing, and shall deliver one of said transcripts to the poor person or his attorney, and file the other with the court clerk together with an affidavit of the fact and date of such delivery and filing. The expense of such transcripts shall be a county charge or, in the counties within the city of New York, a city charge, as the case may be, payable to the stenographer out of the court fund upon the certificate of the judge presiding at the trial or hearing. A poor person may be furnished with a stenographic transcript without fee by order of the court in proceedings other than appeal, the fee therefor to be paid by the county or, in the counties within the city of New York by the city, as the case may be, in the same manner as is paid for transcripts on appeal. Notwithstanding this or any other provision of law, fees paid for stenographic transcripts with respect to those proceedings specified in paragraph (a) of subdivision one of section thirty-five of the judiciary law shall be paid by the state in the manner prescribed by subdivision four of section thirty-five of the judiciary law.

(c) **Appeals.** On an appeal or motion for permission to appeal a poor person may submit typewritten briefs and appendices, furnishing one legible copy for each appellate justice.

(d) **Costs and fees.** A poor person shall not be liable for the payment of any costs or fees unless a recovery by judgment or by settlement is had in his favor in which event the court may direct him to pay out of the recovery all or part of the costs and fees, a reasonable sum for the services and expenses of his attorney and any sum expended by the county or city under subdivision (b).

Rule 2103. Service of Papers

(a) Who can serve. Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over.

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:

1. by delivering the paper to the attorney personally; or

2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at that attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period; or

3. if the attorney's office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if the attorney's office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box; or

4. by leaving it at the attorney's residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at the attorney's residence unless service at the attorney's office cannot be made; or

5. by transmitting the paper to the attorney by facsimile transmission, provided that a facsimile telephone number is designated by the attorney for that purpose. Service by facsimile transmission shall be complete upon the receipt by the sender of a signal from the equipment of the attorney served indicating that the transmission was received, and the mailing of a copy of the paper to that attorney. The designation of a facsimile telephone number in the address block subscribed on a paper served or filed in the course of an action or proceeding shall constitute consent to service by facsimile transmission in accordance with this subdivision. An attorney may change or rescind a facsimile telephone number by serving a notice on the other parties; or

6. by dispatching the paper to the attorney by overnight delivery service at the address designated by the attorney for that purpose or, if none is designated, at the attorney's last known address. Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery. Where a period of time prescribed by law is measured from the service of a paper and

service is by overnight delivery, one business day shall be added to the prescribed period. "Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state; or

7. [Eff. until July 1, 2003, pursuant to L.1999, c. 367, § 10.] by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule upon the party's written consent. The subject matter heading for each paper sent by electronic means must indicate that the matter being transmitted electronically is related to a court proceeding.

(c) Upon a party. If a party has not appeared by an attorney or the party's attorney cannot be served, service shall be upon the party by a method specified in paragraph one, two, four, five or six of subdivision (b) of this rule.

(d) Filing. If a paper cannot be served by any of the methods specified in subdivisions (b) and (c), service may be made by filing the paper as if it were a paper required to be filed.

(e) Parties to be served. Each paper served on any party shall be served on every other party who has appeared, except as otherwise may be provided by court order or as provided in section 3012 or in subdivision (f) of section 3215. Upon demand by a party, the plaintiff shall supply that party with a list of those who have appeared and the names and addresses of their attorneys.

(f) Definitions. For the purposes of this rule:

1. "Mailing" means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state;

2. "Electronic means" means any method of transmission of information between computers or other machines designed for the purpose of sending and receiving such transmissions, and which allows the recipient to reproduce the information transmitted in a tangible medium of expression;

3. "Facsimile transmission" means any method of transmission of documents to a facsimile machine at a remote location which can automatically produce a tangible copy of such documents.

Rule 2219. Time and Form of Order

(a) Time and form of order determining motion, generally. An order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days, after the motion is submitted for decision. The order shall be in writing and shall be the same in form whether made by a court or a judge out of court. An order determining a motion made upon supporting papers shall be signed with the judge's signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper. Except in a town or village court or where otherwise provided by law, upon the request of any party, an order or ruling made by a judge, whether upon written or oral application or sua sponte, shall be reduced to writing or otherwise recorded.

(b) Signature on appellate court order. An order of an appellate court shall be signed by a judge thereof except that, upon written authorization by the presiding judge, it may be signed by the clerk of the court or, in his absence or disability, by a deputy clerk.

Rule 5016. Entry of Judgment

(a) What constitutes entry. A judgment is entered when, after it has been signed by the clerk, it is filed by him.

(b) Judgment upon verdict. Judgment upon the general verdict of a jury after a trial by jury as of right shall be entered by the clerk unless the court otherwise directs; if there is a special verdict, the court shall direct entry of an appropriate judgment.

(c) Judgment upon decision. Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or referee shall, on motion, determine the form of the judgment.

(d) After death of party. No verdict or decision shall be rendered against a deceased party, but if a party dies before entry of judgment and after a verdict, decision or accepted offer to compromise pursuant to rule 3221, judgment shall be entered in the names of the original parties unless the verdict, decision or offer is set aside. This provision shall not bar dismissal of an action or appeal pursuant to section 1021.

(e) Final judgment after interlocutory judgment. Where an interlocutory judgment has been directed, a party may move for final judgment when he becomes entitled thereto.

5501. Scope of Review

(a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. any non-final 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, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;

2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;

3. 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, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;

4. any remark made by the judge to which the appellant objected; and

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

(b) 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. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty- six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

(d) Appellate term. The appellate term shall review questions of law and questions of fact.

5511. Permissible Appellant and Respondent

An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party. He shall be designated as the appellant and the adverse party as the respondent.

