Del-Chen-O Women's Bar Association
A Chapter of WBASNY

Crafting an Effective Appeal

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Success in crafting an appeal depends on a few simple principles: thorough knowledge of your case, the law and the record below; full understanding of your opponent's case; and clear, concise, honest and accurate communication at every stage of the process. This presentation takes a practical approach to skills and strategies that can help you use these principles effectively in your appellate practice, whether or not you represent the winning side.[1]

The Rules of Practice

This presentation will not cover practice rules in any detail. However, as knowledge of the rules and the applicable provisions of the CPLR is essential, a brief listing follows of rules and resources for practice in the Appellate Division and the Court of Appeals. The listing is not intended to be comprehensive and should be used only as a starting place for your own research.

The Court of Appeals and each of the four Judicial Departments of the Appellate Division maintain websites, listed below, that provide useful information on practice rules, e-filing requirements, court contacts and more. The Unified Court

[111] It is apparently a law of the universe that anyone who sets out to write about such subjects as good writing or careful editing and proofreading is doomed to overlook awkward language and typos of her own in the process. I apologize in advance for any such errors and ask you to treat them as reminders to edit and proofread your work more carefully than I have.

System maintains a helpful resource on appellate practice at https://nycourts.gov/courthelp/AfterCourt/appealsResources.shtml. Though designed for pro se litigants, the site contains information and links to rules, forms and FAQs that can also be useful to attorneys.

If you have questions about rules or procedure that you cannot resolve through your own research, never hesitate to contact the appropriate clerk's office. Asking questions is not a sign of ignorance but shows that you care about the quality and correctness of your work. Court staff members would much rather help you get your submissions right in the first place than waste time sending them back to you for corrections.

The Court of Appeals: The Rules of Practice of the Court of Appeals are codified at 22 NYCRR part 500. The Court's website (https://nycourts.gov/ctapps/) has information on all aspects of practice in the Court of Appeals, including links to Part 500 (https://nycourts.gov/ctapps/500rules.htm) and a document entitled "Technical Specifications and Instructions for Submission of Briefs and Record Material in Digital Format," with information on e-filing and naming conventions (https://nycourts.gov/ctapps/techspecs.htm). A copy of part 500 as it existed in January 2022 is included with these materials.

The Appellate Division: The Appellate Division has statewide Rules of Practice, codified at 22 NYCRR part 1250, that govern most aspects of practice in all four Judicial Departments. The court has also adopted statewide e-filing rules, codified at 22 NYCRR part 1245. Each Department supplements the statewide rules with local rules; in the event of any conflict, the local rules prevail. A copy of part 1250 as it existed in January 2022 is included with these materials.

First Department: https://nycourts.gov/courts/ad1/index.shtml
Local Rules: 22 NYCRR part 600
https://nycourts.gov/courts/AD1/Practice&Procedures/rules.shtml

Second Department: https://nycourts.gov/courts/ad2/index.shtml
Local Rules: 22 NYCRR part 670
https://nycourts.gov/courts/ad2/pdf/Local_Rules.pdf

Third Department: https://www.nycourts.gov/ad3/

Local Rules: 22 NYCRR part 850

http://www.nycourts.gov/ad3/RulesOfPractice.html

Fourth Department: https://www.nycourts.gov/courts/ad4/

Local Rules: 22 NYCRR part 1000

https://www.nycourts.gov/courts/ad4/Clerk/Part1000-LocalPracticeRules.pdf

Analyzing and Understanding Your Case

Your first steps in undertaking any appeal are, of course, to find out everything you can about the case – the facts of the initial dispute, what happened in the lower courts, and the governing law – and then to determine whether any appealable errors took place. In this analysis, appellate practitioners must not only master the specific areas and points of law that apply to the appeal in question, but must also bear in mind certain general principles that have important ramifications in every appeal, such as jurisdiction, preservation, and standards of review.

Jurisdiction and Scope of Review: The jurisdiction of each New York court is established by the New York Constitution or by statute. Trial courts, as the courts of original jurisdiction, hear cases initially, and appellate courts hear appeals from the trial courts' decisions. Jurisdictional differences among New York's three tiers of appellate courts determine the scope of each court's review and shape counsel's strategy and choice of issues in individual appeals.[2]

The jurisdiction of the Court of Appeals is established by New York Constitution, art VI, § 3. The Court's function is to decide legal issues of State-wide significance, rather than to correct errors in the lower courts. Accordingly, its jurisdiction is constitutionally limited to errors of law, and most appeals are heard

[2] Although this article focuses on the Appellate Division and the Court of Appeals, the principles discussed here also apply in the lower appellate courts. These courts – including Appellate Terms of the Supreme Court in the First and Second Departments and County Courts in the Third and Fourth Departments – have statutory jurisdiction over a range of appeals from the State's lower trial courts and municipal courts (see generally https://nycourts.gov/COURTS/lowerappeals.shtml).

by permission, with appeals as of right limited to certain defined circumstances. By contrast, the Appellate Division has broad power to review questions of law, findings of fact and exercises of discretion in civil and criminal appeals, and also has defined powers in certain original proceedings. As a practical matter, this limitation means that many issues reviewed in the Appellate Division cannot be addressed by the Court of Appeals and become final upon intermediate review.

Preservation: It is a familiar principle that issues may not be raised for the first time on appeal and, thus, that an appellate court will not act on an alleged error unless an appropriate protest was made in the court of first instance. The preservation doctrine serves important policy goals. Requiring a timely, specific protest serves the pursuit of truth, efficiency and conservation of judicial resources by giving trial courts the opportunity to correct errors before appeals are necessary. The doctrine also discourages gamesmanship in which counsel might otherwise sit on a trial court's error until it is too late to correct it, and then use it to prevail in an appeal.

The preservation doctrine looms large in appellate decision-making, and the differing jurisdiction of the courts directly affects its application. An unpreserved issue does not raise a question of law and thus, in most instances, cannot be addressed by the Court of Appeals – unless the question whether the issue was, in fact, preserved was properly raised in the lower courts, allowing the Court to resolve the preservation question and then potentially review the substantive issue (see e.g. Matter of New York City Asbestos Litig., 27 NY3d 1172, 1175-1176 [2016]). The scope of review of the Appellate Division is likewise restricted to preserved issues (see CPLR 4017, 5501 [a] [3]). Nevertheless, in certain limited circumstances, the Appellate Division has discretionary power to review an unpreserved issue. In a criminal appeal, the Appellate Division may choose to exercise its interest of justice jurisdiction to reverse or modify a judgment based upon an unpreserved error (see CPL 470.15). In most cases, however, no such discretionary power is available. For example, unpreserved issues cannot be addressed in proceedings pursuant to CPLR article 78, because judicial review in

such proceedings is limited by statute to questions of law (see Matter of Khan v New York State Dept. of Health, 96 NY2d 879 [2001]; CPLR article 7803).

Of course, the best time to make sure your appeal will not have preservation issues is in the trial court, before the appeal ever takes place. But even if you had no such opportunity, be aware of the preservation doctrine, consider whether any errors in your case may not have been properly preserved and be prepared to show that they were, in fact, preserved, or, if appropriate, that the Appellate Division should exercise its discretion in the interest of justice to correct them.

Standards of Review: Such a wide variety of differing standards and burdens govern the various areas of appellate practice that they can sometimes trip up an unwary practitioner. While a detailed review is beyond this article's scope, brief discussion of a few standards that sometimes cause confusion may help to illustrate the importance of identifying and understanding the application of these principles to your appeal.

In appeals from criminal convictions after jury trials, two separate standards exist for evaluating the evidence supporting the verdict – challenges to the legal sufficiency of the evidence and to the weight of the evidence supporting the verdict. Practitioners sometimes fail to distinguish between them. People v Bleakley (69 NY2d 490, 495 [1987]) explains that an appellate court determines whether a verdict is supported by legally sufficient evidence by "viewing the facts in a light most favorable to the People [and determining] whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial." By contrast, in weight of the evidence review, the Appellate Division must first determine whether another verdict would have been unreasonable and, if so, view the evidence in a neutral light and "like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (id., internal quotation marks and citations omitted). The Appellate Division acts, in effect, as a thirteenth juror, using its factual review powers to determine whether the trial jury properly assessed the evidence. A

significant difference between these forms of challenge is that a claim of legal insufficiency must be preserved at trial by timely, specific objections (see e.g. People v Hawkins, 11 NY3d 484, 492 [2008]). Weight of the evidence review, by contrast, does not require preservation; the Appellate Division must conduct a weight of the evidence review when it is asked to do so. Such a review necessarily requires a determination whether the elements of the crime were proven beyond a reasonable doubt (see People v Danielson, 9 NY3d 342, 349 [2007]). Thus, a practitioner confronted with an unpreserved legal sufficiency challenge may be able to rescue the essence of the claim by asserting that the weight of the evidence does not support the verdict. As the Court of Appeals lacks the Appellate Division's powers of factual review, it will not review a weight of the evidence determination (see id.).

Turning to civil appeals, these include an extensive range of areas of law, from civil litigation to probate matters, family law, administrative law and much more. Each area has its own set of procedures, standards and burdens that can cause problems, especially if the area is new to the practitioner. Thus, identifying the applicable standards is a necessary first step in planning an appeal. One example that may seem basic occurs in civil litigation, where attention should be paid to such procedural issues as the differences in standards and outcomes between a motion to dismiss a cause of action pursuant to CPLR 3211 and a motion for summary judgment under CPLR 3212. Family law brings different procedural and substantive issues to the fore, such as the difference between children's testimony in Lincoln hearings in custody and visitation cases and in Family Ct Act article 10 proceedings, and the effect of that difference on the confidentiality of the transcript during an appeal.

Administrative appeals, proceedings under CPLR article 78, challenges to arbitration determinations and the like each have their own procedures and standards that often significantly limit an appellate court's review powers. As one example, an appellate court's review of an administrative decision made after a hearing required by law is limited to determining whether the decision was supported by substantial evidence – a relatively low threshold that "means such

relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180 [1978]). In applying this standard, the reviewing court may not revisit the facts or substitute its judgment for that of the agency. It must uphold the agency's determination if substantial evidence exists, even if the evidence would also support another resolution. This area is evolving, and there are disputes in the appellate courts over just how limiting the substantial evidence standard should be. Counsel in an appeal governed by this standard must identify issues and construct arguments with this standard in mind. In general, attention to standards of review in all appeals is essential in identifying issues, developing arguments, seeking changes in the law when appropriate and, at times, in deciding whether an appeal should be undertaken at all.

Some Notes on the Record

Any appellate practitioner must know the record thoroughly and completely. If you represent the appellant, take care to assemble it correctly and completely; if your client is the respondent, review the proposed record carefully to identify any omissions or material that should not have been included. Once the record has been finalized, counsel on both sides must read it thoroughly, more than once, and keep track of the locations of critical sections so that they can be found and referenced readily. This thorough knowledge of the record will protect you from serious, credibility-damaging errors such as misstating the record's contents or referring to facts or documents that it does not include.

When preparing the record, keep legibility in mind. If possible, make copies directly from the original documents; try to avoid including documents that have been copied so often that they can no longer be read. To limit volume, avoid including multiple copies of the same document when possible; instead, insert cross-references to a single location. If photographs are important to resolving your appeal, provide the originals or high-quality copies, in color and on photographic

paper when possible. Black and white copies of color photographs, or any photograph copied on ordinary paper, can be so distorted and unlike the original that they are useless. If the record includes maps or surveys, try not to submit photocopies that have been reduced to fit into the record. Instead, consider providing maps and surveys in their original size, folded into slip pockets at the appropriate record locations. If visual aids are important to the resolution of your appeal, it is worth taking some extra trouble to make sure the court can see them.

The Brief

The brief is the heart of the appeal. It serves two central purposes: first, to educate the appellate court about the facts and law governing your case and, second, to persuade the court that it should decide the matter in your client's favor. Writing a brief that will accomplish these purposes is something like telling a story – a true story that, told well, brings to life the events and conflicts that triggered the appeal, illuminates and explains the law, and concludes with a compelling ending that shows how the law may rightly be applied to resolve the conflict. Every part of your brief's story should serve the purposes of educating and persuading the court, and anything that detracts from these purposes – such as unclear thinking, unnecessary verbiage, irrelevant details or typos – must be ruthlessly excluded.

A key to success in any genre of writing is to know your audience. In brief-writing, the primary audience is, of course, the panel of appellate judges who will decide your appeal. Bear in mind that appellate judges are constantly swamped with reading material: briefs and records, their colleagues' decisions, new decisions being handed down, internal documents, emails and much more. At the same time, judges are writing their own decisions, hearing oral arguments, deciding motions and dealing with the meetings, phone calls, emails and other distractions that beset any professional. To find undistracted time, judges often bring briefs home to read in the evenings and on weekends. Keep these pressures in mind as you organize and write your brief. A judge's time is far too limited to plow laboriously through an

unclear, poorly written brief. The judge may not read such a brief closely, especially if the opponent's brief does a better job of telling the story of the case.

The watchwords in effective brief writing are *concision, clarity, accuracy and honesty*. The first two elements will be examined in this section, and the third and fourth as part of the later discussion of the brief's components. A clear, concise brief is carefully thought out, well-organized and no longer than it absolutely must be. Even if the rules allow you to file a 14,000-word brief, that does not mean that you should do so, unless yours is the rare case that is so complex that there is no other way to make a complete presentation. Of course, the brief must also be complete; it is extremely frustrating to encounter briefs that skim so superficially over the facts and issues that the reader learns nothing. Striking the right balance between these extremes requires you to plan carefully before you start writing, identifying your objectives, the most important issues and your organizational structure. You need not – and in many cases should not – raise every potential error that you can find in the record. Instead, be selective in marshalling and organizing your arguments. Identify the most significant issues, concentrate most of your time and attention on them, and address less significant matters only briefly, if at all.

The writing in an effective brief is clean, clear and, ideally, enjoyable to read. One of the best ways to acquire the skills that make such writing possible – besides practice – is to acquire, read and reread the classic manual, The Elements of Style (William Strunk, Jr., E. B. White et al., Pearson [4th ed 1999]). This little book, which you may have already encountered in college or law school, takes a breezy, accessible approach to rules of usage, principles of composition and matters of style, focusing on the powerful and economical use of language. First published in 1918, it is still one of the best guides to good writing in the English language after more than a century of revisions and new editions.

On concision, Strunk wrote, "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts." This does not mean, Strunk wrote, that every sentence must be short or that no details should

be included. Instead, concision requires selectivity; the writer must make "every word tell." Some basic ways to do this include using the active voice rather than passive, and avoiding long words and complicated sentences when shorter, simpler ones will do. Instead of writing, "A large number of errors were made by the trial court," substitute "The trial court made many errors." As you can see, the second sentence is more direct and vivid than the first and, not coincidentally, much shorter. If you were a busy, tired judge reading a brief at home, which sentence would you rather read?

Another powerful way to improve your writing is to refuse to settle for the first draft of your brief. Instead, reread and rewrite every sentence and paragraph over and over again. In so doing, you will almost always find ways to prune, clarify and invigorate your language, and you are likely to find legal errors and citation mix-ups as well. Like doing anything else well, this process unavoidably takes time. But it is time well spent, because such close attention always results in a stronger, clearer, and probably shorter brief. Blaise Pascal wrote, "I have made this letter longer than usual, only because I have not had the time to make it shorter."

Never overlook the importance of scrupulous editing and proofreading – both to make sure that your brief says exactly what you mean it to say and to eliminate awkward language, typos, grammatical errors and misspellings. Details like these are not mere technicalities. Poor syntax can obscure your meaning, while good grammar and spelling makes your brief cleaner and more inviting and strengthens your credibility and authority. People who read and write for a living, such as appellate judges, notice poor writing, grammar and spelling, even if only subliminally. Fairly or not, if a reader can trust a writer to put together a clear, correctly written sentence, the reader may also be more inclined to trust the writer's legal arguments – and vice versa.

But how to do it? It can be tough for writers to edit our own work, because we know what we meant to say, and we may not be able to tell that we did not actually manage to say it. It is all too easy to overlook even obvious problems. The best solution is to have somebody whose skills and honesty you trust – and

preferably more than one somebody – read your brief with a critical eye. Ask your readers to check not only technical correctness, but also clarity and meaning. You might even consider asking a non-lawyer to read your brief, if you can do so without compromising confidentiality. Can a reader who knows nothing about the case or the law understand the thrust of your argument? If not, you may need to revisit your work.

Remember that a brief is a formal document. Your language should not be stuffy or pretentious, but at the same time it should not be too informal. Stay away from slang, of course, and avoid contractions like *isn't* or *don't*. Such casual language is perfectly natural and normal in speech and in many other forms of writing, but it is out of place in a brief.

Finally, never rely solely on spell-check. It is useful to a point, but it probably will not identify common, embarrassing errors like confusing *there*, *their* and *they're*. Worse, spell-check is not likely to notice when a typo causes a writer to mix up one word with another one. You might be surprised how often attorneys type *martial* when they mean *marital*. A reference to "martial property" in a hotly contested divorce appeal is an ironic error that may make the judge who is reading your brief smile for a moment. Of course, the judge understands what you meant, but the error is distracting and reveals that you took shortcuts in your proofreading. At best, this can damage your credibility; at worst, a truly sloppy brief can cause offense by suggesting that the writer did not take the appeal seriously enough to invest time in doing it right. Do not be that writer. Take the necessary time to make your brief as clean and error-free as you can.

Pay attention to the tone of your writing. The reviewing court, opposing counsel, law clerks and court attorneys who will read your brief are professionals who expect that the case will ultimately be decided on the law. And the litigants themselves – who may well read your brief or see your oral argument in these days of virtual appearances – are human beings for whom this case is not just another appeal, but of vital, maybe life-changing, importance. Make sure that your tone conveys the appropriate respect for everyone involved and for the process.

Never use personal or insulting language or accuse your opponent or a litigant of lying. Of course, you certainly may, and often must, raise genuine issues of credibility or ethics, and sometimes criticism should be pointed. Nevertheless, everything you write must be objective and solidly grounded in the facts and law. If you believe a witness has been dishonest, calling attention to the discrepancies in the testimony may be all you need to do. The judge will be able to draw the necessary inference.

Do not use sarcasm, and avoid humor, which is risky and almost always inappropriate. As for emotion, you are not addressing a jury, but a panel of experienced judges who are well aware that they must base their decisions on the law. You may risk insulting the court if you argue in a way that suggests that you believe it can be swayed by emotion rather than the law, and you are wasting time and space that could have been spent on genuinely persuasive legal arguments. At the same time, judges are human beings, not automatons, and appeals often arise from deeply moving, painful or outrageous situations. Even in those circumstances, judges will decide your appeal as the law requires. But they will do so more readily and comfortably if you bring enough appropriate zeal and passion to your work to demonstrate that the right legal outcome is also the just and fair one. It's a delicate balance and, when in doubt, you should tip the balance toward objectivity. Remember, too, that the bare facts of a matter may carry all the emotional impact that your brief needs. If you must describe a terrible car accident, a bitter custody battle or devastating personal injuries, the unadorned facts may be powerful enough to tell your story without words like "terrible," "bitter," or "devastating."

Be careful not to instruct the court that it "must" decide a legal issue in your client's favor. That is presumptuous, potentially irritating, and probably not true. Many, if not most, appeals that make it to the level of the Appellate Division or the Court of Appeals can reasonably be viewed in more than one way. Your task in persuasion is not to insist that the case must be decided your way, but instead to show the court, respectfully and professionally, why it should do so consistently with the requirements of law and justice.

The Brief's Components

The Statement of Facts: If writing a brief is like telling a story, the statement of facts is the story's most important part. Whether you represent the appellant or the respondent, the statement of facts is your first – and perhaps only – chance to tell the court about your case. It is also your first opportunity to establish your own credibility as a trustworthy narrator, not just in this appeal but in others you may file in the future. Thus, even if you represent the respondent and the appellant has already given a full account of the facts, it is almost always best to write your own separate statement. No matter how complete the appellant's version may be, it is usually best to take advantage of the opportunity to present the facts from your client's point of view.

Honesty and accuracy are critical precepts in preparing the statement of facts. Of course, it is your goal and duty to present the facts in the way that will best support the inferences and conclusions that you want the court to reach. But in so doing, you must be scrupulously careful to make sure that every fact is stated accurately. Use the knowledge of the record that you developed in the beginning to make sure that – while you may legitimately color the facts in your client's favor – you never stretch the truth or make unwarranted overstatements. At the same time, be honest about unfavorable facts. If you ignore them or try to cover them up, your opponent will surely notice the omission and point it out to the court. Your opponent may then present the troublesome facts as unfavorably as possible and make them seem more important than they are. Instead, take preemptive action by honestly acknowledging the existence of unfavorable facts at your first opportunity, while also presenting them in the best ethically permissible light.

As for matters of format, be sure to support every fact you include with citations to the record. If your appeal includes both an original record and an appendix, include page references for both volumes. And, of course, if you cannot document a fact in the record, do not include it, no matter how telling it may be.

Make it easier for the reader to follow your account by using consistent names or designations for each party, witness or entity. Do not call someone "the injured party" on one page and "the plaintiff" on the next. Instead, choose a designation for each member of your brief's cast of characters and stick with it throughout. Identifying parties by their roles – the mother, the buyer, the eyewitness, the Town or the Bank – is often easier for a reader to follow than procedural descriptors like "appellant" or "plaintiff-respondent." Roles may also be easier to remember than names, especially in matters with many parties and witnesses, or related litigants who share the same surname.

Turning to organization, the facts will usually be easiest to understand if presented chronologically, but there may be times when some alternate form of organization is better, especially in multi-party cases or those with complex histories. Use subheadings if the facts are especially lengthy or complicated. These not only aid the reader's comprehension, but also make it easier to refer to the relevant parts of the facts while considering each point of law in the argument. Likewise, use charts, graphs or tables if they will help to clarify a case. Your overall goal is to find the way to present the facts that will be simplest and easiest for your readers to comprehend.

The Argument: In developing the argument section of your brief, you must fully understand not only your side of the case, but also your opponent's. Research both sides of every point of law and know the strongest and weakest points on each side. If you represent the appellant, examine the facts and the law from the respondent's perspective as carefully as your own, so that you can anticipate your opponent's arguments. If your client is the respondent, you have the advantage of seeing your opponent's arguments laid out before you. Reading these arguments carefully and with an open mind will help you find the most effective ways to expose their weak points, deal with their strengths and develop your own arguments. Finally, the reply brief gives the appellant the same opportunity that the respondent already had to point out weaknesses in the opponent's arguments and strengths in its own. Remember that the purpose of the reply brief is to rebut the

respondent's claims. Do not restate facts or repeat arguments that were already fully developed in the original brief, except to the extent necessary to refute the respondent's claims. Remember that new claims may not be raised for the first time in a reply brief, that surreply briefs are not permitted, and that no further post-submission communications may be made unless requested or authorized by the court.

Your legal arguments should be divided into points of law that are directly related to the questions presented at the brief's beginning. Each point heading should state an answer to the corresponding question in direct, affirmative terms. The best way to organize the points of law is often, but not always, to state the strongest issues first. Sometimes it may be necessary to organize your arguments in a different logical pattern – for example, when you must show that a court's minor error in a preliminary matter led to another, more substantive error.

As in the statement of facts, maintain honesty and accuracy in every aspect of your legal analysis. Your goals of educating and persuading the court include the ethical obligation to advise the court of any adverse authorities that may exist – although, of course, you are also free to demonstrate that these authorities do not apply in your case, or to suggest their reconsideration. In this regard, remember that precedents are more often overruled in the Court of Appeals than in the Appellate Division, unless the precedent in question was decided by the Department where you are arguing. Nevertheless, issues of reconsideration must be raised in the Appellate Division to preserve them for the Court of Appeals.

Cite to official reports and use the citation formats prescribed in the Law Reporting Bureau's Style Manual. Using the official format gives your brief a consistent, professional look and makes it easier for judges and court staff to find your references.[3] The Style Manual provides formats for statutes, treatises and other authorities as well as lists of approved abbreviations, word styles and the like. It is available online at https://nycourts.gov/reporter/Styman_Menu.shtml and can

[3] If you are citing to an unpublished decision or some other resource that may be difficult to find, consider including a copy at the end of your brief.

also be purchased in hard copy form. The Law Reporting Bureau also maintains online citators that provide the correct titles for New York and United States Supreme Court cases at https://www.nycourts.gov/reporter/Citator_Menu.shtml

In using caselaw, avoid "string citations," or lengthy lists of cases supporting the same principle of law. Instead, rely on two or three of the strongest cases. It is usually unnecessary to include lengthy descriptions of the cases you cite, as the cases themselves will be read. Instead, use as few words as possible to show what specific aspects of the cited case support your position or how the case can be distinguished. Always use pinpoint citations to help your readers find the precise point of law in question. Avoid lengthy quotations and abstract statements of the law that do not show the application of the law to your case. In the Appellate Division, cite to cases decided in the Department where you are appealing whenever possible, although citations to other Departments are appropriate when, for example, your Department has not yet addressed an issue or you are discussing a split between Departments.

The Conclusion: Your conclusion should be concise and affirmative, and it should not repeat facts or legal arguments. Most importantly, make certain that your conclusion clearly tells the court what you want it to do. If appropriate, you may also choose to describe alternate resolutions that would serve your goals – but be sure you are clear. You do not want the court to have to ask you at oral argument, "But counsel, what do you want us to do?"

Oral Argument

Purposes: The primary purposes of oral argument are to provide counsel with the chance to highlight the most important aspects of the case and to allow the court to ask questions about any matters that may not have been made fully clear in the briefs. However, oral argument also serves less obvious purposes. In addition to a discussion between counsel and the court, oral argument often becomes a conversation among the judges. The argument may be the first

opportunity the panel has had to discuss the case as a group. A judge's question may be a signal to the rest of the panel about some aspect of the case that strikes the inquiring judge as troubling or particularly important. The other judges may respond with questions of their own, revealing whether they share this concern. Finally, oral argument provides an opportunity for direct communication between the court and the appellate bar, allowing the judges to attach faces to names. When you argue an appeal, you are not simply dealing with the case before you. Preparing carefully, arguing clearly and competently, and being scrupulously honest and accurate in all aspects of your argument will build your reputation and credibility for the future, even if you happen to lose the case you argued that day.

Preparing for argument: Deciding whether to argue or submit may depend on the rules governing your appeal or on the decisions made by your opponent. If, for example, you represent a criminal defendant in an assigned appeal where the issues have frequently been addressed in the past and no new nuances are present, you may choose not to argue. Likewise, if you represent the respondent in an uncomplicated case and the appellant chooses to submit, you will likely decide to submit as well. On the other hand, if the appellant elects to argue, you should almost certainly do so. In most cases, the best choice is to take the opportunity to present your case in person, highlight the most compelling aspects of your case, and clarify any questions or concerns that the court may have.

It can be difficult to prepare for oral argument, because you cannot predict exactly what your opponent's arguments will be or what questions the court may ask. Nevertheless, the chances are good that you will be arguing before a hot bench – that is, a panel of judges who have already read the briefs and thought about your case. It is fairly safe to assume that there will be a few questions. Even if there are none, you should not restate the facts, repeat the same points that you presented in your brief, try to cover every issue or read a prepared argument. Instead, make a brief outline that highlights the most compelling arguments in your client's favor. When the argument takes place, get through as much of this outline as you can, while also answering questions and thinking on your feet to incorporate as many of

the highlights into your responses as you can. You can also prepare a brief conclusion, summarizing your most central claims, that is short enough to give in a sentence or two if you discover that you are running out of time.

Your preparation should include, as always, careful review of the record, as well as the arguments in the briefs. Mark the record to remind yourself where the most critical facts are stated. Be familiar enough with your record that you can answer promptly and confidently if you are asked whether something appears in the record or where it can be found. Of course, you need not use up your argument time hunting for a page number; just be ready to state, for example, that the matter in question was addressed during the defendant's testimony. You can ask the court if it would like you to provide more specific information in a post-argument submission – but do not make such a submission without permission. Likewise, you need not state the full citation for every case you mention during your argument, but you should have the citations on hand, especially for any new case decided after the briefs were filed, so that you can provide them if asked by the court.

If possible, rehearse your oral argument before a moot court of other attorneys. Have them ask you the most difficult questions you can anticipate. Make sure that you can state your strongest points and your conclusion in less time than you are allotted, to leave time to answer questions.

If you are nervous about public speaking – and most of us are – rehearsing gives you a chance to overcome your anxiety and reassure yourself that you can get through your argument successfully. It may help to remind yourself that an oral argument is not a speech to a large audience, but instead, a conversation with four or five people who know something about your case and genuinely want to know more. Your back will be turned to the other attorneys and court personnel in the room, and you are likely to find that once you start speaking to the judges, you will forget that the others are there. In the end, oral argument is nothing more than talking to a few other interested people about a subject that you know well. You already know how to do that, even if this is your first oral argument.

Making your argument: The most effective tactic you can use during the argument itself is to *listen*. When your opponent is speaking, do not use the time to review your outline. Instead, listen intently to your opponent's arguments and the judges' questions, take notes, and prepare to respond as necessary when your turn comes to speak. When you are speaking, pay close attention to the judges' questions and be ready to stop speaking immediately, even in mid-sentence, if a judge asks a question. Judges do interrupt counsel during oral argument (although it goes without saying that counsel must never interrupt a judge!) The judge is not trying to be rude. Instead, the judge can often predict where you are going with a particular line of argument and may wish to turn the discussion to some other issue that the judge perceives as more important. Judges, like you, are working within the confines of the limited time allotted for each argument. If they want to be sure that their concerns are addressed, they cannot always wait for counsel to pause and take a breath.

If you represent the appellant, remember to reserve time for rebuttal at the beginning of your argument, and then be sure to stay within the limits of your remaining time. If you represent the respondent, you will not have a separate opportunity for rebuttal, but you can nevertheless use the first minute or two of your time to refute an argument or respectfully correct an error before turning to your own argument.

Handling questions: Remember that questioning is not intended to be hostile. Even if you are closely questioned by a judge who seems skeptical of your position, do not be defensive. The judge would not be asking questions if he or she did not want to hear your answer. You can, and should, stand up for your position and explain why you believe it to be correct, but always approach your answer in a respectful, positive spirit, with goals of helpfulness and clarity.

Be sure to answer every question directly and as soon as it is asked. Never deflect a question with a response like, "I'll come to that in just a moment." Instead, deal with the question immediately, and when you have answered as fully as you can, return to the point you were making before the question was asked. If you are

not sure you understand a judge's question, ask for clarification. And if you do not know the answer, it is better to say so than to flounder around hoping to come up with something. If appropriate, you may offer to find the answer and provide it in a post-argument submission.

Just as in writing your brief, you must, of course, always be fully candid in acknowledging weaknesses in your case, unfavorable facts or adverse authority. But you may, and should, do so in the context of explaining to the court why you do not believe the weakness or adverse authority damages your position.

Speak to each judge on the panel as you argue and try to make eye contact with each judge. Do not be discouraged if a judge is looking down at papers, writing or passing a note to a colleague. The judge is most likely paying attention to your argument and looking at your brief, taking notes on something you said or discussing your case with the other judge.

Tone matters in oral argument just as much as it does in your brief. You must, of course, express yourself vigorously and show that you believe strongly in your position – but at the same time remember that you are not giving a closing statement before a jury. Hyperbole, sarcasm, insults, and accusations have no place. Do not make faces while your opponent is arguing – keep your expression and your body language neutral, and let your arguments reveal your respectful disagreement when it is your turn to speak. When a judge appears to misunderstand something about your case, take the opportunity to set things right, but do so as diplomatically as you can. If you and a judge get into a spirited disagreement, be careful not to contradict or condescend. Judges speak lawyer-ese and will know precisely what you mean if you say, "With all due respect, your honor . . ." If you can tell that you are failing to change a judge's mind, accept it and back off politely, acknowledging that you understand the judge's position without conceding yours.

You need not use every minute of argument time that you reserved. If you have made your central points, the judges are not asking questions, and you still have time left, you will offend no one by saying, "If there are no further questions,

your honors, I will rest upon my brief." Likewise, if you reserved rebuttal time and find that respondent's counsel did not say anything you need to refute or that the judges' questions fully covered everything you meant to say, it is fine to ask the court if it has questions and, if not, close your argument.

Oral argument is the kind of encounter where you will almost certainly think of something you should have said, or that you wish you had not said, while you are on your way home that night. (This sometimes happens to judges, too.) But try not to be too hard on yourself. Count things that you might have done differently as learning experiences and store them away to assist you in your next argument. If you were able to articulate most of your main points, give complete, respectful answers to the judges' questions, and respond appropriately to your opponent's remarks, you have succeeded, no matter how the matter is ultimately decided.