5512. Appealable Paper; Entry of Order Made Out of Court

(a) Appealable paper. An initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is sought to be reviewed. If a timely appeal is taken from a judgment or order other than that specified in the last sentence and no prejudice results therefrom and the proper paper is furnished to the court to which the appeal is taken, the appeal shall be deemed taken from the proper judgment or order.

(b) Entry of order made out of court. Entry of an order made out of court and filing of the papers on which the order was granted may be compelled by order of the court from or to which an appeal from the order might be taken.

5513. Time to take Appeal, Cross-Appeal or Move for Permission to Appeal

(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

(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 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.

(c) Additional time where adverse party takes appeal or moves for permission to appeal. A party upon whom the adverse party has served a notice of appeal or motion papers on a motion for permission to appeal may take an appeal or make a motion for permission to appeal within ten days after such service or within the time limited by subdivision (a) or (b) of this section, whichever is longer, if such appeal or motion is otherwise available to such party.

(d) Additional time where service of judgment or order and notice of entry is served by mail or overnight delivery service. Where service of the judgment or order to be appealed from and written notice of its entry is made by mail pursuant to paragraph two of subdivision (b) of rule twenty-one hundred three or by overnight delivery service pursuant to paragraph six of subdivision (b) of rule twenty-one hundred

three of this chapter, the additional days provided by such paragraphs shall apply to this action, regardless of which party serves the judgment or order with notice of entry.

5514. Extension of Time to Take Appeal or to Move for Permission to Appeal

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

(b) Disability of attorney. If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

(c) Other extensions of time; substitutions or omissions. No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, section 1022, or section 5520.

5515. Taking an Appeal; Notice of Appeal

1. An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered except that where an order granting permission to appeal is made, the appeal is taken when such order is entered. A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken.

2. Whenever an appeal is taken to the court of appeals, a copy of the notice of appeal shall be sent forthwith to the clerk of the court of appeals by the clerk of the office where the notice of appeal is required to be filed pursuant to this section.

3. Where leave to appeal to the court of appeals is granted by permission of the appellate division, a copy of the order granting such permission to appeal shall be sent forthwith to the clerk of the court of appeals by the clerk of the appellate division.

Rule 5516. Motion for Permission to Appeal

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.

5517. Subsequent Orders

(a) Appeal not affected by certain subsequent orders. An appeal shall not be affected by:

1. the granting of a motion for reargument or the granting of an order upon reargument making the same or substantially the same determination as is made in the order appealed from; or

2. the granting of a motion for resettlement of the order appealed from; or

3. the denial of a motion, based on new or additional facts, for the same or substantially the same relief applied for in the motion on which the order appealed from was made.

(b) Review of subsequent orders. A court reviewing an order may also review any subsequent order made upon a motion specified in subdivision (a), if the subsequent order is appealable as of right.

5519. Stay of Enforcement

(a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

1. the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state; provided that where a court, after considering an issue specified in question four of section seventy-eight hundred three of this chapter, issues a judgment or order directing reinstatement of a license held by a corporation with no more than five stockholders and which employs no more than ten employees, a partnership with no more than five partners and which employs no more than ten employees, a proprietorship or a natural person, the stay provided for by this paragraph shall be for a period of fifteen days; or

2. the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed; or

3. the judgment or order directs the payment of a sum of money, to be paid in fixed installments, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party shall pay each installment which becomes due pending the appeal and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay any installments or part of installments then due or the part of them as to which the judgment or order is affirmed; or

4. the judgment or order directs the assignment or delivery of personal property, and the property is placed in the custody of an officer designated by the court of original instance to abide the direction of the court to which the appeal is taken, or an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will obey the direction of the court to which the appeal is taken; or

5. the judgment or order directs the execution of any instrument, and the instrument is executed

and deposited in the office where the original judgment or order is entered to abide the direction of the court to which the appeal is taken; or

6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency; or

7. the judgment or order directs the performance of two or more of the acts specified in subparagraphs two through six and the appellant or moving party complies with each applicable subparagraph.

(b) Stay in action defended by insurer. If an appeal is taken from a judgment or order entered against an insured in an action which is defended by an insurance corporation, or other insurer, on behalf of the insured under a policy of insurance the limit of liability of which is less than the amount of said judgment or order, all proceedings to enforce the judgment or order to the extent of the policy coverage shall be stayed pending the appeal, and no action shall be commenced or maintained against the insurer for payment under the policy pending the appeal, where the insurer:

1. files with the clerk of the court in which the judgment or order was entered a sworn statement of one of its officers, describing the nature of the policy and the amount of coverage together with a written undertaking that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the insurer shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed, to the extent of the limit of liability in the policy, plus interest and costs;

2. serves a copy of such sworn statement and undertaking upon the judgment creditor or his attorney; and

3. delivers or mails to the insured at the latest address of the insured appearing upon the records of the insurer, written notice that the enforcement of such judgment or order, to the extent that the amount it directs to be paid exceeds the limit of liability in the policy, is not stayed in respect to the insured. A stay of enforcement of the balance of the amount of the judgment or order may be imposed by giving an undertaking, as provided in paragraph two of subdivision (a), in an amount equal to that balance.

(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

(d) Undertaking. On an appeal from an order affirming a judgment or order, the undertaking shall secure both the order and the judgment or order which is affirmed.

(e) Continuation of stay. If the judgment or order appealed from is affirmed or modified, the stay shall continue for five days after service upon the appellant of the order of affirmance or modification with notice of its entry in the court to which the appeal was taken. If an appeal is taken, or a motion is made for permission to appeal, from such an order before the expiration of the five days, the stay shall continue until five days after service of notice of the entry of the order determining such appeal or motion. When a motion for permission to appeal is involved, the stay, or any other stay granted pending determination of the motion for permission to appeal, shall:

(i) if the motion is granted, continue until five days after the appeal is determined; or

(ii) if the motion is denied, continue until five days after the movant is served with the order of denial with notice of its entry.