COURT OF APPEALS STATE OF NEW YORK
PART 500. RULES OF PRACTICE
(22 NYCRR Part 500)

GENERAL MATTERS

500.1 General Requirements.

(a) All papers shall comply with applicable statutes and rules, particularly the signing requirement of 22 NYCRR 130-1.1a.

(b) Papers filed. "Papers filed" means briefs, papers submitted pursuant to sections 500.10 and 500.11 of this Part, motion papers, records and appendices.

(c) Method of reproduction. All papers filed may be reproduced by any method that produces a permanent, legible, black image on white paper. Reproduction on both sides of the paper is encouraged.

(d) Designation of original. Where this Part requires the filing of multiple copies of papers, the parties shall identify on its cover the original document filed.

(e) Proof of service. The original affidavit of service shall be affixed to the inside of the back cover of the original of each paper filed.

(f) Disclosure statement. All papers filed by or on behalf of a corporation or other business entity shall contain a disclosure statement listing all its parents, subsidiaries and affiliates, or state that no such parents, subsidiaries and affiliates exist.

(g) Citation form. Where New York authorities are cited in any submissions, New York Official Law Report citations shall be included, if available.

(h) Inclusion of decisions and cited material. Copies of decisions that are not officially published, or are not otherwise readily available, shall be included in the submission in which such decisions are cited. Copies of other cited materials that are not readily available shall be submitted as a separate filing.

(i) Paper quality, size and binding. Paper shall be opaque, unglazed, white and 11 by 8½ inches. Briefs, appendices, records and motion papers shall be bound on the left side in a manner that keeps all pages securely together, without plastic covers or any metal fasteners or similar hard material that protrudes or presents a bulky surface or sharp edge.

(j) Papers filed prepared by word-processing systems. Papers prepared by a word-processing system shall be printed in either a serifed, proportionally spaced typeface, such as Times New Roman, or a serifed monospaced typeface, such as Courier. Narrow

or condensed typefaces and condensed font spacing shall not be used. Except in headings, words shall not be in bold type or type consisting of all capital letters.

(1) Papers filed using a proportionally spaced typeface. The body of any papers filed using a proportionally spaced typeface shall be printed in 14-point type. Footnotes shall be printed in type of no less than 12 points.

(2) Papers filed using a monospaced typeface. The body of any papers filed using a monospaced typeface shall be printed in 12-point type containing no more than 10½ characters per inch. Footnotes shall be printed in type of no less than 10 points.

(k) Typewritten papers filed. Typewritten papers filed shall be neatly prepared in legible type no smaller than elite and in a pitch of no more than 12 characters per inch. The original, ribbon typescript of any papers filed shall be signed and filed as the original required by this Part. Carbon copies will not be accepted.

(l) Margins, line spacing and page numbering of papers filed. Papers prepared by word-processing systems and typewritten papers 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 consecutively numbered in the center of the bottom margin of each page.

(m) Handwritten papers. Self-represented litigants may serve and file handwritten papers. Such papers shall be neatly prepared in cursive script or hand printing in black ink. Pages shall be consecutively numbered in the center of the bottom margin of each page. The filing of handwritten papers is not encouraged. The Clerk of the Court may reject illegible papers.

(n) Filing of papers. All papers filed shall be addressed to the Clerk of the Court at 20 Eagle Street, Albany, New York 12207, not to a Judge or Judges of the Court, and shall be served on each other party in accordance with the requirements of this Part. Submissions shall only be filed by facsimile transmission, electronic mail, or other electronic transmission when requested by the Clerk of the Court or otherwise required by this Part.

(o) Acknowledgment of receipt of papers. A request for an acknowledgment of receipt of papers shall be accompanied by an additional copy of the papers filed to be stamped by the Clerk's Office and a self-addressed, postage pre-paid envelope. Parties proceeding as poor persons or requesting poor person relief shall comply with this requirement if acknowledgment of receipt of papers is desired.

(p) Nonconforming papers. The Clerk of the Court may reject papers that do not conform to the requirements of this Part.

500.2 Submission of Companion Digital Filings.

(a) The Court requires the submission of filings in digital format as companions to the required number of copies of paper filings required under sections 500.10, 500.11, 500.12, 500.14, 500.20, 500.21, 500.22, 500.23, 500.24, 500.26 and 500.27 of this Part.

(b) The companion digital filings shall comply with the technical specifications and instructions for submission available from the Clerk's Office.

(c) The companion digital filings shall be identical to the original printed filings, except they need not contain an original signature.

(d) Unless otherwise permitted by the Clerk of the Court, companion digital filings required under sections 500.10, 500.11, 500.12 and 500.27 shall be received by the Clerk's Office no later than the filing due date for the printed filings. Companion digital filings required under sections 500.21, 500.22, 500.23 and 500.24 shall be submitted no later than seven days after the return date of the motion. Companion digital filings required under sections 500.20 and 500.26 shall be submitted within the time directed by the Clerk of the Court.

(e) A request to be relieved of the requirements of this Part to submit companion digital filings shall be by letter addressed to the Clerk of the Court, with proof of service of one copy on each other party, and shall specifically state the reasons why submission of companion digital filings would present an undue hardship. Such request shall be accompanied by unbound copies of the required printed filings.

(f) The Clerk of the Court may reject companion digital filings that do not comply with the requirements of this Part or the technical specifications and instructions for submission available from the Clerk's Office.

500.3 Fees.

(a) Upon the filing of record material in a civil appeal pursuant to section 500.11, 500.12 or subsection 500.26(a) of this Part, appellant shall provide the Clerk of the Court the fee in the amount specified in CPLR 8022 in the form of an attorney's check, certified check, cashier's check or money order payable to "State of New York, Court of Appeals" unless:

(1) appellant demonstrates exemption from the fee requirements by statute or other authority;

(2) other payment arrangements have been made with the Clerk of the Court;

(3) the appeal is accompanied by a motion requesting poor person relief or a motion requesting relief from payment of the filing fee; or

(4) appellant in the Court of Appeals provides a copy of an order issued by any court in the action or proceeding to which the appeal relates granting that party poor person relief, together with a sworn affidavit that the same financial circumstances exist at the time of filing in the Court of Appeals as when the order granting poor person relief was issued.

(b) Upon the filing of each motion or cross motion in a civil case pursuant to sections 500.21 through 500.24 or subsection 500.26(b) of this Part, movant shall provide the Clerk of the Court with the fee in the amount specified in CPLR 8022 in the form of an attorney's check, certified check, cashier's check or money order payable to "State of New York, Court of Appeals" unless:

(1) movant demonstrates exemption from the fee requirements by statute or other authority;

(2) other payment arrangements have been made with the Clerk of the Court;

(3) the motion or cross motion is accompanied by a motion requesting poor person relief or a motion requesting relief from payment of the filing fee; or

(4) movant in the Court of Appeals provides a copy of an order issued by any court in the action or proceeding to which the motion relates granting that party poor person relief, together with a sworn affidavit that the same financial circumstances exist at the time of filing in the Court of Appeals as when the order granting poor person relief was issued.

(c) Except as provided in subsections (a) or (b) of this section or where otherwise specifically required by law or by the Court, no fees shall be charged by the Clerk of the Court.

500.4 Pro Hac Vice Admission.

An attorney or the equivalent who is a member of the bar of another state, territory, district or foreign country may apply to appear pro hac vice with respect to a particular matter pending in this Court (see 22 NYCRR 520.11[a] [Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law--Admission Pro Hac Vice]). The application shall consist of a letter request to the Clerk of the Court, with proof of service on each other party, and shall include current certificates of good standing from each jurisdiction in which the applicant is admitted and any orders of the courts below granting such relief in the matter for which pro hac vice status is sought.

500.5 Confidential and Sensitive Material: Sealing and Redaction.

(a) Documents under seal are not available for public viewing.

(b) Any cases or materials sealed by a court or otherwise required by statute to be sealed shall be sealed in the Court of Appeals. In cases that are sealed in their entirety, each document filed shall clearly indicate that it is filed under seal. In cases where some documents are sealed, such sealed documents shall be reproduced in a separate volume that shall clearly indicate that it is filed under seal.

(c) To the extent possible, confidential information subject to a statutory proscription against publication shall be omitted or redacted from public documents. Where such information must be included and cannot be redacted, the cover of the document filed shall clearly indicate that it contains confidential material.

(d) To the extent possible, sensitive material, even if it is not subject to a statutory proscription against publication, shall be omitted or redacted from public documents. Information of this type includes, but is not limited to: social security, taxpayer identification or financial account numbers; full dates of birth; exact street addresses; e-mail addresses; telephone numbers; names of minor children; names of children's schools; names of employers; or other information that would identify a person whose identity should not be revealed (e.g., a victim of a sex crime).

(e) Any party may request that papers not sealed below be sealed in this Court. Such requests shall be by an original and one copy of a motion pursuant to section 500.21 of this Part, with proof of service of one copy on each other party.

500.6 Developments Affecting Appeals, Certified Questions, Motions and Criminal Leave Applications.

Counsel shall timely inform the Clerk's Office and each other party by letter of all developments affecting appeals, section 500.27 certified questions, motions and criminal leave applications pending in this Court, including contemplated and actual settlements, circumstances or facts that could render the matter moot and pertinent developments in applicable case law, statutes and regulations. For appeals, counsel shall also timely inform the Clerk's Office and each other party by letter of any changes in the status of any related litigation reported on the appellant's preliminary appeal statement or of any related litigation commenced after the filing of appellant's preliminary appeal statement. Such letters shall contain proof of service on each other party.

500.7 Post-Briefing, Post-Submission and Post-Argument Communications.

Except for communications providing the information required by section 500.6 of this Part or those specifically requested by the Court, post-briefing, post-submission and post-argument written communications to the Court are not favored, and shall be returned to the sender unless accepted by the Clerk of the Court following a written request with a copy of the proposed submission and proof of service of one copy on each other party.

500.8 Withdrawal of Appeal, Motion or Criminal Leave Application.

(a) Appeals.

(1) Before argument or submission, an appeal shall be marked withdrawn upon receipt by the Clerk of the Court of a stipulation of withdrawal signed by counsel for all parties to the appeal and by all self-represented litigants and, in criminal appeals, additionally by defendant.

(2) After argument or submission, a request to withdraw an appeal shall be supported by a stipulation of withdrawal signed by counsel for all parties to the appeal and by all self-represented litigants and, in criminal appeals, additionally by defendant. The request shall be submitted to the Court for determination.

(b) Motions.

(1) Before its return date, a motion shall be marked withdrawn upon receipt by the Clerk of the Court of a written notice of withdrawal signed by counsel for the moving party, with proof of service of one copy on each other party.

(2) After the return date, a request to withdraw a motion shall be supported by a stipulation of withdrawal signed by counsel for all parties to the motion and by all self-represented litigants. The request shall be submitted to the Court for determination.

(c) Criminal Leave Applications. A request to withdraw an application shall be in writing and, if made on behalf of a defendant, shall also be signed by defendant. The request shall contain an indication of service of one copy upon all parties and, if the request is made by defendant personally, proof of service upon defense counsel, if defendant is represented. The request shall be submitted to the assigned Judge for determination.

APPEALS

500.9 Preliminary Appeal Statement.

(a) Within 10 days after an appeal is taken by (1) serving a notice of appeal on the adverse party and filing that notice of appeal in the place and manner required by CPLR 5515, (2) entry of an order granting a motion for leave to appeal in a civil case, or (3) issuance of a certificate granting leave to appeal in a criminal case, appellant shall file with the Clerk of the Court an original and one copy of a preliminary appeal statement on the form prescribed by the Court, with the required attachments and proof of service of one copy on each other party. No fee is required at the time of filing the preliminary appeal statement.

(b) Where a party asserts that a statute is unconstitutional, appellant shall give written notice to the Attorney General before filing the preliminary appeal statement, and a copy of the notification shall be attached to the preliminary appeal statement. The notification

and a copy of the preliminary appeal statement shall be sent to the Solicitor General, Department of Law, The Capitol, Albany, New York 12224.

(c) After review of the preliminary appeal statement, the Clerk of the Court will notify the parties either that review pursuant to section 500.10 or section 500.11 of this Part shall commence or that the appeal shall proceed in the normal course.

500.10 Examination of Subject Matter Jurisdiction.

(a) On its own motion, the Court may examine its subject matter jurisdiction over an appeal based on the papers submitted in accordance with section 500.9 of this Part. The Clerk of the Court shall notify all parties by letter (Jurisdictional Inquiry) when an appeal has been selected for examination pursuant to this section, stating the jurisdictional concerns identified in reviewing the preliminary appeal statement and setting a due date for filing and service of comments in letter form (Jurisdictional Response) from all parties. Such examination shall result in dismissal or transfer of the appeal by the Court or in notification to the parties that the appeal shall proceed either under the review process described in section 500.11 of this Part or in the normal course, with or without oral argument. This examination of jurisdiction shall not preclude the Court from addressing any jurisdictional concerns at any time.

(b) Companion submission in digital format. Unless a request to be relieved of the digital filing requirement is submitted pursuant to subsection 500.2(e) of this Part, each party shall submit in digital format its Jurisdictional Response. Appellant shall also submit in digital format one copy of the record below, or appendix if the appendix method was used in the court below, and one copy of the briefs or papers filed below by each of the parties. The Jurisdictional Response in digital format shall be identical to the filed original Jurisdictional Response, except it need not contain an original signature. All material submitted under this section shall comply with the technical specifications and instructions for submission available from the Clerk's Office. The Jurisdictional Response in digital format shall be received by the Clerk’s Office no later than the due date for the printed filings.

500.11 Alternative Procedure for Selected Appeals.

(a) On its own motion, the Court may review selected appeals by an alternative procedure. Such appeals shall be determined on the intermediate appellate court record or appendix and briefs, the writings in the courts below and additional letter submissions on the merits. The Clerk of the Court shall notify all parties by letter when an appeal has been selected for review pursuant to this section. Appellant may request such review in its preliminary appeal statement. Respondent may request such review by letter to the Clerk of the Court, with proof of service of one copy on each other party, within five days after the appeal is taken.

(b) Appeals may be selected for alternative review on the basis of:

(1) questions of discretion, mixed questions of law and fact or affirmed findings of fact, which are subject to a limited scope of review;

(2) recent, controlling precedent;

(3) narrow issues of law not of statewide importance;

(4) unpreserved issues of law;

(5) a party's request for such review; or

(6) other appropriate factors.

(c) Appellant's filing. In addition to the submission in digital format required by subsection (k) of this section, within 25 days after the date of the Clerk of the Court's letter initiating the alternative review procedure, appellant shall:

(1) file three copies of the intermediate appellate court record or appendix and three copies of each brief filed by each party in the intermediate appellate court. Original exhibits to be relied upon which are not in the record or appendix at the intermediate appellate court shall be filed or, if they are on file with the clerk of the trial court, subpoenaed to this Court and the Court so advised by letter. Such exhibits shall be clearly identified and, where appropriate, their authenticity shall be certified or stipulated to;

(2) file an original and two copies of a letter stating its arguments in support of appellant's position on the merits. If appellant objects to review pursuant to this section, the letter shall also explain that position;

(3) include as part of its submission a disclosure statement pursuant to subsection 500.1(f) of this Part, if necessary;

(4) file proof of service of one copy of its arguments on each other party; and

(5) remit the fee, if any, required by subsection 500.3(a) of this Part.

(d) Respondent's filing. In addition to the submission in digital format required by subsection (k) of this section, within 20 days after service of appellant's submission, respondent shall file an original and two copies of a letter stating its arguments in support of its position on the merits. If respondent objects to review pursuant to this section, the letter shall also explain that position. Respondent shall include in its submission a disclosure statement pursuant to subsection 500.1(f) of this Part, if necessary, and file proof of service of one copy of its arguments on each other party.

(e) Appellant's reply. A reply is not permitted unless authorized by the Court upon request of the appellant, which shall accompany the proposed filing, or on the Court's own motion.

(f) Abandonment of arguments. A party shall be deemed to have abandoned any argument made in the intermediate appellate court briefs not addressed or reserved in the letter submission to this Court.

(g) Review of subject matter jurisdiction. An appeal selected for review pursuant to this section is subject to dismissal on the Court's own motion, should it be determined that the Court is without subject matter jurisdiction.

(h) Related litigation. Where necessary, each letter filing shall indicate the status of any related litigation as of the date of the letter's filing.

(i) Termination of alternative procedure. If the Court terminates its review of the appeal pursuant to this section before disposition, the Clerk of the Court will notify counsel by letter and set a schedule for full briefing of the appeal.

(j) Amicus curiae relief. The Attorney General of the State of New York may file, no later than the filing date set for respondent's submission, an original and two copies of an amicus curiae submission without leave of the Court, with proof of service of one copy on each party. Any other proposed amicus curiae shall request amicus curiae relief pursuant to subsection 500.23(a)(2) of this Part.

(k) Companion submission in digital format. Each appellant, respondent and amicus curiae shall submit in digital format its letter stating its position on the merits or its amicus curiae argument. The letter in digital format shall be identical to the filed original printed letter, except it need not contain an original signature. Appellant shall also submit in digital format each brief filed by each party in the intermediate appellate court, the intermediate appellate court record or appendix, and original exhibits to be relied upon that are not in the record or appendix at the intermediate appellate court. All material submitted under this section shall comply with the technical specifications and instructions for submission available from the Clerk's Office. Unless otherwise permitted by the Clerk of the Court, letters, intermediate appellate court briefs and records or appendices in digital format shall be received by the Clerk's Office no later than the filing due date for the printed materials.

(l) All submissions under this section shall comply with the requirements of section 500.5 of this Part regarding sealing and redaction.

(m) Word and page limits. Submissions pursuant to subsections (c)(2), (d) and (j) of this section and subsection 500.23 (a)(2) of this Part shall not exceed 7,000 words if prepared by a word-processing system and shall not exceed 20 pages if typewritten or handwritten. The person whose signature appears on a submission prepared by a word-processing system shall certify the total word count for the text of the submission. The certification

may rely on the word count of the word-processing system used to prepare the submission. The word and page limits of this subsection apply to the body of the submission and are exclusive of the information required by subsection 500.1(f) of this Part and subsection (h) of this section.

500.12 Filing of Record Material and Briefs in Normal Course Appeals.

(a) Scheduling letter. Generally, in an appeal tracked for normal course treatment, the Clerk of the Court issues a scheduling letter after the filing of the preliminary appeal statement. A scheduling letter also issues upon the termination of an inquiry pursuant to section 500.10 or 500.11 of this Part. The scheduling letter sets the filing dates for record material and briefs.

(b) Appellant's initial filing. In addition to the submission in digital format required by subsection 500.14(g) of this Part, on or before the date specified in the scheduling letter, appellant shall serve and file record material in compliance with section 500.14 of this Part, and shall remit the fee, if any, required by subsection 500.3(a) of this Part. In addition to the submission in digital format required by subsection (h) of this section, appellant also shall file an original and nine copies of a brief, with proof of service of three copies on each other party. If no scheduling letter is issued, appellant's papers shall be served and filed within 60 days after appellant took the appeal by (1) serving a notice of appeal on the adverse party and filing a notice of appeal in the place and manner required by CPLR 5515, (2) entry of an order granting a motion for leave to appeal in a civil case, or (3) issuance of a certificate granting leave to appeal in a criminal case.

(c) Respondent’s filing. In addition to the submission in digital format required by subsection (h) of this section and subsection 500.14(g) of this Part, on or before the date specified in the scheduling letter, respondent shall serve and file an original and nine copies of a brief and an original and nine copies of a supplementary appendix, if any, with proof of service of three copies on each other party. If no scheduling letter is issued, respondent's papers shall be filed within 45 days after service of appellant's brief.

(d) Reply briefs. A reply brief is not required but may be served and filed by appellant on or before the date specified in the scheduling letter. If no scheduling letter is issued, a reply brief may be served and filed within 15 days after service of respondent's brief. Where cross appeals are filed, the cross appellant may serve and file a reply brief to the main appellant's responsive brief. In addition to the submission in digital format required by subsection (h) of this section, an original and nine copies of a reply brief shall be served and filed, with proof of service of three copies on each other party.

(e) Amicus curiae briefs. The Attorney General of the State of New York may file, no later than the filing date set for respondent's brief, and in addition to the submission in digital format required by subsection (h) of this section, an original and nine copies of an amicus curiae brief without leave of the Court, with proof of service of three copies on each party. Any other proposed amicus curiae shall request amicus curiae relief pursuant to subsection 500.23(a)(1) of this Part.

(f) Briefs in response to amicus curiae briefs. Briefs in response to an amicus curiae brief are not required but may be served and filed by a party whose position is adverse to that of the amicus curiae. The brief shall be served and filed within 15 days after the date of this Court's order granting a motion for amicus curiae relief or within 15 days after the service of an amicus curiae brief by the Attorney General of the State of New York. Reply briefs by amicus curiae are not permitted. In addition to the submission in digital format required by subsection (h) of this section, an original and nine copies shall be filed, with proof of service of three copies on each other party and one copy on each amicus curiae.

(g) Surreply briefs. Surreply briefs are not permitted.

(h) Companion submission in digital format. Each appellant, respondent and amicus curiae shall submit in digital format its brief and record material. The brief and record material in digital format shall be identical to the filed original printed brief and record material, except they need not contain an original signature, and they shall comply with the technical specifications and instructions for submission available from the Clerk's Office. Unless otherwise permitted by the Clerk of the Court, briefs and record material in digital format shall be received by the Clerk's Office no later than the filing due date for the printed brief and record material.

(i) All submissions under this section shall comply with the requirements of section 500.5 of this Part regarding sealing and redaction.

500.13 Content and Form of Briefs in Normal Course Appeals.

(a) Content. All briefs shall conform to the requirements of section 500.1 of this Part and contain a table of contents, a table of cases and authorities, questions presented, point headings, and, if necessary, a disclosure statement pursuant to subsection 500.1(f) of this Part. Such disclosure statement shall be included before the table of contents in the party's principal brief. Appellant's brief shall include a statement showing that the Court has jurisdiction to entertain the appeal and to review the questions raised, with citations to the pages of the record or appendix where such questions have been preserved for the Court's review. The original of each brief shall be signed and dated, shall have the affidavit of service affixed to the inside of the back cover and shall be identified on the front cover as the original. Each brief shall indicate the status of any related litigation as of the date the brief is completed. Such statement shall be included before the table of contents in each party's brief.

(b) Brief covers. Brief covers shall be white and shall contain the caption of the case and name, address, telephone number, and facsimile number of counsel or self-represented litigant and the party on whose behalf the brief is submitted, and the date on which the brief was completed. In the upper right corner, the brief cover shall indicate whether the party proposes to submit the brief without oral argument or, if argument time is requested, the amount of time requested and the name of the person who will present oral argument (see section 500.18 of this Part). If a time request does not appear on the brief,

generally no more than 10 minutes will be assigned. The Court will determine the argument time, if any, to be assigned to each party. Plastic covers shall not be used.

(c) Word and page limits. Except by permission of the Court pursuant to subsection (c)(4) of this section, the following limitations apply:

(1) Briefs prepared by word-processing systems. The principal briefs of appellant and respondent shall not exceed 14,000 words; reply briefs, amicus briefs, and briefs in response to amicus briefs shall not exceed 7,000 words. The person whose signature appears in the brief pursuant to subsection (a) of this section shall certify the total word count for all printed text in the body of the brief. The certification may rely on the word count of the word-processing system used to prepare the brief.

(2) Typewritten and handwritten briefs. The principal briefs of appellant and respondent shall not exceed 35 pages; reply briefs, amicus briefs, and briefs in response to amicus briefs shall not exceed 20 pages.

(3) Common requirements. The word and page limits of this subsection apply only to the body of the brief and are exclusive of the statement of status of the related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part. In a cross appeal, the responding/reply brief of the main appellant shall constitute a principal brief.

(4) Oversized briefs. An application for permission to file an oversized brief shall be by letter addressed to the Clerk of the Court, with proof of service of one copy on each other party, stating the number of additional words or pages requested, demonstrating with specificity good cause for the oversized brief and asserting that the brief has been edited for conciseness and to eliminate repetition. The letter shall be received by the Clerk's Office at least ten days before the brief is due to be filed.

500.14 Records, Appendices and Exhibits in Normal Course Appeals.

(a) Record material. Appellant shall supply the Court with record material in one of the following ways:

(1) Appellant may subpoena the original file to this Court from the clerk of the court of original instance or other custodian, and submit original exhibits to be relied upon, and, in addition to the submission in digital format required by subsection (g) of this section, supplement these with an original and nine copies of an appendix conforming to subsection (b) of this section, with proof of service of three copies of the appendix on each other party. If appellant is represented by

assigned counsel, or has established indigency, an oral or written request may be made of the Clerk of this Court to obtain the original file.

(2) In addition to the submission in digital format required by subsection (g) of this section, appellant may file with the Clerk of the Court one copy of the reproduced record used at the intermediate appellate court. This record shall be supplemented by an original and nine copies of an appendix conforming to subsection (b) of this section, with proof of service of three copies of the appendix on each other party.

(3) In addition to the submission in digital format required by subsection (g) of this section, appellant may file with the Clerk of the Court an original and nine copies of a new and full record which shall include the record used at the court below, the notice of appeal or order granting leave to appeal to this Court, the decision and order appealed from to this Court, and any other decision and order brought up for review, with proof of service of three copies of the new record on each other party.

(b) Appendix. An appendix shall conform to the requirements of CPLR 5528 and 5529, and shall be sufficient by itself to permit the Court to review the issues raised on appeal without resort to the original file (see subsection [a][1] of this section) or reproduced record used at the court below (see subsection [a][2] of this section). The Clerk's Office encourages the filing of any appendix as a separately bound submission. The appendix shall include, as relevant to the appeal, the following:

(1) the notice of appeal or order or certificate granting leave to appeal;

(2) the order, judgment or determination appealed from to this Court;

(3) any order, judgment or determination which is the subject of the order appealed from, or which is otherwise brought up for review;

(4) any decision or opinion relating to the orders set forth in subsections (b)(2) and (3) of this section; and

(5) the testimony, affidavits, jury charge and written or photographic exhibits useful to the determination of the questions raised on appeal or cited in the brief of the party filing the appendix.

(c) Respondent's appendix. A respondent may file a supplementary appendix. The Clerk's Office encourages the filing of any supplementary appendix as a separately bound submission.

(d) Inadequate appendix. When appellant has filed an inadequate appendix, respondent may move to strike the appendix (see section 500.21 of this Part) or, in addition to the submission in digital format required by subsection (g) of this section, may submit an

original and nine copies of an appendix containing such additional parts of the record as respondent deems necessary to consider the questions involved, with proof of service of three copies of the appendix on each other party. The Court may direct appellant to supplement the appendix with additional parts of the record it deems necessary to consider the questions involved.

(e) Description of action or proceeding. The new and full record referred to in subsection (a)(3) of this section or the appendix shall contain the statement required by CPLR 5531.

(f) Correctness of the record. The correctness of the new and full record referred to in subsection (a)(3) of this section or the appendix and additional papers shall be authenticated pursuant to CPLR 2105 or stipulated to pursuant to CPLR 5532.

(g) Companion submission in digital format. Each appellant shall submit in digital format its appendix pursuant to subsection (a)(1) of this section, intermediate appellate court record and appendix pursuant to subsection (a)(2) of this section, or new and full record pursuant to subsection (a)(3) of this section. If a respondent files an appendix pursuant to this section, respondent shall submit in digital format such appendix. The record material in digital format shall be identical to the filed original printed record material, except it need not contain an original signature, and it shall comply with the technical specifications and instructions for submission available from the Clerk's Office. Unless otherwise permitted by the Clerk of the Court, record material in digital format shall be received by the Clerk's Office no later than the due date for the printed record material.

(h) All submissions under this section shall comply with the requirements of section 500.5 of this Part regarding sealing and redaction.

500.15 Extensions of Time.

The Clerk of the Court is authorized to grant, for good cause shown, a reasonable extension of time for filing papers on an appeal. A request for an extension may be made by telephone call to the Clerk's Office. The party requesting an extension shall advise the Clerk of the Court of the position of each other party with regard to the request. A party granted an extension shall file a confirmation letter, with proof of service of one copy on each other party, unless the Clerk's Office has notified all parties in writing of the determination of the request.

500.16 Failure to Proceed or File Papers.

(a) Dismissal of appeal. If appellant has not filed and served the papers required by section 500.11, 500.12 or subsection 500.26(a) of this Part within the time set by the Clerk's Office or otherwise prescribed by this Part, the Clerk of the Court shall enter an order dismissing the appeal.

(b) Preclusion. If respondent has not filed and served the papers required by section 500.11, 500.12 or subsection 500.26(a) of this Part within the time set by the Clerk's Office or otherwise prescribed by this Part, the Clerk of the Court shall enter an order precluding respondent's filing.

(c) Judicial review. A party may seek judicial review of dismissal and preclusion orders entered pursuant to subsections (a) and (b) of this section by motion on notice in accordance with section 500.21 of this Part.

500.17 Calendar.

(a) Notification of argument time and date. When the calendar has been prepared, the Clerk of the Court shall advise counsel by letter of the date and time assigned for oral argument.

(b) Calendar preferences. A party seeking a preference shall address a letter to the Clerk of the Court, with proof of service of one copy on each other party. The letter shall state why a preference is needed, why an alternative remedy, such as review pursuant to section 500.11 of this Part or submission without argument, is not appropriate, and opposing counsel's position on the request.

(c) Notification of unavailability. Counsel have a continuing obligation to notify the Clerk's Office of days of known or possible unavailability for oral argument during the Court's scheduled sessions.

(d) Adjournments. Requests for adjournment of a calendared appeal are not favored. A party seeking an adjournment shall address a letter to the Clerk of the Court, with proof of service of one copy on each other party. The letter shall state in detail why the adjournment is necessary, and why submission on the brief filed or having substitute counsel argue are not viable alternatives, and opposing counsel's position on the request.

500.18 Oral Argument.

(a) Argument time. Maximum argument time is 30 minutes per party, unless otherwise directed or permitted by the Court upon advance request by letter addressed to the Clerk of the Court with proof of service of one copy on each other party. In requesting argument time, counsel shall presume the Court's familiarity with the facts, procedural history and legal issues the appeal presents. The Court may assign time for argument that varies from a party's request and may determine that the appeal be submitted by any party or all parties without oral argument (see subsection 500.13[b] of this Part).

(b) Arguing counsel. Only one counsel is permitted to argue for a party, unless otherwise directed or permitted by the Court upon advance request by letter addressed to the Clerk of the Court with proof of service of one copy on each other party.

(c) Rebuttal. Prior to beginning argument, appellant may orally request permission from the Chief Judge to reserve a specific number of minutes for rebuttal. The time reserved shall be subtracted from the total time assigned to appellant. Respondent may not request permission to reserve time for surrebuttal.

500.19 Remittitur.

(a) The remittitur of the Court, containing the Court's adjudication, together with the return papers filed with the Court, shall be sent to the clerk of the court of original instance or to the clerk of the court to which the case is remitted, there to be proceeded upon according to law.

(b) The court of original instance or the court to which the case is remitted issues any order to effect the adjudication in this Court's remittitur, including an award of costs.

CRIMINAL LEAVE APPLICATIONS

500.20 Criminal Leave Applications.

(a) Letter application. In addition to the submission in digital format required by subsection 500.20(e) of this Part, applications to the Chief Judge for leave to appeal in a criminal case (CPL 460.20) shall be by letter addressed to 20 Eagle Street, Albany, New York 12207, and shall be sent to the attention of the Clerk of the Court, with proof of service of one copy on the adverse party. The letter shall indicate:

(1) the names of all codefendants in the trial court, if any, and the status of their appeals, if known;

(2) that no application for the same relief has been addressed to a justice of the Appellate Division, as only one application is available;

(3) whether an oral hearing on the application, in person or by telephone conference call, is requested; and

(4) the grounds upon which leave to appeal is sought. Particular written attention shall be given to reviewability and preservation of error, identifying and reproducing the particular portions of the record where the questions sought to be reviewed are raised and preserved.

(b) Material to be provided with application.

(1) Orders of intermediate appellate courts determining appeals to those courts. An application for leave to appeal from an intermediate appellate court order determining an appeal taken to that court shall include:

(i) each brief submitted on defendant's behalf and the People's behalf to the intermediate appellate court in digital format only, unless a request to be relieved of the digital filing requirements is submitted pursuant to subsection 500.2(e) of this Part. If a request to be relieved of the digital filing requirements is submitted pursuant to subsection 500.2(e) of this Part, the application shall include one unbound copy of each brief submitted on defendant's and the People's behalf to the intermediate appellate court;

(ii) the order and decision of the intermediate appellate court sought to be appealed from;

(iii) all relevant opinions or memoranda of the courts below, along with any other papers to be relied on in furtherance of the application; and

(iv) if defendant is a corporation or other business entity, a disclosure statement pursuant to subsection 500.1(f) of this Part.