(f) Proceedings after stay. A stay of enforcement shall not prevent the court of original instance from proceeding in any matter not affected by the judgment or order appealed from or from directing the sale of perishable property.

(g) Appeals in medical, dental or podiatric malpractice judgments. In an action for medical, dental or podiatric malpractice, if an appeal is taken from a judgment in excess of one million dollars and an undertaking in the amount of one million dollars or the limit of insurance coverage available to the appellant for the occurrence, whichever is greater, is given together with a joint undertaking by the appellant and any insurer of the appellant's professional liability that, during the period of such stay, the appellant will make no fraudulent conveyance without fair consideration as described in section two hundred seventy-three-a of the debtor and creditor law, the court to which such an appeal is taken shall stay all proceedings to enforce the judgment pending such appeal if it finds that there is a reasonable probability that the judgment may be reversed or determined excessive. In making a determination under this subdivision, the court shall not consider the availability of a stay pursuant to subdivision (a) or (b) of this section. Liability under such joint undertaking shall be limited to fraudulent conveyances made by the appellant subsequent to the execution of such undertaking and during the period of such stay, but nothing herein shall limit the liability of the appellant for fraudulent conveyances pursuant to article ten of the debtor and creditor law or any other law. An insurer that pays money to a beneficiary of such a joint undertaking shall thereupon be subrogated, to the extent of the amount to be paid, to the rights and interests of such beneficiary, as a judgment creditor, against the appellant on whose behalf the joint undertaking was executed.

5520. Omissions; Appeal by Improper Method

(a) Omissions. If an appellant either serves or files a timely notice of appeal or notice of motion for permission to appeal, but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the appeal is taken or the court of original instance may grant an extension of time for curing the omission.

(b) Appeal by permission instead of as of right. An appeal taken by permission shall not be dismissed

upon the ground that the appeal would lie as of right and was not taken within the time limited for an appeal as of right, provided the motion for permission was made within the time limited for taking the appeal.

(c) Defects in form. Where a notice of appeal is premature or contains an inaccurate description of the judgment or order appealed from, the appellate court, in its discretion, when the interests of justice so demand, may treat such a notice as valid.

Rule 5526. Content and Form of Record on Appeal

The record on appeal from a final judgment shall consist of the notice of appeal, the judgment-roll, the corrected transcript of the proceedings or a statement pursuant to subdivision (d) of rule 5525 if a trial or hearing was held, any relevant exhibits, or copies of them, in the court of original instance, any other reviewable order, and any opinions in the case. The record on appeal from an interlocutory judgment or any order shall consist of the notice of appeal, the judgment or order appealed from, the transcript, if any, the papers and other exhibits upon which the judgment or order was founded and any opinions in the case. All printed or reproduced papers comprising the record on appeal shall be eleven inches by eight and one-half inches. The subject matter of each page of the record shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or recross examination shall be stated at the top of each page.

Rule 5528. Content of Briefs and Appendices

(a) Appellant's brief and appendix. The brief of the appellant shall contain in the following order:

1. a table of contents, which shall include the contents of the appendix, if it is not bound separately, with references to the initial page of each paper printed and of the direct, cross, and redirect examination of each witness;

2. a concise statement, not exceeding two pages, of the questions involved without names, dates, amounts or particulars, with each question numbered, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;

3. a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with supporting references to pages in the appendix;

4. the argument for the appellant, which shall be divided into points by appropriate headings distinctively printed; and

5. an appendix, which may be bound separately, containing only such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent; provided, however, that the appellate division in each department may by rule applicable in the department authorize an appellant at his election to proceed upon a record on appeal printed or reproduced in like manner as an

appendix, and in the event of such election an appendix shall not be required.

(b) Respondent's brief and appendix. The brief of the respondent shall conform to the requirements of subdivision (a), except that a counterstatement of the questions involved or a counterstatement of the nature and facts of the case shall be included only if the respondent disagrees with the statement of the appellant and the appendix shall contain only such additional parts of the record as are necessary to consider the questions involved.

(c) Appellant's reply brief and appendix. Any reply brief of the appellant shall conform to the requirements of subdivision (a) without repetition.

(d) Joint appendix. A joint appendix bound separately may be used. It shall be filed with the appellant's brief.

(e) Sanction. For any failure to comply with subdivision (a), (b) or (c) the court to which the appeal is taken may withhold or impose costs.

Rule 5529. Form of Briefs and Appendices

(a) Form of reproduction; size; paper; binding.

1. Briefs and appendices shall be reproduced by any method that produces a permanent, legible, black image on white paper. Paper shall be of a quality approved by the chief administrator of the courts.

2. Briefs and appendices shall be on white paper eleven inches along the bound edge by eight and one-half inches.

3. An appellate court may by rule applicable to practice therein prescribe the size of margins and type of briefs and appendices and the line spacing and the length of briefs.

(b) Numbering. Pages of briefs shall be numbered consecutively. Pages of appendices shall be separately numbered consecutively, each number preceded by the letter A.

(c) Page headings. The subject matter of each page of the appendix shall be stated at the top thereof, except that in the case of papers other than testimony, the subject matter of the paper may be stated at the top of the first page of each paper, together with the page numbers of the first and last pages thereof. In the case of testimony, the name of the witness, by whom he was called and whether the testimony is direct, cross, redirect or recross examination shall be stated at the top of each page.

(d) Quotations. Asterisks or other appropriate means shall be used to indicate omissions in quoted excerpts. Reference shall be made to the source of the excerpts quoted. Where an excerpt in the appendix is testimony of a witness quoted from the record the beginning of each page of the transcript shall be indicated by parenthetical insertion of the transcript page number.