(2) Orders of intermediate appellate courts determining applications for writs of error coram nobis. An application for leave to appeal from an intermediate appellate court order determining an application for coram nobis relief shall include:

(i) the order and decision sought to be appealed from;

(ii) the papers in support of and opposing the application filed in the intermediate appellate court, as well as the briefs filed on the underlying appeal, if available, in digital format only, unless a request to be relieved of the digital filing requirements is submitted pursuant to subsection 500.2(e) of this Part. If a request to be relieved of the digital filing requirements is submitted pursuant to subsection 500.2(e) of this Part, the application shall include one unbound copy of the papers in support of and opposing the application filed in the intermediate appellate court, as well as the briefs filed on the underlying appeal, if available; and

(iii) the intermediate appellate court decision and order sought to be vacated.

(c) Assignment. The Chief Judge directs the assignment of each application to a Judge of the Court through the Clerk of the Court; counsel shall not apply directly to a Judge or request that an application be assigned to a particular Judge. The assigned Judge shall advise the parties if an oral hearing on the application will be entertained.

(d) Additional and Responding Submissions. After the application is assigned to a Judge for review, the applicant will be given an opportunity to serve and file additional submissions, if any, and the adverse party will be given an opportunity to respond. A

reply is not permitted unless authorized by the assigned Judge. In addition to the submission in digital format required by subsection 500.20(e) of this Part, hard copy additional and responding submissions shall be addressed to 20 Eagle Street, Albany, New York 12207, and shall be sent to the attention of the assigned Judge, with proof of service of one copy on the adverse party.

(e) Companion submission in digital format.

(1) Unless a request to be relieved of the digital filing requirement is submitted pursuant to subsection 500.2(e) of this Part, the following materials are required to be submitted in digital format:

(i) subsection 500.20(a) letter application and subsection 500.20(b) material to be provided with the application;

(ii) subsection 500.20(d) additional and responding submissions; and

(iii) subsection 500.20(f) reargument or reconsideration requests.

(2) All material submitted under this section shall comply with the technical specifications and instructions for submission available from the Clerk's Office, be submitted within the time directed by the Clerk of the Court and be identical to the filed original printed materials except they need not contain original signatures.

(f) Reargument or reconsideration.

(1) In addition to the submission in digital format required by subsection 500.20(e) of this Part, requests for reargument or reconsideration shall be in letter form addressed to the Clerk of the Court, with proof of service on the adverse party, and shall be assigned to the Judge who ruled on the original application. Copies of the papers filed on the underlying leave application need not be filed. A request for reargument or reconsideration shall not be based on the assertion for the first time of new points, except for extraordinary and compelling reasons.

(2) Unless otherwise permitted by the assigned Judge, the reargument or reconsideration request shall be served not later than 30 days after the date of the certificate determining the application of which reargument or reconsideration is sought. Only one request for reargument or reconsideration per party of a specific criminal leave application is permitted.

(g) Counsel. This Court does not assign counsel for criminal leave applications. One set of motion papers addressed to this Court under section 500.21 of this Part for assignment of counsel on a criminal appeal may be filed, with proof of service of one copy on the adverse party, only after leave to appeal is granted.

(h) Stay requests. Whether prominently set forth at the beginning of a letter application for leave to appeal or made by separate letter with proof of service of one copy on the adverse party, an applicant seeking a stay (CPL 460.60; 530.50) should contact the

Clerk's Office in advance of the filing and file the stay request as directed by the Clerk's Office. A stay request shall state:

(1) whether the relief sought has been previously requested;

(2) whether defendant is presently incarcerated and the incarceration status, if known, of any codefendants; and,

(3) if the defendant is at liberty:

(i) whether a surrender date has been set; and

(ii) the conditions of release (e.g., on defendant's own recognizance or on a set bail amount).

(i) Applications for extensions of time to seek leave to appeal. An application for an extension of time to seek leave to appeal (CPL 460.30) shall be by one set of motion papers in compliance with section 500.21 of this Part, with proof of service of one copy on the adverse party. The motion shall be accompanied by a copy of the order sought to be appealed. If the motion for an extension of time is granted and the motion is treated as a timely criminal leave application, the parties must comply with the submission in digital format requirements of subsection 500.20(e).

MOTIONS

500.21 Motions - General Procedures.

(a) Return date. Regardless whether the Court is in session, motions shall be returnable on a Monday or, if Monday is a legal holiday, the first business day of the week unless otherwise provided by statute, order to show cause or stipulation so ordered by a Judge of the Court. Motions shall be submitted without oral argument, unless the Court directs otherwise. No adjournments shall be permitted other than in those limited instances provided by statute (CPLR 321[c] and 1022).

(b) Notice and service. Movant shall serve a notice of motion and supporting papers on sufficient notice to each other party, as set forth in the CPLR and subsections (b)(1), (2), (3) and (4) of this section. In computing the notice period, the date of service shall not be included.

(1) When the motion is personally served, movant shall give at least eight days' notice (CPLR 2214(b)).

(2) When the motion is served by regular mail, movant shall give at least 13 days' notice (CPLR 2103(b)(2)).

(3) When the motion is served by overnight delivery service, movant shall give at least nine days' notice (CPLR 2103(b)(6)).

(4) When the motion is served by facsimile transmission, movant shall comply with CPLR 2103(b)(5), and give at least eight days' notice.

(c) Filing. In addition to the submission in digital format required by subsection 500.21(i) of this Part, unless otherwise permitted by the Court or Clerk of the Court, movant shall file its motion, with proof of service on each other party, at Court of Appeals Hall no later than noon on the Friday preceding the return date. On or before the return date of the motion, respondent may file papers in opposition to the motion, with proof of service on each other party. Submissions shall not be filed by facsimile transmission or electronic mail, or other electronic transmission except when requested by the Clerk of the Court or otherwise permitted by this Part. The Court's motion practice does not permit the filing of reply briefs and memoranda. A request for permission to file papers after the return date of the motion is governed by section 500.7 of this Part.

(d) Number of required copies. Except in cases of indigency, where subsection (g) of this section applies, movant shall file an original and one copy of its motion, with proof of service of one copy on each other party. Respondent may file an original and one copy of its papers in opposition to the motion, with proof of service of one copy on each other party.

(e) Fee required. Movant shall remit the fee, if any, required by subsection 500.3(b) of this Part with each motion and cross motion filed.

(f) Form of papers. Movant's papers and opposing papers shall comply in form with section 500.1 of this Part. The papers shall include a disclosure statement pursuant to subsection 500.1(f) of this Part, if required.

(g) Proof of indigency. Any motion may be made on one set of papers, with proof of service of one copy on each other party, where:

(1) the motion requests poor person relief and contains the information required by CPLR 1101(a), or

(2) movant provides a copy of an order, issued by any court in the action or proceeding to which the motion relates, granting that party poor person relief, together with a sworn affidavit that the same financial circumstances exist at the time of filing in the Court of Appeals as when the order granting poor person relief was issued.

(h) Orders determining motions. The original of an order of the Court of Appeals issued on a motion decision is filed in the Clerk's Office automatically by the Clerk of the Court and is entered on the date of decision. There is no procedure for filing additional papers, such as proof of service of a copy of the order with notice of entry upon adverse parties.

If necessary, such papers may be filed in the office where papers submitted to the court of original instance are filed.

(i) Companion submission in digital format. Unless a request to be relieved of the digital filing requirement is submitted pursuant to subsection 500.2(e) of this Part, each party shall submit in digital format its motion or opposition papers. The motion or opposition papers in digital format shall be identical to the filed original printed motion or opposition papers, except the digital filing need not contain an original signature. All material submitted under this section shall comply with the technical specifications and instructions for submission available from the Clerk's Office. The companion motion and opposition papers in digital format shall be submitted no later than seven days after the return date of the motion.

500.22 Motions for Permission to Appeal in Civil Cases.

(a) Filing and notice. In addition to the submission in digital format required by subsection 500.22(e) of this section, movant shall file an original and one copy of its motion, unless permitted to proceed pursuant to subsection 500.21(g), with proof of service of one copy on each other party. The motion shall be noticed for a return date in compliance with CPLR 5516 and subsection 500.21(b) of this Part.

(b) Content. The motion shall be a single document, bound on the left, and shall contain in the order here indicated:

(1) A notice of motion (see CPLR 2214).

(2) A statement of the procedural history of the case, including a showing of the timeliness of the motion.

(i) If no prior motion for leave to appeal to the Court of Appeals was filed at the Appellate Division, movant's papers to this Court shall demonstrate timeliness by stating the date movant was served (see CPLR 2103(b)) with the order or judgment sought to be appealed from, with notice of entry.

(ii) If a prior motion for leave to appeal to the Court of Appeals was filed at the Appellate Division, movant's papers filed in this Court shall demonstrate that the timeliness chain is intact by stating:

(a) the date movant was served with the order or judgment sought to be appealed from, with notice of entry,

(b) the date movant served the notice of motion addressed to the Appellate Division upon each other party, and

(c) the date movant was served with the Appellate Division order denying leave to appeal with notice of entry.

(3) A showing that this Court has jurisdiction of the motion and of the proposed appeal, including that the order or judgment sought to be appealed from is a final determination or comes within the special class of nonfinal orders appealable by permission of the Court of Appeals (see CPLR 5602(a)(2)).

(4) A concise statement of the questions presented for review and why the questions presented merit review by this Court, such as that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. Movant shall identify the particular portions of the record where the questions sought to be reviewed are raised and preserved.

(5) A disclosure statement pursuant to subsection 500.1(f) of this Part, if required.

(6) Copies of the order or judgment sought to be appealed from with notice of entry, as well as copies of all relevant orders, opinions or memoranda rendered in the courts below. The papers shall state if no opinion was rendered.

(c) Additional documents. Movant shall file with its motion one copy of the record below, or appendix if the appendix method was used in the court below, and one copy of the briefs filed below by each of the parties in digital format only, unless a request to be relieved of the digital filing requirements is submitted pursuant to subsection 500.2(e) of this Part. If a request to be relieved of the digital filing requirements is submitted pursuant to subsection 500.2(e) of this Part, movant shall file with its motion one unbound copy of the record below, or appendix if the appendix method was used in the court below, and one unbound copy of the briefs filed below by each of the parties.

(d) Opposing papers. In addition to the submission in digital format required by subsection 500.22(e) of this section, respondent may file an original and one copy of papers in opposition to the motion, with proof of service of one copy on each other party. The opposing papers shall state concisely respondent's argument for dismissal or denial of the motion.

(e) Companion submission in digital format. Unless a request to be relieved of the digital filing requirement is submitted pursuant to subsection 500.2(e) of this Part, each party shall submit in digital format its motion or opposition papers. Movant shall also submit in digital format one copy of the record below, or appendix if the appendix was used in the court below, and one copy of the briefs filed below by each of the parties. The motion, opposition and papers filed in the court below in digital format shall be identical to the filed original printed motion or opposition papers and papers filed in the court below, except it need not contain an original signature. All material submitted under this section shall comply with the technical specifications and instructions for submission available from the Clerk's Office. The companion motion and opposition papers in digital format shall be submitted no later than seven days after the return date of the motion.

500.23 Amicus Curiae Relief.

Any nonparty other than the Attorney General seeking to file an amicus brief on an appeal, certified question or motion for leave to appeal must obtain permission by motion. Potential amici seeking information are encouraged to contact the Clerk's Office by telephone during business hours. Information on the calendar status of appeals and certified questions, Court session dates and appropriate return dates for amicus motions also is available on the Court's web site.

(a) Motions for amicus curiae relief.

(1) Amicus curiae relief on normal course appeals and normal course certified questions.

(i) In addition to the submission in digital format required by subsection 500.23(c) of this section, movant shall file an original and one copy of its motion, accompanied by an original amicus brief, with proof of service of one copy of the motion and one copy of the brief on each other party. The proposed brief shall conform to the word and page limits set forth in subsection 500.13(c) of this Part and the requirements of section 500.1 of this Part.

(ii) If the motion is granted, in addition to the submission in digital format required by subsection 500.12(h) of this Part, nine copies of the brief shall be filed, with proof of service of three copies on each party, within the time set by the Court's order.

(iii) The motion shall be noticed for a return date no later than the Court session preceding the session in which argument or submission of the appeal or certified question is scheduled. When an appeal or certified question is scheduled for argument or submission during the Court's January or September session, the motion shall be noticed for a return date no later than the first Monday in December or the first Monday in August, respectively.

(2) Amicus curiae relief on appeals and certified questions selected for review by the alternative procedure. In addition to the submission in digital format required by subsection 500.23(c) of this section, movant shall file an original and one copy of its motion, accompanied by an original and one copy of the proposed submission, with proof of service of one copy on each other party. The motion shall be noticed for a return date no later than the filing date set for respondent's submission on the appeal. The proposed submission shall conform to the word and page limits set forth in subsection 500.11(m) of this Part and the requirements of section 500.1 of this Part.

(3) Amicus curiae relief on motions for permission to appeal in civil cases. In addition to the submission in digital format required by subsection 500.23(c) of this section, movant shall file an original and one copy of its papers, accompanied by an original amicus brief, with proof of service of the motion and one copy of the brief on each other party. The motion shall be noticed for a return date as soon as practicable after the return date of the motion for permission to appeal to which it relates. The granting of a motion to appear amicus curiae on a motion for permission to appeal does not authorize the movant to appear amicus curiae on the subsequent appeal. A new motion for amicus curiae relief on the appeal must be brought pursuant to subsection (a)(1) or (2) of this section.

(4) Criteria. Movant shall not present issues not raised before the courts below. A motion for amicus curiae relief shall:

(i) demonstrate that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; movant could identify law or arguments that might otherwise escape the Court's consideration; or the proposed amicus curiae brief otherwise would be of assistance to the Court;

(ii) include a statement of the identity of movant and movant's interest in the matter; and

(iii) include a statement indicating whether:

(a) a party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner;

(b) a party or a party’s counsel contributed money that was intended to fund preparation or submission of the brief; and

(c) a person or entity, other than movant or movant’s counsel, contributed money that was intended to fund preparation or submission of the brief and, if so, identifying each such person or entity.

(5) Opposing papers. In addition to the submission in digital format required by subsection 500.23(c) of this section, respondent may file an original and one copy of papers in opposition to the motion, with proof of service of one copy on each other party.

(b) Amicus curiae filings by the Attorney General.

(1) Amicus curiae relief on motions for permission to appeal in civil cases. In addition to the submission in digital format required by subsection 500.23(c) of this section, the Attorney General shall file an original and one copy of the submission with proof of service of one copy on each other party. The

submission shall be filed without leave of the Court on or before the return date of the motion for permission to appeal.

(2) Amicus curiae relief on normal course appeals and normal course certified questions. See subsections 500.12(e) and 500.13(c) of this Part and section 500.1 of this Part.

(3) Amicus curiae relief on appeals and certified questions selected for review by the alternative procedure. See subsections 500.11(j) and 500.11(m) of this Part.

(c) Companion submission in digital format. Unless a request to be relieved of the digital filing requirement is submitted pursuant to subsection 500.2(e) of this Part, each party shall submit in digital format its motion or opposition papers. Movant shall also submit in digital format the proposed amicus brief or submission. The motion, proposed amicus brief or submission, and opposition papers submitted in digital format shall be identical to the filed original printed motion or opposition papers, except the digital filing need not contain an original signature. All material submitted under this section shall comply with the technical specifications and instructions for submission available from the Clerk's Office. The motion, proposed amicus brief or submission, and opposition papers in digital format shall be submitted within seven days of the return date of the motion.

500.24 Motions for Reargument of Appeals, Motions and Decisions on Certified Questions.

(a) Filing and notice. In addition to the submission in digital format required by subsection 500.24(g) of this section, movant shall file an original and one copy of its motion , with proof of service of one copy on each other party.

(b) Timeliness. Movant shall serve the notice of motion not later than 30 days after the appeal, certified question or motion sought to be reargued has been decided, unless otherwise permitted by the Court.

(c) Content. The motion shall state briefly the ground upon which reargument is sought and the points claimed to have been overlooked or misapprehended by the Court, with proper reference to the particular portions of the record and to the authorities relied upon.

(d) New matters. The motion shall not be based on the assertion for the first time of new arguments or points of law, except for extraordinary and compelling reasons.

(e) Limitation on motions. The Court shall entertain only one motion per party for reargument of a specific appeal, motion or certified question decision.

(f) Opposing papers. In addition to the submission in digital format required by subsection 500.24(g) of this section, respondent may file an original and one copy of papers in opposition to the motion, with proof of service of one copy on each other party. The opposing papers shall briefly state respondent's argument for dismissal or denial of the motion.

(g) Companion submission in digital format. Unless a request to be relieved of the digital filing requirement is submitted pursuant to subsection 500.2(e) of this Part, each party shall submit in digital format its motion or opposition papers. The motion or opposition papers in digital format shall be identical to the filed original printed motion or opposition papers, except the digital filing need not contain an original signature. All material submitted under this section shall comply with the technical specifications and instructions for submission available from the Clerk's Office. The companion motion and opposition papers in digital format shall be submitted within seven days of the return date of the motion.

500.25 Emergency Matters; Orders to Show Cause.

A request for emergency relief pending the determination of an appeal or a motion for permission to appeal shall be brought on by order to show cause. The applicant shall contact the Clerk's Office in advance of the filing. The papers shall be filed as directed by the Clerk's Office. The order to show cause shall include telephone and facsimile numbers for each attorney and self-represented party, and a statement giving reasons for granting the request. If there is no pending appeal or motion for permission to appeal, the order to show cause shall bring on a motion for leave to appeal or be accompanied by a notice of appeal or a motion for permission to appeal complying with section 500.22 of this Part. There is no fee for filing an order to show cause. If a Judge signs an order to show cause bringing on a motion, movant shall pay the fee, if any, required by subsection 500.3(b) of this Part.

PRIMARY ELECTION SESSION

500.26 Primary Election Session Procedures.

(a) Appeals as of right or by permission of the Appellate Division.

(1) Appellant shall immediately contact the Clerk's Office by telephone upon receipt of the order from which the appeal is taken.

(2) Appellant shall immediately orally notify each other party of the appeal.

(3) Within the time directed by the Clerk of the Court, appellant shall file:

(i) a copy of the notice of appeal or order granting a motion for leave to appeal and a preliminary appeal statement with proof of service on each other party;

(ii) 10 copies of appellant's Appellate Division brief and, where applicable, the record or appendix;

(iii) the original file, where applicable, which appellant shall obtain;

(iv) the fee, if any, required by subsection 500.3(a) of this Part;

(v) an original and nine copies of a letter setting forth appellant's arguments in this Court with proof of service of one copy on each other party; and

(vi) additional papers, if requested.

(4) Within the time directed by the Clerk of the Court, respondent shall submit 10 copies of its Appellate Division brief, and may submit an original and nine copies of a letter in opposition with proof of service of one copy on each other party.

(b) Motions for permission to appeal.

(1) Movant shall immediately contact the Clerk's Office by telephone upon receipt of the order from which movant seeks leave to appeal.

(2) Movant shall immediately orally notify each other party of the motion.

(3) Within the time directed by the Clerk of the Court, movant shall file:

(i) an original and one copy of a letter requesting permission to appeal with proof of service of one copy on each other party;

(ii) one copy of the Appellate Division decision and order;

(iii) one copy of the Supreme Court decision and order;

(iv) the original file, where applicable, which movant shall obtain; and

(v) the fee, if any, required by subsection 500.3(b) of this Part.

(4) Within the time directed by the Clerk of the Court, respondent may submit an original and one copy of a letter in opposition with proof of service of one copy on each other party.

(5) Companion submission in digital format. Unless a request to be relieved of the digital filing requirement is submitted pursuant to subsection 500.2(e) of this Part, within the time directed by the Clerk of the Court, movant shall file in digital format a copy of the letter requesting permission to appeal, the Appellate Division decision and order, the Supreme Court decision and order, one copy of movant’s Appellate Division brief and, where applicable, the record or appendix; respondent shall file in digital format a copy of respondent’s Appellate Division brief and any letter in opposition. These filings in digital format shall be identical to the filed original papers, except the digital filings need not contain an original signature. All material submitted under this section shall comply with the

technical specifications and instructions for submission available from the Clerk's Office.

Effective: December 31, 2020

Practice Rules of the Appellate Division

Approved by Joint Order of the Departments of the New York State
Supreme Court, Appellate Division
December 12, 2017
(Revised June 29, 2018)
(Revised November 25, 2019)

Part 1250 shall apply to all matters that are commenced in the Appellate Division, or in which a notice of appeal to the Appellate Division is filed, on or after September 17, 2018, and

Unless otherwise ordered by the Court upon a showing that application of part 1250 to the matter would result in substantial prejudice to a party or would be manifestly unjust or impracticable under the circumstances, part 1250 shall apply to each matter pending in the Appellate Division on September 17, 2018.

Practice Rules of the Appellate Division
Part 1250

Part 1250

1250.1 General Provisions and Definitions

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

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

(2) Any reference to the "court" or the "Appellate Division" means the Appellate Division of the Supreme Court of the State of New York for the Judicial Department having jurisdiction over the cause or matter; any reference to a "justice" means a justice of that court; any reference to the "clerk" means the clerk of that court or a designee, unless the context of usage indicates the clerk of another court.

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

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

(5) The phrase "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 as relates to that appeal and cross appeal.

(6) The word "concurrent," when used to describe appeals, shall 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 as relates to those appeals.

(7) The word "appellant" shall refer to the party required to file the initial brief to the court in a cause or matter, including an appellant, a petitioner, an appellant-respondent and similar parties.

(8) The term "NYSCEF" shall mean the New York State Courts Electronic Filing System and the "NYSCEF site" shall mean the New York State Courts Electronic Filing System website located at www.nycourts.gov/efile.

(9) The phrase "filed electronically," when used to describe submissions to a court, shall refer to documents that have been filed by electronic means through the NYSCEF site.

(10) The phrase "electronic means" shall mean any method of transmission of information between computers or other machines, other than facsimile machines.

(11) The phrase "hard copy" shall mean a document in paper format.

(12) The phrase "digital copy" shall mean a document in text-searchable portable document format and otherwise compliant with the technical requirements established by the court.

(b) Number of Justices. When a cause is argued or submitted to the court with four justices present, it shall, whenever necessary, be deemed submitted also to any other duly qualified justice of the court, unless objection is noted at the time of argument or submission.

(c) Filing and Service; Weekends and Holidays.

(1) Filing

(i) Electronic filing. For the purpose of meeting deadlines imposed by court rule, order, or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions filed electronically will be deemed filed as of the time copies of the submissions are transmitted to the NYSCEF site. The filing of additional hard copies of such electronic filings pursuant to court rules shall not affect the timeliness of the filing.

(ii) Hard copy filing. For the purpose of meeting deadlines imposed by court rule, order or statute, all records on appeal, briefs, appendices, motions, affirmations and other submissions not filed

electronically will be deemed filed as of the time hard copies of the submissions are received and stamped by the office of the clerk.

(iii) A document deemed filed for purposes of timeliness under this rule may thereafter be reviewed and rejected by the clerk for failure to comply with any applicable statute, rule or order.

(2) Proof of Service. All hard copy filings shall be accompanied by proof of service upon all necessary parties pursuant to CPLR 2103.

(3) Service by Mail and Overnight Mail. If a period of time prescribed by this Part is measured from the service of a record, brief or other submission 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.

(4) Service by Electronic Mail Upon Consent. Unless otherwise directed by the court, parties in matters not subject to e-filing may agree, in writing, to service of submissions by electronic mail. A copy of any such agreement shall be filed with the court with the affidavit of service.

(5) Weekends and Holidays. If a period of time prescribed by this Part for the performance of an act ends on a Saturday, Sunday or court holiday, the act will be deemed timely if performed before the close of business on the next business day.

(d) Signing of documents. The original of every hard copy document submitted for filing in the office of the clerk of the 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 parties to the matter and shall be filed in the office of the clerk whenever multiple copies of a submission are required to be served and filed in accordance with the provisions of this Part. Documents filed electronically shall be signed in accordance with the provisions of the Appellate Division Rules for Electronic Filing.

(e) Confidentiality and Sealing.

(1) Records, briefs and other submissions filed in matters deemed confidential by law shall not be available to the public except as provided by statute or rule.

(2) Appeals and proceedings that are confidential by law include, but are not limited to:

(i) Matters arising pursuant to the Family Court Act (Family Court Act § 166).

(ii) Matrimonial actions and proceedings (Domestic Relations Law § 235; CPLR 105 [p]).

(iii) Adoption proceedings (Domestic Relations Law § 114).

(iv) Youthful offender adjudications (CPL 720.35 [2]; 725.15).

(v) Proceedings pursuant to article 6 of the Social Services Law (Social Services Law § 422 [4] [a]).

(vi) In criminal matters not otherwise confidential, records of grand jury proceedings (CPL 190.25 [4]), grand jury reports (CPL 190.85) and presentence reports and memoranda (CPL 390.50).

(vii) Proceedings pursuant to Civil Rights Law § 50-b.

(viii) Proceedings pursuant to Judiciary Law § 90 (10).

(3) Applications for sealing and unsealing court records shall be made by motion, upon good cause shown.

(4) In a civil cause, documents that are subject to an existing sealing order from another court shall remain subject to such order, except as otherwise ordered by the Appellate Division.

(f) Appellate Division Numbers. All documents filed with the court shall prominently display the name of the court of original instance, the index number or indictment number of the case in such court, if any, and any number assigned by the Appellate Division.

(g) Rejection for Noncompliance. The clerk may reject any submission that does not comply with this Part, is incomplete, is untimely, is not legible, or fails to

comply with any applicable statute, rule or order. The court may waive compliance by any party with any provision of this Part.

(h) Sanctions. An attorney or party who fails to comply with a rule or order of the court or who engages in frivolous conduct shall be subject to such sanction as the court may impose. The imposition of sanctions and costs may be made upon motion or upon the court's own initiative, after a reasonable opportunity to be heard. The court may impose sanctions and/or costs upon a written decision setting forth the conduct on which the imposition is made.

(i) Electronic Filing Rules. The rules of this Part shall be read in conjunction with the Electronic Filing Rules of the Appellate Division (22 NYCRR Part 1245). Where there is a conflict between this Part and Part 1245 in an appellate e-filed matter, Part 1245 shall control.

1250.2 Settlement or Withdrawal of Motion, Appeal or Proceeding; Notice of Change in Circumstances

(a) Withdrawal of Motion. A moving party may file a written request to withdraw a motion at any time prior to its determination.

(b) Withdrawal or Discontinuance of Appeal or Proceeding.

> (1) Unperfected appeals, or proceedings where issue has not been joined, may be withdrawn and discontinued by letter application to the court, with service on all parties.
>
> (2) An appeal that has been perfected or a proceeding where issue has been joined may be withdrawn and discontinued by leave of the court upon the filing with the court of a written stipulation of discontinuance signed by the parties or their attorneys and, in criminal appeals, by the appellant personally. Absent such a stipulation, an appellant may move for permission to withdraw such an appeal or proceeding. An appeal that has been perfected in the Second Judicial Department and in which no respondent's brief has been filed may be withdrawn by letter application to the court, with service on all parties.

(c) Notice of Change of Circumstances. The parties or their attorneys shall immediately notify the court when there is a settlement of a matter or any issue

therein or when a matter or any issue therein has been rendered moot. The parties or their attorneys shall likewise immediately notify the court if the cause should not be calendared because of the death of a party, bankruptcy or other appropriate event. Any such notification shall be followed by an application for appropriate relief. Any party or attorney who, without good cause shown, fails to comply with the requirements of this subdivision may be subject to the imposition of sanctions.

1250.3 Initial Filings; Active Management of Causes; Settlement or Mediation Program

(a) Initial Filings. Unless the court shall direct otherwise, in all civil matters counsel for the appellant or the petitioner shall file with the clerk of the court of original instance and serve on all parties, together with the notice of appeal or transfer order and the order or judgment appealed from, an initial informational statement on a form approved by the court and in such number as the court may direct. The clerk of the court from which the appeal is taken shall promptly transmit to the Appellate Division the informational statement and a copy of the notice of appeal or order granting leave or transferal and the order or judgment appealed from.

(b) Active Management. The court may direct that any matter be actively managed and may set forth a scheduling order specifying the time and manner of expedited briefing.

(c) Settlement or Mediation Program.

> (1) The court may issue a notice in any settlement or mediation program directing the attorneys for the parties, the parties themselves (unless the court excuses a party's personal presence), and such additional parties in interest as the court may direct to attend a conference before such person as it may designate to consider settlement, the limitation of issues and any other matter that such person determines may aid in the disposition of the appeal or resolution of the action or proceeding. Attorneys and representatives who appear must be fully familiar with the action or proceeding, and must be authorized to make binding stipulations or commitments on behalf of the party represented.

(2) Counsel to any party may apply to the court by letter at any time requesting such a conference. The application shall include a brief statement indicating why a conference would be appropriate.

(3) Upon the failure of any party, representative or counsel to appear for or participate in a settlement or mediation conference, or to comply with the terms of a stipulation or order entered following such a conference, the party or counsel may be subject to sanctions.

1250.4 Motions

(a) General.

(1) Day and time returnable. Unless otherwise required by statute, rule or order of the court or any justice thereof, every motion and every proceeding initiated in the court shall be made returnable at 10:00 a.m. on any Monday (or, if Monday is a legal holiday, the first business day of the week), and on such other days as the court may direct.

(2) Commencement; filing. All motions initiated by notice of motion shall be filed with the clerk at least one week before the return date. The originals of all such submissions shall be filed, together with proof of service upon all parties entitled to notice. Motions by any other method shall be as directed by the court or a justice thereof.

(3) The submissions in support of every motion made before the appeal is determined shall include a copy of the order, judgment or determination sought to be reviewed, the decision, if any, and the notice of appeal or other document which first invoked the jurisdiction of the court, with proof of filing.

(4) Notice and service of documents. Unless otherwise directed by the court, a motion shall be served with sufficient notice to all parties as set forth in CPLR 2214. In computing the notice period, the date upon which service is made shall not be included.

(5) Answering and reply documents, if any, shall be served within the time prescribed by CPLR 2214 (b) or directed by a justice of the court. The originals thereof with proof of service shall be filed by 4:00 p.m. of the

business day preceding the day on which the motion is returnable, unless, for good cause shown, they are permitted to be filed at a later time.

(6) Cross motions. Cross motions shall be made returnable on the same date as the original motion. A cross motion shall be served, either personally, by overnight delivery service or by electronic means, and filed at least three business days before the return date.

(7) Motions shall be deemed submitted on the return date, and no further documents shall be accepted for filing without leave of the court upon written application.

(8) Oral argument. Oral argument of motions is not permitted.

(9) One adjournment, for a period of 7 or14 days, shall be permitted upon written consent of the parties to the appeal, filed no later than 10:00 a.m. on the return date.

(b) Motions or Applications Which Include Requests for Interim Relief.

(1) An application or order to show cause presented for signature that includes a request for a temporary stay or other interim relief pending determination of a motion, or an application pursuant to CPLR 5704, shall be presented in person unless the court excuses such appearance, and shall state, among other things:

(i) the nature of the motion or proceeding;

(ii) the specific relief sought; and

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

(2) Notice. The party seeking relief as provided in this subdivision shall give reasonable notice to his or her adversary of the day and time when, and the location where, the application or order to show cause will be presented and the relief (including interim relief) being requested. The application or order to show cause shall be accompanied by an affidavit or affirmation stating the time, place and manner of such notification; by whom such

notification was given; if applicable, reasons for the non-appearance of any party; and, to the extent known, the position taken by the opposing party.

(3) Response. Unless otherwise ordered by the court, all submissions in opposition to any motion or proceeding initiated by an application or order to show cause shall be filed with the clerk at or before 10:00 a.m. on 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 submissions shall be filed with the court. On the return date the motion or proceeding will be deemed submitted to the court without oral argument.

(4) Reply. Reply submissions shall be permitted only by leave of the court.

(c) Permission to Appeal to the Appellate Division in a Civil Matter.

(1) When Addressed to a Justice.

(i) An application to a justice of the court for permission to appeal pursuant to CPLR 5701 (c) shall be made within the time prescribed by CPLR 5513.

(ii) The submissions upon which such an application is made shall state whether any previous application has been made and, if so, to whom and the reason given, if any, for any denial of leave or refusal to entertain the application.