(e) Citations of decisions. New York decisions shall be cited from the official reports, if any. All other decisions shall be cited from the official reports, if any, and also from the National Reporter System if they

are there reported. Decisions not reported officially or in the National Reporter System shall be cited from the most available source.

(f) Questions and answers. The answer to a question in the appendix shall not begin a new paragraph.

CIVIL PRACTICE LAW AND RULES

ARTICLE 56 - APPEALS TO THE COURT OF APPEALS

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.

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.

ARTICLE 57 - APPEALS TO THE APPELLATE DIVISION

5702. Appeals to Appellate Division from Other Courts of Original Instance

An appeal may be taken to the appellate division from any judgment or order of a court of original instance other than the supreme court or a county court in accordance with the statute governing practice in such court.

5704. Review of Ex Parte Orders

(a) By appellate division. The appellate division or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

(b) By appellate term. The appellate term in the first or second judicial department or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate term; and such appellate term may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate term.

7803. Questions Raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

8017. Exemption of the State and Counties, and Agencies and Officers Thereof, From Fees of Clerks

(a) Notwithstanding any other provision of this article or any other general, special or local law relating to fees of clerks, no clerk shall charge or collect a fee from the state, or an agency or officer thereof, for any service rendered in an action in which any of them is involved, nor shall any clerk charge or collect a fee for filing, recording or indexing any paper, document, map or proceeding filed, recorded or indexed for the county, or an agency or officer thereof acting in an official capacity, nor for furnishing a transcript, certification or copy of any paper, document, map or proceeding to be used for official purposes.

(b) Notwithstanding any other provision of law the exemption of subdivision (a) of this section shall not apply to the fees of clerks where the action is on behalf of the New York State Higher Education Services Corporation to recover money due as a result of default of a student loan.

8022. Fee on Civil Appeals and Proceedings before Appellate Courts

(a) A county clerk, upon filing a notice of appeal, is entitled to a fee of sixty-five dollars, payable in advance.

(b) The clerks of the appellate divisions of the supreme court and the clerk of the court of appeals are entitled, upon the filing of a record on a civil appeal or a statement in lieu of record on a civil appeal, as required by rule 5530 of this chapter, to a fee of three hundred fifteen dollars, payable in advance. The clerks of the appellate divisions also shall be entitled to such fee upon the filing of a notice of petition or order to show cause commencing a special proceeding in their respective courts. In addition, the clerks of the appellate divisions of the supreme court and the clerk of the court of appeals are entitled, upon the filing of each motion or cross motion with respect to a civil appeal or special proceeding, to a fee of forty-five dollars, payable in advance. However, no fee shall be imposed for a motion or cross motion which seeks leave to prosecute or defend a civil appeal or special proceeding as a poor person pursuant to subdivision (a) of section eleven hundred one of this chapter.

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GENERAL CONSTRUCTION LAW

GENERAL CONSTRUCTION LAW

ARTICLE 2 - MEANING OF TERMS

§ 25-a. Public Holiday, Saturday or Sunday in Statutes; Extension of Time Where Performance of Act is due on Saturday, Sunday or Public Holiday

1. When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day and if the period ends at a specified hour, such act may be done at or before the same hour of such next succeeding business day, except that where a period of time specified by contract ends on a Saturday, Sunday or a public holiday, the extension of such period is governed by section twenty-five of this chapter.

2. Where time is extended by virtue of the provisions of this section, such extended time shall not be included in the computation of interest, except that when the period is specified as a number of months, such extended time shall be included in the computation of interest.

BACK TO TOC

ADMINISTRATIVE POLICIES AND PROCEDURES

SUPREME COURT APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT
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JOANA C EDER, ESQ.
Director

Please contact our office for current procedures regarding trial transcripts.

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JOANA C EDER, ESQ.
Director

Please contact our office for current information regarding transcription services.

Pages 113-122 have been deleted.

FORMS

NOTICE OF RIGHT TO APPEAL IN A FAMILY COURT PROCEEDING

Re:_____ **Docket Number:** _____

PLEASE SIGN AND DATE THE STATEMENT BELOW AND RETURN IT IN THE ENCLOSED SELF-ADDRESSED ENVELOPE

Section 1121 of the Family Court Act requires that I advise you of your right to appeal the decision for the Family Court to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. The law states that if you wish to appeal the Family Court order, I must serve and file a notice of appeal no later than thirty days after the entry and service of that order.

A notice of appeal is the document that begins the appeal process, but it will also be necessary to obtain a transcript of the testimony given in the Family Court. If you are unable to pay the cost of an appeal, you have the right to apply for leave to appeal as a poor person.

An appeal may be based upon an error of law made by the judge, or a decision against the weight of the evidence. If you win the appeal, the case may be referred back to the Family Court for a new fact-finding hearing and/or dispositional hearing. This may result in a different finding or a different disposition. It is possible that the appellate court could dismiss the original petition, and the case would be over. If you lose the appeal, the current Order of Disposition would be enforceable, and you would need to follow its terms and conditions.

I HAVE BEEN NOTIFIED OF MY RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO WISH TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

OR

I HAVE BEEN NOTIFIED OF MY RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO NOT WISH TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

NOTICE TO CLIENT OF RIGHT TO APPEAL IN A JUVENILE DELINQUENCY PROCEEDING

Re:_____ **Docket Number:** _____

PLEASE SIGN AND DATE THE STATEMENT BELOW AND RETURN IT IN THE ENCLOSED SELF-ADDRESSED ENVELOPE

Section 354.2 of the Family Court Act requires that I advise you and your parent or legal guardian of your right to appeal the decision for the Family Court to the Supreme Court of the State of New York, Appellate Division, Second Department. The law states that if you wish to appeal the Family Court order, I must serve and file a notice of appeal no later than thirty days after the entry and service of that order.