(2) When Addressed to the Court.

(i) Where leave of the court is required for an appeal to be taken to it, the application for such leave shall be made in the manner and within the time prescribed by CPLR 5513 and 5516.

(ii) The submissions upon which an application for leave to appeal is made shall include a copy of the order or judgment and decision, if any, of the court below, a concise statement of the grounds of alleged error and a copy of the order of the lower court denying leave to appeal, if any.

(3) Motions for leave to appeal from an order of the Appellate Term.

(i) Where applicable, motions pursuant to CPLR 5703 for leave to appeal from an order of the Appellate Term shall be made only after a denial of a motion for leave to appeal made at the Appellate Term.

(ii) Such motions shall include a copy of the 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 application shall also include the applicant's stipulation consenting to the entry of judgment absolute against him or her in the event that the Appellate Division should affirm the order appealed from.

(d) Poor Person Relief.

(1) All matters. An affidavit in support of a motion for permission to proceed as a poor person, with or without a request for assignment of counsel, shall set forth the amount and sources of the movant's income; that the movant is unable to pay the costs, fees and expenses necessary to prosecute or respond in the matter; whether trial counsel was assigned or retained; 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; and such other information as the court may require.

(2) Civil Matters.

(i) In a civil appeal or special proceeding, an affidavit in support of a motion for permission to proceed as a poor person shall, in addition to meeting the requirements of section 1250.4(d)(1) of this Part, set forth sufficient facts so that the merit of the contentions can be ascertained (CPLR 1101 [a]). This subdivision has no application to appeals described in Family Court Act §1120(a), SCPA 407(1) and Judiciary Law § 35(1).

(ii) Applicants for poor person relief in civil matters shall comply with the service requirements of CPLR 1101(c).

(3) Family Court Matters

(i) In appeals pursuant to the Family Court Act, in lieu of a motion, an application for either permission to proceed as a poor person or for permission to proceed as a poor person and assignment of counsel may be made by trial counsel assigned pursuant to Family Court Act § 262 by filing with the clerk a certification of continued indigency and continued eligibility for assignment of counsel pursuant to Family Court Act § 1118.

(ii) Counsel shall attach to the certification a copy of the order from which the appeal is taken, together with the decision, if any, and a copy of the notice of appeal with proof of service and filing.

(4) Criminal Matters. In a criminal appeal not otherwise addressed in section 1250.11(a) of this Part, an affidavit in support of a motion for permission to proceed on appeal as a poor person shall, in addition to meeting the requirements of section 1250.4(d)(1), set forth the following: the date and county of conviction; whether the defendant is at liberty or in custody; the name and address of trial counsel; whether trial counsel was appointed or retained and, if retained, the source of the funds for such retention and an explanation as to why similar funds are not available to retain appellate counsel; whether the defendant posted bail during the trial proceedings; and, if bail was posted and the defendant is currently in custody, an explanation as to why the funds used to post such bail are not available to retain appellate counsel.

(e) Admission Pro Hac Vice. An attorney and counselor-at-law or the equivalent may apply for permission to appear pro hac vice with respect to a particular matter pending before the court pursuant to 22 NYCRR 520.11 by providing an affidavit stating that the applicant is a member in good standing in all the jurisdictions in which the applicant is admitted to practice and that the applicant is associated with a member in good standing of the New York bar, which member shall be the attorney of record in the matter. The applicant shall attach to the affidavit an original certificate of good standing from the court or other body responsible for regulating admission to the practice of law in the state in which the applicant

maintains his or her principal office for the practice of law. The New York attorney of record in the matter shall provide an affirmation in support of the application.

(f) Leave to File Amicus Curiae Brief. A person or entity who is not a party to an appeal or proceeding may make a motion to serve and file an amicus curiae brief. An affidavit or affirmation in support of the motion shall briefly set forth the issues to be briefed and the movant's interest in the issues, and shall include such number of copies of the proposed brief as the court requires. The proposed brief may not duplicate arguments made by a party to the appeal or proceeding. Unless permitted by the court, a person or entity granted permission to file an amicus curiae brief shall not be entitled to oral argument.

1250.5 Methods of Perfecting Causes

(a) Unless the court directs that a cause be perfected in a particular manner, an appellant may elect to perfect a cause by the reproduced full record method (CPLR 5528 [a] [5]); by the appendix method (CPLR 5528 [a] [5]); by the agreed statement in lieu of record method (CPLR 5527); or, where authorized by statute or this Part or order of the court, on the original record.

(b) Reproduced Full Record Method. If the appellant elects to proceed on a reproduced full record on appeal, the record shall be printed or otherwise reproduced as provided in sections 1250.6 and 1250.7 of this Part.

(c) Appendix Method. If the appellant elects to proceed by the appendix method, the appendix shall be printed or otherwise reproduced as provided in sections 1250.6 and 1250.7 of this Part.

(d) Agreed Statement in Lieu of Record Method. If the appellant elects to proceed by the agreed statement in lieu of record method, the statement shall be reproduced as a joint appendix as provided in sections 1250.6 and 1250.7 of this Part. The statement required by CPLR 553l shall be appended.

(e) Original Record. In the First, Second and Fourth Judicial Departments, the following causes may be perfected upon the original record, including a properly settled transcript of the trial or hearing, if any:

(1) appeals from the Family Court;

(2) appeals under the Election Law;
(3) appeals under the Human Rights Law (Executive Law § 298);
(4) proceedings transferred to the court pursuant to CPLR 7804 (g)
(5) appeals where the sole issue is compensation of a judicial appointee;
(6) appeals under Correction Law §§ 168-d (3) and 168-n (3);
(7) appeals of criminal causes;
(8) appeals from the Appellate Term, where the matter was perfected on an original record at the Appellate Term;
(9) other causes where an original record is authorized by statute; and
(10) causes where permission to proceed upon the original record has been authorized by the court.

1250.6 Reproduction of Records, Appendices and Briefs

(a) Compliance with the CPLR. Briefs, appendices and 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 or its digital equivalent. Use of recycled paper and reproduction on both sides of the paper is encouraged for hard copy filings and submissions.

(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 8½ 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 causes originating in the Appellate Division, 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, or such other identifying number as the court shall direct, in the upper right-hand portion opposite the title.

1250.7 Form and Content of Records and Appendices; Exhibits

(a) Format. Records and appendices shall be consecutively paginated and shall include accurate reproductions of the submissions made to the court of original instance, formatted in accordance with the practice in that court. 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 include the items set forth in CPLR 5526, and shall include 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 cause on the upper portion, and, on the lower portion, the names, addresses, telephone numbers and email addresses of the attorneys, the county clerk's index or file number, the docket or other identifying number or numbers used in the court from which the appeal is taken, and the superior court information or indictment number;

(2) The statement required by CPLR 553l;

(3) A table of contents which shall list and briefly describe each document 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 re-cross 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;

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

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

(6) A stipulation or order dispensing with reproducing exhibits, as provided in subdivision (c).

(7) The appropriate certification, stipulation, or settlement order pursuant to subdivision (g).

(c) Exhibits. The parties may stipulate to dispense with reproduction of exhibits in the full reproduced record on grounds that (1) the exhibits are not relevant or necessary to the determination of an appeal, and will not be cited in the parties' submissions; or (2) the exhibits, though relevant and necessary, are of a bulky or dangerous nature, and will be kept in readiness and delivered to the court on telephone notice.

(d) Appendix.

(1) The appendix shall include 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, and in a criminal case, the indictment or superior court information;
(v) material excerpts from transcripts of testimony or from documents in connection with a motion. Such excerpts shall include all the testimony or averments upon which the appellant relies and upon which it may be reasonably assumed the respondent will rely. Such

excerpts shall not be misleading or unintelligible by reason of incompleteness or lack of surrounding context;
(vi) copies of relevant exhibits, including photographs, to the extent practicable;
(vii) if pertinent, a statement identifying bulky, oversized or dangerous exhibits relevant to the appeal, as well as identifying the party in custody and control of each exhibit; and
(viii) the appropriate certification, stipulation or settlement order pursuant to subdivision (g).

(2) The appendix shall have a cover complying with subdivision (b)(1) and shall include the statement required by CPLR 553l and a table of contents.

(3) The court may require such other contents in an appendix in a criminal cause as it deems appropriate.

(4) If a settled transcript of the stenographic minutes, or an approved statement in lieu of such transcript, is not included in the submissions, the appellant shall cause a digital copy of such transcript or statement to be filed together with the brief.

(e) Condensed Format of Transcripts Prohibited. No record or appendix may include 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, unless the transcript was submitted in that format to the court from which the appeal is taken.

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

(g) Certification of Record or Appendix. A reproduced full record or an appendix shall be certified either by: (1) a certificate of the appellant's attorney pursuant to CPLR 2l05; (2) a certificate of the proper clerk; or (3) a stipulation in lieu of certification pursuant to CPLR 5532 or, if the parties are unable to stipulate, an order settling the record. The reproduced copy containing the signed certification or stipulation shall be marked "Original." A party may move to waive certification

pursuant to this rule for good cause shown, and shall include with the motion a copy of the proposed record or appendix.

1250.8 Form and Content of Briefs

(a) 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. The lower right-hand section shall contain the name, address, telephone number and email address of the attorney filing the brief and shall indicate whom the attorney represents.

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

(1) a table of contents, which shall include (i) a list of point headings and (ii) the contents of the appendix, if it is not bound separately, with references to the initial page of each document included and of the direct, cross and redirect examination of each witness;

(2) a table of cases (alphabetically arranged), statutes and other authorities, indicating the pages of the brief where they are cited;

(3) a concise statement, not exceeding two pages, of the questions involved, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;

(4) a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with appropriate citations to the reproduced record, appendix, original record or agreed statement in lieu of record;

(5) the argument for the appellant, which shall be divided into points by appropriate headings distinctively printed;

(6) a statement certifying compliance with printing requirements under this Part, on a form approved by the court, as set forth in subdivision (j);

(7) in the First and Second Judicial Departments, the appellant's brief shall include as an addendum the statement required by CPLR 5531;

(8) in the First and Second Judicial Departments, in any civil cause permitted to be heard on the original record, the appellant's brief shall include:

(i) a copy of the order or judgment appealed from and the decision, if any;

(ii) a copy of the opinion and findings, if any, of a hearing officer and the determination and decision of any administrative department, board or agency; and

(iii) a copy of the notice of appeal or order transferring the proceeding to this court.

(c) Respondent's Brief. The respondent's brief shall conform to the requirements of subdivision (b), 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.

(d) Reply Brief. Any reply brief of the appellant or cross appellant shall conform to the requirements of subdivision (b), without repetition. An appellant's reply in a cross appeal shall include the points of argument in response to the cross appeal.

(e) Sur-reply Brief. Absent leave of the court, sur-reply briefs shall not be permitted.

(f) Computer-generated briefs.

(1) 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 and in quotations of language that appears in such type in the original source, words may not be in bold type or type consisting of all capital letters.

(i) 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.

(ii) 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 10½ characters per inch, but footnotes may be printed in type of no less than 10 points.

(2) 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 signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k).

(g) Typewritten briefs.

(1) 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 original of the brief shall be signed and filed as one of the number of copies required by section 1250.9 of this Part.

(2) Typewritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k).

(h) 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.

(i) Handwritten briefs.

(1) Self-represented litigants and persons filing pro se supplemental briefs may serve and file handwritten briefs. Such briefs shall be neatly prepared in cursive script or hand printing in black or blue ink.

(2) Handwritten appellants' and respondents' briefs shall not exceed 50 pages and reply briefs and amicus curiae briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, table of citations, proof

of service, certificate of compliance or any addendum authorized pursuant to subdivision (k). Pages shall be numbered consecutively. The submission of handwritten briefs is not encouraged. If illegible, handwritten briefs may be rejected for filing by the clerk.

(j) Printing Specifications Statement. Every brief, except those that are handwritten, shall have at the end thereof a printing specifications statement, stating that the brief was prepared either on a typewriter, a computer or by some other specified means. If the brief was typewritten, the statement shall further specify the size and pitch of the type and the line spacing used. If the brief was prepared on a computer, the statement shall further specify the name of the typeface, point size, line spacing and word count. A party preparing the statement 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 statement.

(k) Briefs may include addenda that are composed exclusively 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.

1250.9 Time, Number and Manner of Filing of Records, Appendices and Briefs

(a) Appellant's Filing. Except where the court has directed that an appeal be perfected by a particular time, an appellant shall file with the clerk within six months of the date of the notice of appeal or order granting leave to appeal:

(1) if employing the reproduced full record method, an original and five hard copies of a reproduced full record, an original and five hard copies of appellant's brief, and one digital copy of the record and brief, with proof of service of one hard copy of the record and brief upon each other party to the appeal; or

(2) if employing the appendix method, an original, five hard copies and one digital copy of appellant's brief and appendix, with proof of service of one hard copy of the brief and appendix upon each other party to the appeal, and either:

(i) in the First and Second Judicial Departments, proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division, or

(ii) in the Third and Fourth Judicial Departments, a digital copy of the complete record.

(3) if employing the agreed statement in lieu of record method, an original and five hard copies of the agreed statement in lieu of record as provided in CPLR 5527, an original and five hard copies of appellant's brief, and one digital copy of the agreed statement and the brief, with proof of service of one hard copy of the agreed statement and brief upon each other party to the appeal; or

(4) if perfecting on the original record, an original and five hard copies and one digital copy of appellant's brief, with proof of service of one hard copy of the brief upon each other party to the appeal and either:

(i) in the First and Second Judicial Departments, proof of service of a subpoena upon the clerk of the court of original instance requiring all documents constituting the record on appeal to be filed with the clerk of the Appellate Division, or

(ii) in the Fourth Judicial Department, a hard copy of the complete record.

(5) In the First and Second Judicial Departments, where a subpoena is required to be served upon the clerk of the court of original instance pursuant to sections 1250.9(a)(2)(i) and 1250.9(a)(4)(i) of this Part, the clerk from whom the papers are subpoenaed shall compile the original papers constituting the record on appeal and cause them to be transmitted to the clerk of the 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.

(b) Extension of time to perfect appeal. Except where the court has directed that the appeal be perfected by a particular time, the parties may stipulate, or in the alternative an appellant may apply by letter, on notice to all parties, to extend the time to perfect an appeal up to 60 days. Any such stipulation shall be filed with

the court. The appellant may thereafter apply by letter, on notice to all parties, to extend the time to perfect by up to an additional 30 days. Any further application for an extension of time to perfect the appeal shall be made by motion.

(c) Respondent's Filing. The respondent on an appeal shall file with the clerk within 30 days of the date of service of the appellant's submissions or, in the First Judicial Department, in accordance with the court's published terms calendar:

(1) under the full record method, the agreed statement in lieu of record method, or when perfecting on the original record, an original and five hard copies and one digital copy of the respondent's brief, with proof of service of one hard copy of the brief upon each party to the appeal; or

(2) under the appendix method, an original and five hard copies and one digital copy of the respondent's brief and appendix, if any, with proof of service of one hard copy of the brief and appendix, if any, upon each party to the appeal.

(d) Appellant's Reply. The appellant shall file with the clerk an original, five hard copies and one digital copy of the appellant's reply brief, with proof of service of one hard copy of the brief upon each party to the matter, within 10 days of the date of service of the respondent's submissions or, in the First Judicial Department, in accordance with the court's published terms calendar.

(e) Pro se or unrepresented parties shall be exempt from the requirement of the filing of a digital copy of any brief or other document.

(f) Cross Appeals; Concurrent Appeals from Single Order or Judgment; Consolidation of Appeals from Multiple Orders or Judgments.

(1) Cross appeals. In a cross appeal:

(i) The appealing parties shall consult and make best efforts to stipulate to a briefing schedule. In the First Judicial Department, if the parties fail to stipulate to an alternative briefing schedule, the cause shall be perfected in accordance with the court's published terms calendar, and shall not be governed by the time parameters set forth in subsections (iv) through (vi).

(ii) The appealing parties shall file a joint record or joint appendix certified as provided in section 1250.7(g) of this Part and shall share equally the cost of that record or appendix;

(iii) The party that first perfects the appeal shall be denominated the appellant-respondent;

(iv) A respondent-appellant's answering brief shall include the points of argument on the cross appeal and, unless the parties have stipulated otherwise, shall be filed and served within 30 days after service of the first appeal brief;

(v) An appellant-respondent's reply brief shall include the points of argument in response to the cross-appeal and, unless the parties have stipulated otherwise, shall be filed and served within 30 days after service of the answering brief;

(vi) Unless the parties have stipulated otherwise, a respondent-appellant's reply brief, if any, shall be served within 10 days after service of appellant's reply brief.