A notice of appeal is the document that begins the appeal process, but it will also be necessary to obtain a transcript of the testimony given in the Family Court. If you are unable to pay the cost of an appeal, you have the right to apply for leave to appeal as a poor person.

An appeal may be based upon an error of law made by the judge, or a decision against the weight of the evidence. If you win the appeal, the case may be referred back to the Family Court for a new fact-finding hearing and/or dispositional hearing. This may result in a different finding or a different disposition. It is possible that the appellate court could dismiss the original petition, and the case would be over. If you lose the appeal, the current Order of Disposition would be enforceable, and you would need to follow its terms and conditions.

I HAVE BEEN NOTIFIED OF MY RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO WISH TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

OR

I HAVE BEEN NOTIFIED OF MY RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO NOT WISH TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

NOTICE TO PARENT OF RIGHT TO APPEAL IN A JUVENILE DELINQUENCY PROCEEDING

Re:_____ **Docket Number:** _____

PLEASE SIGN AND DATE THE STATEMENT BELOW AND RETURN IT IN THE ENCLOSED SELF-ADDRESSED ENVELOPE

Section 354.2 of the Family Court Act requires that I advise you and your child of your right to appeal the decision for the Family Court to the Supreme Court of the State of New York, Appellate Division, Second Department. The law states that if your child wishes to appeal the Family Court order, I must serve and file a notice of appeal no later than thirty days after the entry and service of that order.

A notice of appeal is the document that begins the appeal process, but it will also be necessary to obtain a transcript of the testimony given in the Family Court. If you are unable to pay the cost of an appeal, you have the right to apply for leave to appeal as a poor person.

An appeal may be based upon an error of law made by the judge, or a decision against the weight of the evidence. If your child wins the appeal, the case may be referred back to the Family Court for a new fact-finding hearing and/or dispositional hearing. This may result in a different finding or a different disposition. It is possible that the appellate court could dismiss the original petition, and the case would be over. If your child loses the appeal, the current Order of Disposition would be enforceable, and your child would need to follow its terms and conditions.

I HAVE BEEN NOTIFIED OF THE RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO WISH MY CHILD TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

OR

I HAVE BEEN NOTIFIED OF THE RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO NOT WISH MY CHILD TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

NOTICE OF RIGHT TO APPEAL IN P.I.N.S. PROCEEDING

Re:_____ **Docket Number:** _____

PLEASE SIGN AND DATE THE STATEMENT BELOW AND RETURN IT IN THE ENCLOSED SELF-ADDRESSED ENVELOPE

Section 760 of the Family Court Act requires that I advise you and your parent or legal guardian of your right to appeal the decision for the Family Court to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. The law states that if you wish to appeal the Family Court order, I must serve and file a notice of appeal no later than thirty days after the entry and service of that order.

A notice of appeal is the document that begins the appeal process, but it will also be necessary to obtain a transcript of the testimony given in the Family Court. If you are unable to pay the cost of an appeal, you have the right to apply for leave to appeal as a poor person.

An appeal may be based upon an error of law made by the judge, or a decision against the weight of the evidence. If you win the appeal, the case may be referred back to the Family Court for a new fact-finding hearing and/or dispositional hearing. This may result in a different finding or a different disposition. It is possible that the appellate court could dismiss the original petition, and the case would be over. If you lose the appeal, the current Order of Disposition would be enforceable, and you would need to follow its terms and conditions.

I HAVE BEEN NOTIFIED OF MY RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO WISH TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

OR

I HAVE BEEN NOTIFIED OF MY RIGHT TO APPEAL THE ORDER OF DISPOSITION IN THE ABOVE-NAMED CASE, AND *I DO NOT WISH TO APPEAL.*

Print name: _____

Sign name: _____ **Date:** _____

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

M/

2007-

SCHEDULING ORDER

In the Matter of ,
v .

(Docket No.)

Appeal by from an order of the Family Court, County, dated , 2007. Pursuant to § 670.4(a) of the Rules of this court (22 NYCRR 670.4[a]), it is

ORDERED that the appeal in the above-entitled proceeding shall be perfected within 60 days after the receipt by the appellant of the transcripts of the minutes of the proceedings in the Family Court, and the appellant shall notify this court by letter of the date the transcripts are received, or, in cases where there are no minutes of proceedings to be transcribed, within 60 days of the date of this scheduling order; and it is further,

ORDERED that within 30 days after the date of this scheduling order, the appellant shall file in the office of the Clerk of this court one of the following:

(1) an affidavit or affirmation stating that there are no minutes of the Family Court proceedings to be transcribed for the appeal; or

(2) if there are such minutes, an affidavit or affirmation that the transcript has been received, and indicating the date that it was received; or

(3) if the transcript has not been received, an affidavit or affirmation stating that it has been ordered and paid for, the date thereof and the date by which the transcript is expected; or

(4) if the appellant is indigent and cannot afford to obtain the minutes or perfect the appeal, a motion in this court for leave to prosecute the appeal as a poor person and for the assignment of counsel, pursuant to the requirements of CPLR 1101. Such a motion must be supported by an affidavit from the appellant, stating either that he or she qualified for assigned counsel upon application to the Family Court and that his or her

financial status has not changed since that time, or that he or she had retained counsel or appeared pro se in the Family Court, and listing his or her assets and income; or

(5) an affidavit or an affirmation withdrawing the appeal; and it is further,

ORDERED that if none of the above actions described in (1), (2), (3), (4), or (5) above, has been taken within 30 days of the date of this scheduling order, the Clerk of the court shall issue an order to all parties to the appeal to show cause why the appeal should or should not be dismissed.

ENTER:

Clerk of the Court

The Case Manager assigned to this case is Ms. Vazquez. Please contact her at 718-722-6488 with any questions.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

M/

2007-

SCHEDULING ORDER

In the Matter of ,
v .

(Docket No.)

Appeal by from an order of the Family Court, County, dated . By decision and order of this court dated , 2007, the following attorney was assigned as counsel on the appeal:

Pursuant to § 670.4(a) of the Rules of this court (22 NYCRR 670.4[a]), it is

ORDERED that the appeal in the above-entitled proceeding shall be perfected either within 60 days after the receipt by the assigned counsel of the transcripts of the minutes of the proceedings in the Family Court, and the assigned counsel shall notify this court by letter of the date the transcripts are received, or, in cases where there are no minutes of proceedings to be transcribed, within 60 days of the date of this scheduling order; and it is further,

ORDERED that within 30 days after the date of this scheduling order, the assigned counsel shall file in the office of the Clerk of this court one of the following:

(1) an affidavit or affirmation stating that there are no minutes of any Family Court proceeding to be transcribed for the appeal; or

(2) if there are such minutes, an affidavit or affirmation that the transcripts have been received, and indicating the date received; or

(3) if the transcripts have not been received, an affidavit or affirmation stating that the order of this court dated , 2007, has been served upon the clerk of the court from which the appeal is taken, the date thereof, and the date by which the transcripts are expected;

or

(4) an affidavit or an affirmation withdrawing the appeal; and it is further,

ORDERED that if none of the above actions described in (1), (2), (3), or (4) above, has been taken within 30 days of the date of this scheduling order, the Clerk of the court shall issue an order to all parties to the appeal to show cause why the appeal should or should not be dismissed.

ENTER:

Clerk of the Court

The Case Manager assigned to this case is Ms. Vazquez. Please contact her at 718-722-6488 with any questions.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

2007-

DECISION & ORDER ON MOTION
Motion for Poor Person Relief
and to Assign New Counsel
Family Court

(Docket No.)

Motion by the appellant for leave to prosecute an appeal from an order of the Family Court, County, dated , as a poor person, and for the assignment of counsel.

Upon the papers filed in support of the motion and the papers filed in opposition or relation thereto, it is

ORDERED that the motion is granted; and it is further,

ORDERED that the appeal will be heard on the original papers (including a certified transcript of the proceedings, if any) and on the briefs of the appellant, the respondent, and the Law Guardian, if any. The parties are directed to file nine copies of their respective briefs and to serve one copy on each other (22 NYCRR 670.9[d][1][ii]; Family Ct Act § 1116); and it is further,

ORDERED that the stenographer(s) and/or the transcription service(s) is/are required promptly to make and certify two transcripts of the proceedings, if any, except for those minutes previously transcribed and certified (22 NYCRR 671.9); *in the case of stenographers, both transcripts shall be filed with the clerk of the Family Court, and the clerk of the Family Court shall furnish one of such certified transcripts to the appellant's counsel, without charge; in the case of transcription services, one transcript shall be filed with the clerk of the Family Court and one transcript shall be delivered to the assigned counsel. Assigned counsel is directed to provide copies of said transcripts to all of the other parties to the appeal, including the Law Guardian, if any, when counsel serves the appellant's brief upon those parties;* and it is further,

ORDERED that pursuant to Family Court Act § 1120 the following named attorney is assigned as counsel to prosecute the appeal:

, Esq.
- Suite
, New York
(TELEPHONE NUMBER)

and it is further,

ORDERED that the assigned counsel shall prosecute the appeal expeditiously in accordance with any scheduling order or orders issued pursuant to § 670.4(a) of the rules of this court (22 NYCRR 670.4[a]); and it is further,

ORDERED that assigned counsel is directed to serve a copy of this order upon the clerk of the court from which the appeal is taken.

ENTER:

Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

2007- ORDER ON CERTIFICATION
Assignment of counsel

In the Matter of ,
v .

(Docket No.)

Appeal by from an order of the Family Court, County, dated . Pursuant to Family Court Act §§ 1118 and 1120, and upon the certification of , dated , 2007, it is

ORDERED that the appellant is granted leave to proceed as a poor person on the appeal, and the following named attorney is assigned as counsel to prosecute the appeal:

and it is further,

ORDERED that assigned counsel shall promptly attempt to contact the appellant, at the address provided by the court, and shall notify the Case Manager assigned to the appeal on or before , 2007, in writing, that he or she has done so and that either

(1) the appellant is interested in prosecuting the appeal, or

(2) the appellant is not interested in prosecuting the appeal, or that he or she has been unable to contact the appellant, and wishes to be relieved of the assignment;

and it is further,

ORDERED that the appeal will be heard on the original papers (including a certified transcript of the proceedings, if any) and on the briefs of the appellant, the respondent, and the Law Guardian, if any. The parties are directed to file nine copies of their respective briefs and to serve one copy on each other (22 NYCRR 670.9[d][1][ii]; Family Ct Act § 1116); and it is further,

ORDERED that the stenographer(s) and/or the transcription service(s) is/are required promptly to make and certify two transcripts of the proceedings, if any, except for those minutes previously transcribed and certified (22 NYCRR 671.9); in the case of stenographers, both

transcripts shall be filed with the clerk of the Family Court, and the clerk of the Family Court shall furnish one of such certified transcripts to the appellant's counsel, without charge; in the case of transcription services, one transcript shall be filed with the clerk of the Family Court and one transcript shall be delivered to the assigned counsel. Assigned counsel is directed to provide copies of said transcripts to all of the other parties to the appeal, including the Law Guardian, if any, when counsel serves the appellant's brief upon those parties; and it is further,

ORDERED that the assigned counsel shall prosecute the appeal expeditiously in accordance with any scheduling order or orders issued pursuant to § 670.4(a) of the rules of this court (22 NYCRR 670.4[a]); and it is further,

ORDERED that upon a determination that the appellant is interested in proceeding with the appeal, the assigned counsel is directed to serve a copy of this order upon the clerk of the court from which the appeal is taken.

ENTER:

Clerk of the Court

The Case Manager assigned to this case is Ms. Vazquez. Please contact her at 718-722-6488 with any questions.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

M/

2007-

SCHEDULING ORDER

In the Matter of ,
v .

(Docket No.)

Appeal by from an order of the Family Court, County, dated . The appellant's brief was filed in the office of the Clerk of this court on , 2007. Pursuant to § 670.4(a)(2) of the Rules of this court (see 22 NYCRR 670.4[a][2]), it is

ORDERED that within 30 days of the date of this order, the briefs of the respondent(s) and the Law Guardian, if any, in the above-entitled appeal, shall be served and filed.

ENTER:

Clerk of the Court

The Case Manager assigned to this case is Ms. Vazquez. Please contact her at 718-722-6488 with any questions.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

M/

2007-

ORDER TO SHOW CAUSE

In the Matter of ,
v .

(Docket No.)

Appeal by from an order of the Family Court, County, dated . By scheduling order dated , 2007, the appellant was directed to file one of the following in the office of the clerk of the court, within 30 days after the date of the scheduling order:

(1) an affidavit or affirmation stating that there were no minutes of the Family Court proceedings to be transcribed for the appeal; or

(2) if there were such minutes, an affidavit or affirmation that the transcript was received, and indicating the date that it was received; or

(3) if the transcript was not received, an affidavit or affirmation stating that it was ordered and paid for, the date thereof and the date by which the transcript was expected; or

(4) if the appellant was indigent and could not afford to obtain the minutes or perfect the appeal, a motion in this court for leave to prosecute the appeal as a poor person and for the assignment of counsel, pursuant to the requirements of CPLR 1101; or

(5) an affidavit or an affirmation withdrawing the appeal.

The appellant has failed to comply with the scheduling order. Pursuant to § 670.4(a)(5) of the rules of this court (22 NYCRR 670.4[a][5]), it is

ORDERED that the parties or their attorneys are directed to show cause before this court why an order should or should not be made and entered dismissing the appeal in the above-entitled proceeding for failure to comply with the scheduling order dated , 2007, by each filing an

affirmation or affidavit on that issue in the office of the Clerk of this court and serving one copy of the same on each other on or before , 2007; and it is further,

ORDERED that the Clerk of this court, or his designee, is directed to serve a copy of this decision and order upon the parties or their attorneys.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

BACK TO TOC

ORDER TO SHOW CAUSE

Appellate Division Docket No.:

_____

_____

Upon the annexed affidavit of _____, dated _____ ____, 200__, and the papers annexed thereto,

LET _____ **SHOW CAUSE BEFORE THIS COURT,** at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the ____ day of _____, 200__, at 9:30 o'clock in the forenoon of that date, why an order should not be made and entered:

1.

2.

3. Granting such other and further relief as to the court may seem just and equitable.

SUFFICIENT CAUSE THEREFOR APPEARING, it is

ORDERED that pending the hearing and determination of this motion _____ _____ _____ _____ are stayed; and it is further,

ORDERED that service of a copy of this order to show cause and the papers upon which it was made upon _____ by

- ❑ personal delivery pursuant to CPLR 2103(b)(1)
- ❑ office delivery pursuant to CPLR 2103(b)(3)
- ❑ overnight delivery service pursuant to CPLR 2103(b)(6)

on or before _____ ____, 200__, shall be deemed sufficient service thereof.

Dated: Brooklyn, New York
_____ _____, 200__

_____
Associate Justice
Appellate Division: 2nd Department

NOTE: On the return date all motions and proceedings are deemed submitted. Oral argument is not permitted (22 NYCRR 670.5[b]).

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

NOTICE OF MOTION

Appellate Division Docket No.:

_____

_____

Please take notice that upon the annexed affidavit of _____, dated _____ ____, 200__, and the papers annexed thereto, the undersigned will move this court, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the ____ day of _____, 200__, at 9:30 o'clock in the forenoon of that date, for an order granting the following relief:

1.

2.

3.

4.

5. Such other and further relief as to the court may seem just and equitable.

Dated: _____, New York
_____ _____, 200__

Yours, etc.:

_____

Signature

Print name: _____
Address: _____
_____
_____

To: _____
_____
_____

_____
_____
_____

NOTE: On the return date all motions are deemed submitted. Oral argument is not permitted (22 NYCRR 670.5[b]).

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

AFFIDAVIT

Appellate Division Docket No.: _____

_____

State of New York)
County of _____) ss.:

I, _____, being duly sworn, depose and say that:

1.

2.

3.

4.

5.

WHEREFORE, I request that the court grant me the following relief:

Dated: _____ ____, 200__

_____

Sworn to before me this _____
day of _____, 200__

_____
Notary Public

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

AFFIRMATION

Appellate Division Docket No.:

_____

_____

State of New York)
County of _____) ss.:

I, _____, affirm under the penalties of perjury that:

1.

2.

3.

4.

5.

WHEREFORE, I request that the court grant me the following relief:

Dated: _____ ____, 200__

_____

Affirmed before me this _____
day of _____, 200__

_____
Notary Public

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

ATTORNEY'S AFFIRMATION

Appellate Division Docket No.:

_____

_____

I, _____, an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled cause, affirm the following to be true under the penalties of perjury pursuant to CPLR 2106:

1.

2.

3.

4.

5.

6.

7.

WHEREFORE, I request that the court grant the following relief:

Dated: _____, New York

_____ ____, 200__

_____

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

---

200 - AFFIRMATION/AFFIDAVIT

In the Matter of , respondent,
v , appellant .

(Docket No. - -)

, Attorney at Law, affirms the following under penalty of law:

1. I represented the appellant in the above-entitled proceeding in the Family Court, County.

2. At the appellant's request I filed a notice of appeal from an order of the Family Court, County, dated , , 2003.

3. Although I am on the Family Court Assigned Counsel Panel, I am not on the appeals panel and do not believe that I am equipped to represent the appellant on the appeal.

4. I therefore request that I be relieved from acting as counsel for the appellant on this appeal.

5. In addition, I request that new counsel be assigned to the appellant on the appeal. The appellant qualified for the assignment of counsel in the Family Court. His/her affidavit is attached, in which he/she indicates that his/her financial condition is unchanged, and that he/she is interested in prosecuting the appeal.

, Esq.

Dated: , 2003

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

In the Matter of

against

ATTORNEY'S CERTIFICATE OF APPELLANT'S CONTINUED ELIGIBILITY FOR POOR PERSON RELIEF AND ASSIGNMENT OF COUNSEL ON APPEAL

Appellate Division Docket No.: _____

THIS FORM MAY NOT BE USED IN ANY CASE IN WHICH THE FAMILY COURT, AFTER THE ASSIGNMENT OF COUNSEL, HAS ISSUED AN ORDER FINDING THAT THE APPELLANT IS OF SUFFICIENT MEANS TO PAY SPOUSAL OR CHILD SUPPORT, OR ARREARAGES THEREOF.

I, _____, an attorney admitted to practice in the State of New York, hereby certify, pursuant to Family Court Act § 1118 and CPLR 1101, that:

1. I am an attorney duly licensed to practice in the State of New York, and a member of an assigned counsel program OR employed by _____, which is a legal aid or legal services program representing indigent parties *(strike one)*.

2. I was assigned as counsel for _____, the petitioner/respondent in the above-entitled proceeding, upon a determination of the Family Court, _____ County, pursuant to Family Court Act § 262, that the he/she was indigent and unable to afford the costs, fees, and expenses of the proceeding, and was entitled to the assignment of counsel.

3. On behalf of _____, I filed a notice of appeal from an order of the Family Court, _____ County, dated _____ ___, 200_, which _____

_____

_____ *(set forth the nature of the order)*.

Copies of the order appealed from, the notice of appeal, and any separate decision are attached hereto.

4. To the best of my knowledge, (1) since the date of my assignment, the appellant has not been found to be of sufficient means to pay spousal or child support or any arrearages thereof, and (2) the financial status of the appellant has not changed from the date the Family Court, _____ County, determined that he/she was entitled to the assignment of counsel, and (3) he/she is presently, and for the foreseeable future will be unable to afford the costs, fees, and expenses of the above-entitled appeal.

5. To the best of my knowledge, _____ is interested in prosecuting the appeal. The appellant's last known address is as follows:

6. I wish to be assigned to represent _____ on the appeal in the above-entitled proceeding.

OR

6. I cannot represent _____ on the appeal in the above-entitled proceeding, and request that another attorney be assigned to represent him/her.

7. A copy of this certification is being provided to the County Attorney, and to counsel for each other party, or to the party if appearing pro se, and to the law guardian, if any.

Dated: _____, New York
_____ ___, 200___

_____

The following persons have been provided with a copy of the foregoing certificate:

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

---

200 -

CERTIFICATION OF ATTORNEY
FOR THE CHILD/JUVENILE
Assignment of Counsel

In the Matter of

(Docket No.)

---

1. I, _____, Esq., an attorney admitted to practice in the State of new York hereby certify, pursuant to Family Court Act §§ 1118 and 1120 that:

2. I am an attorney duly licensed to practice law in the state of New York, and was assigned in the Family Court, _____ County, pursuant to Family Court Act § 249 as the attorney for the child/juvenile _____, in the above-entitled proceeding upon a determination that independent legal representation was not available to the child/juvenile.

3. I filed a notice of appeal/A notice of appeal was filed in the above-entitled proceeding from an order of the Family Court, _____, County, dated _____

4. To the best of my knowledge, independent legal representation continues to be unavailable to the child/juvenile.

5. Although my assignment continues, I am unable/do not wish to represent the child/juvenile on the appeal. I therefore request, pursuant to Family Court Act § 1120(b), that I be relieved from acting as attorney for the child/juvenile on this appeal, and that a new attorney for the child/juvenile be assigned. The last known address for the child/juvenile is as follows:

_____
, Esq.

Dated:

Model Anders Letter

ATTORNEY'S LETTERHEAD

DATE

DEFENDANT'S ADDRESS

RE: *People v DEFENDANT'S NAME*
App. Div. Docket No.: YYYY-#####

Dear DEFENDANT'S NAME:

As your assigned appellate counsel I have carefully reviewed the record of the proceedings of your case in the trial court for the purpose of preparing a brief for you on appeal. The result of that review is that I have been unable to find any non-frivolous issues that can be raised on your behalf. Accordingly I am filing the enclosed brief with the Appellate Division pursuant to the case of *Anders v California* (386 US 738 [1967]). In that brief I have asked to be relieved as your attorney because I could not find a non-frivolous issue.

If the court accepts my analysis, it will grant my motion to be relieved from representing you and will affirm the JUDGMENT OF CONVICTION/ORDER from which you appealed. It is very important, therefore, that you be aware that you have the right to file a *pro se* supplemental brief with the Appellate Division setting forth any points that you think ought to be raised on your appeal. The court will conduct its own review of the record and any supplemental brief from you, and if it concludes that a non-frivolous ground exists for reversal or modification of the JUDGMENT/ORDER, it will assign new appellate counsel to represent you.

If you wish to file a *pro se* supplemental brief, you must notify the court in writing within 30 days from the date of mailing of this letter of your intention to do so (22 NYCRR 670.12[g][2]). Mail your letter to:

Assigned Counsel Clerk
Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Yours truly,

ATTORNEY'S NAME