(2) Concurrent appeals from a single order or judgment. In concurrent appeals, the appellants shall perfect the appeals together, without motion, in the period measured from the date of the latest notice of appeal. The appellants shall file a joint record or joint appendix certified as provided in section 1250.7(g) of this Part and shall share equally the cost of that record or appendix.

(3) Appeals from multiple orders or judgments. When an appellant takes appeals from multiple orders and judgments arising out of the same action or proceeding, the appellant may perfect the appeals together, without motion and upon a single record or appendix, provided that each appeal is perfected in a timely manner pursuant to this Part.

(4) Absent an order of the court, 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.

(g) Extensions of Time to File and Serve Responsive Briefs. Except where the court has directed that answering or reply briefs be served and filed by a particular time, an extension of time to serve and file such briefs may be obtained as follows:

(1) By initial stipulation or application. The parties may stipulate or a party may apply by letter on notice to all parties to extend the time to file and serve an answering brief by up to 30 days, and to file a reply brief by up to 10 days. Not more than two such stipulations or applications shall be permitted. A stipulation shall not be effective unless promptly filed with the court. Any further application shall be made by motion. In the First Judicial Department, extensions by stipulation shall be filed by a date set forth in the court's published terms calendar, and shall put a matter over to any later term other than the June Term.

(2) By motion. A party may move to extend the time to file and serve a brief.

(h) Leave 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 oversized brief is necessary. The letter shall be accompanied by a copy of the proposed brief and printing specifications statement.

(i) Constitutionality of State Statute. Where the constitutionality of a statute of the State is involved in a matter 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, and file proof of service with the court. The Attorney General may thereupon intervene in the appeal.

1250.10 Dismissal of a Matter

(a) Civil Matters. In the event that an appellant fails to perfect a civil matter within six months of the date of the notice of appeal, the order of transfer, or the order granting leave to appeal, as extended pursuant to section 1250.9(b) of this Part, the matter shall be deemed dismissed without further order.

(b) Criminal Matters. The court upon its own motion or the motion of a respondent may dismiss a criminal appeal pursuant to CPL 470.60.

(c) Motion to Vacate Dismissal. When an appeal or proceeding has been deemed dismissed pursuant to subdivision (a) or by order of the court for failure to perfect, a motion to vacate the dismissal may be made within one year of the date of the dismissal. In support of the motion, the movant shall submit an affidavit setting forth good cause for vacatur of the dismissal, an intent to perfect the appeal or proceeding within a reasonable time, and sufficient facts to demonstrate a meritorious appeal or proceeding.

1250.11 Additional Rules Relating to Criminal Appeals

(a) Poor Person Relief and Assigned Counsel.

(1) Continuation of eligibility for assigned counsel on appeal. Where a sentencing court has granted a defendant's application for poor person relief on appeal pursuant to CPL 380.55, the Appellate Division may, upon receipt of a properly filed notice of appeal and a copy of the order, assign appellate counsel or provide other relief without the need for further motion or application.

(2) Continuation of assigned counsel in People's appeal. Unless otherwise ordered by the court, a defendant represented in the superior court by assigned counsel shall continue to be represented by that counsel on an appeal taken by the People.

(b) Application for Certificate Granting Leave to Appeal in a Criminal Matter.

(1) An application for a certificate granting leave to appeal to the Appellate Division shall

(i) be made, in writing, within 30 days after service of the order upon the applicant;

(ii) provide 15 days' notice to the District Attorney;

(iii) be filed with proof of service; and

(iv) be submitted without oral argument.

(2) The moving papers for a certificate granting leave to appeal shall be addressed to the court for assignment to a justice, shall state that no prior application for such certificate has been made, and shall set forth:

(i) the return date;

(ii) the name and address of the party seeking leave to appeal and the name of the District Attorney;

(iii) the indictment number; and

(iv) the questions of law or fact which ought to be reviewed.

(3) The moving papers shall include:

(i) a copy of the order sought to be reviewed;

(ii) a copy of the decision of the court below or a statement that there was none; and

(iii) a copy of all submissions filed with the trial court.

(4) Answering submissions or a statement that there is no opposition to the application shall be served and filed not later than one business day before the return date stated in the application.

(c) Exhibits. If required by the court in a criminal appeal, in lieu of submitting original physical exhibits (e.g., weapons or contraband) to the court, the appellant may file a stipulation of the parties identifying the particular exhibits, identifying the party in custody and control of each exhibit and providing that each exhibit shall be made available to the court upon the request of the clerk.

(d) Briefs.

(1) There shall be included at the beginning of the main brief submitted by an appellant in any criminal cause a statement setting forth the order or judgment appealed from; the sentence imposed, if any; whether an application for a stay of execution of judgment pending determination of the appeal was made and, if so, the date of such application; 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 whether there were codefendants in the trial court, the disposition with respect to such codefendants, and the status of any appeals taken by such codefendants.

(2) Briefs in criminal appeals shall otherwise conform to the requirements of section 1250.8 of this Part.

(3) Assigned counsel shall file proof of mailing of a copy of briefs filed on behalf of a defendant to the defendant at his or her last known address.

(e) Expedited appeal of an order reducing an indictment or dismissing an indictment and directing the filing of a prosecutor's information.

(1) At the request of either party, the court shall give preference to the hearing of an appeal from an order reducing an indictment or dismissing an indictment and directing the filing of a prosecutor's information (CPL 210.20 (6) (c); 450.20 (1-a); 450.55), and shall determine the appeal as expeditiously as possible.

(2) The appellant's brief in such an appeal shall include an appendix containing a copy of the notice of appeal, the indictment, the order appealed from and any underlying decision. The respondent's brief may also include an appendix, if necessary. The appellant shall file, separate from the appendix, one copy of the grand jury minutes under seal.

(f) Application for Withdrawal of Assigned Appellate Counsel Pursuant to *Anders v California* (386 US 738 [1967]). When assigned appellate counsel files a brief pursuant to *Anders v California*, counsel shall additionally either

(1) file proof that the following were mailed to the defendant at his or her last known address: (i) a copy of the brief, and (ii) a copy of a letter to the defendant advising that he or she may file a pro se supplemental brief and, if he or she wishes to file such a brief, that he or she must notify the court no later than 30 days after the date of mailing of counsel’s letter of the intention to do so; or

(2) in the Fourth Judicial Department, move to be relieved as counsel pursuant to *People v. Crawford*, 71 A.D.2d 38 (4th Dept. 1979).

(g) Pro Se Supplemental Briefs in Criminal Appeals Involving Assigned Counsel. When assigned appellate counsel does not file a brief pursuant to *Anders v California*, a defendant wishing to file a pro se supplemental brief shall

(1) in the First and Second Judicial Departments, move for permission to do so not later than 45 days after the date of mailing to the defendant of a copy of the brief filed by counsel; the affidavit in support of the motion shall briefly set forth the points that the defendant intends to raise in the supplemental brief; or

(2) in the Third and Fourth Judicial Departments, file the pro se supplemental brief not later than 45 days after the date of mailing to the defendant of a copy of the brief filed by counsel.

(h) Appeal from an Order Concerning a Grand Jury Report.

(1) The mode, time and manner for perfecting an appeal from an order accepting a report of a grand jury pursuant to CPL 190.85 (1) (a), or from an order sealing a report of a grand jury pursuant to CPL 190.85 (5), shall be in accordance with the provisions of this Part governing appeals in criminal cases.

(2) An appeal from such an order shall be a preferred cause.

(3) The record, briefs and other documents on such an appeal shall be sealed and not be available for public inspection except as permitted by CPL 190.85 (3).

(i) Review of certain protective orders issued pursuant to CPL 245.70. Expedited review pursuant to CPL 245.70 (6) of a protective order "relating to the name, address, contact information or statements of a person" (CPL 245.70 [a]) shall be sought by application made by order to show cause in accordance with section 1250.4 (b) of these rules and within two business days of the adverse or partially adverse ruling.

1250.12 Transferred Proceedings

(a) Transferred CPLR Article 78 Proceedings. Unless otherwise directed by the court, a proceeding commenced pursuant to CPLR article 78 and transferred to the Appellate Division pursuant to CPLR 7804(g) shall be governed in the same manner as an appeal under this Part, with the time to file the petitioner's brief measured from the date of the order of transfer.

(b) Transferred Human Rights Law Proceedings (Executive Law § 298).

(1) A proceeding under the Human Rights Law which is transferred to the Appellate Division for disposition shall be prosecuted upon the original record, which shall include:

(i) copies of all submissions filed in the Supreme Court;
(ii) the decision of the Supreme Court, or a statement that no decision was rendered;
(iii) the order of transfer; and
(iv) the original record before the State Division of Human Rights, including a copy of the transcript of the public hearing.

(2) In all other respects every proceeding so transferred shall be governed by this Part in the same manner as an appeal, with the time to perfect measured from the date of the order of transfer.

(3) In the event that the original record that was before the State Division of Human Rights was not previously submitted to the Supreme Court, the Division shall file the original record with the Appellate Division within 45 days after entry of, or service upon it of a copy of the order of transfer.

1250.13 Original Special Proceedings

(a) Return date. Unless otherwise required by statute or court directive, original special proceedings commenced in the Appellate Division, including original proceedings pursuant to CPLR article 78, shall be made returnable at 10:00 a.m. on any Monday or on such other days as the court may direct, with a return date not less than 20 days after service of the notice of verified petition and petition on each respondent.

(b) Necessary documents.

(1) Unless otherwise required by statute, a petitioner shall file the original and a digital copy of the notice of petition or order to show cause, the petition and the filing fee as required by CPLR 8022.

(2) Proof of service of a hard copy of the notice of petition (or order to show cause) and the petition on each respondent shall be filed not later than 15 days after the applicable statute of limitations has expired (see CPLR 306-b).

(3) Each respondent shall serve a hard copy, and shall file a hard copy and a digital copy, of an answer or other lawful response, the record before the respondent, the transcript of the hearing, if any, and the determination and findings of the respondent.

(c) Briefing and Original Record in Original Special Proceedings.

(1) In the following original special proceedings commenced in the First and Second Judicial Departments, the petitioner shall file an original, five copies and a digital copy of a brief, with proof of service of one hard copy of the brief upon each other party to the proceeding, within six months of the date of service of the answer:

(i) Eminent Domain Procedure Law § 207;
(ii) Public Service Law §§ 128 or 170;
(iii) Labor Law §§ 220 or 220-b;
(iv) Public Officers Law § 36; and
(v) Real Property Tax Law § 1218.

In all other special proceedings commenced in the First and Second Judicial Departments, further briefing shall not be required, and the court shall determine the matter on the original submissions.

(2) In all original special proceedings filed in the Third and Fourth Judicial Departments, the petitioner shall file an original, five hard copies and one digital copy of the petitioner's brief, with proof of service of one hard copy of the brief upon each other party to the proceeding within six months of the date of service of the answer, or pursuant to such briefing schedule that the court may issue.

(3) In original special proceedings where briefing is required, the respondent to the petition shall file within 30 days of the date of service of the petitioner's brief, or, in the First Judicial Department, in accordance with the court's published terms calendar, an original, five hard copies and one digital copy of the respondent's brief, with proof of service of one hard copy of the brief upon each other party to the proceeding. Not more than ten days after service of the respondent's brief, or, in the First Judicial Department, in accordance with the court's published terms calendar, the petitioner may file an original, five hard copies and one digital copy of the petitioner's reply brief, if any.

(4) In original special proceedings where briefing is required, the period of time within which to file the petitioner's brief or respondent's brief may be extended in the manner provided for the extension of time to perfect and appeal or to file and serve responsive briefs set forth in sections 1250.9(b) and 1250.9(g) of this Part.

(5) All original special proceedings will be heard upon the original record, which shall include: (A) the notice of petition or order to show cause and petition; (B) the original record before the respondent, including a copy of the transcript of the hearing, if any; and (C) the determination and findings of the respondents.

1250.14 Miscellaneous Appeals and Proceedings

(a) Annexation Proceedings. Annexation proceedings shall be prosecuted as set forth in General Municipal Law article 17.

(b) Election Appeals. Appeals in proceedings brought pursuant to any provision of the Election Law shall be prosecuted upon the original record, pursuant to a scheduling directive of the court or clerk, with the filing and service of briefs in such number and manner as the court shall direct.

(c) Appeals from the Workers' Compensation Board and Unemployment Insurance Appeal Board. Appeals from decisions of the Workers' Compensation Board and the Unemployment Insurance Appeal Board shall be prosecuted exclusively before the Appellate Division, Third Judicial Department, in accordance with the rules established by that court.

(d) Original Proceedings under the Education Law, Public Health Law and Tax Law. Proceedings seeking review of determinations pursuant to Education Law § 6510, Public Health Law § 230-c or Tax Law § 2016 shall be prosecuted exclusively before the Appellate Division, Third Judicial Department, in accordance with the rules established by that court.

(e) Appeals of Compensation Awards to Judicial Appointees. If the sole issue sought to be reviewed on appeal is the amount of compensation awarded to a judicial appointee (i.e., referee, arbitrator, guardian, guardian ad litem, conservator, committee of the person or a committee of the property of an incompetent or patient, receiver, person designated to perform services for a receiver, such as but not limited to an agent, accountant, attorney, auctioneer or appraiser, person designated to accept service), the cause may be prosecuted by motion or as an appeal. In such event, the review may be had on the original record, and briefs may be filed at the option of the parties.

(f) Appeals from the Appellate Term. When the court has made an order granting leave to appeal from an order of the Appellate Term, the appellant shall file with the clerk of the Appellate Term a copy of the order. Thereafter the appeal may be brought on for argument by the filing of briefs in the same manner as any other cause.

(g) Submitted facts (CPLR 3222). An original agreed statement of facts in an action submitted to the court pursuant to CPLR 3222 shall be filed in the office of the county clerk, and a copy shall be appended to appellant's brief together with a statement required by CPLR 5531. Briefs shall be served and filed in the manner and in accordance with the time requirements prescribed by section 1250.9 of this Part.

1250.15 Calendar Preference; Calendar Notice; Oral Argument; Post-Argument Submissions

(a) Calendar Preference.

(1) By letter. A party seeking and entitled by law to a preference in the hearing of an appeal shall provide prompt notice by letter to the court setting forth the basis for such preference.

(2) By motion. A party not entitled to a preference by law may move for a calendar preference for good cause shown.

(b) Calendar Notice. Notification that a cause has been placed on the calendar shall be published on the court's website. The court may also arrange for publication of such notice in a daily law journal or other newspaper or periodical regularly published within the Judicial Department.

(c) Oral Argument.

(1) Oral Argument Generally. Oral argument shall be permitted unless proscribed by court rule or, in a particular cause, by the court in its discretion. Parties who do not file a brief on appeal shall not be permitted to argue a cause.

(2) Oral Argument by Permission. Where oral argument is proscribed by rule, a party may seek leave of the court therefor by filing of a letter application, on notice to all parties, or by motion where required by the court, within 7 days of the filing of the respondent's brief. The application or motion shall specify the reasons why oral argument is appropriate and the amount of time requested.

(3) Failure to Request Oral Argument. 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, the cause will be deemed to have been submitted without oral argument by that party.

(4) Failure to Appear for Oral Argument. Where counsel or a self-represented litigant fails to appear timely for oral argument, the matter shall be deemed to have been submitted without oral argument by that party.

(5) Rebuttal. Prior to beginning argument, the appellant may orally request permission to reserve a specific number of minutes for rebuttal in the First and Third Judicial Departments. The time reserved shall be subtracted from the total time assigned to the appellant. The respondent may not request permission to reserve time for sur-rebuttal.

(d) Post-Argument Submissions. Post-argument submissions are discouraged, and may be made only with leave of the court.

1250.16 Decisions, Orders and Judgments; Costs; Remittitur; Motions for Reargument or Leave to Appeal to the Court of Appeals

(a) Decisions, Orders and Judgments. A decision, order or judgment of the court on a cause shall be deemed entered on the date upon which it was issued. Unless otherwise directed by the court, copies of the court's decisions, orders and judgments shall be posted on the court's website.

(b) Costs. Costs upon an appeal under CPLR 8107 shall be allowed only as directed by the court in each case. In the absence of a contrary direction, the award by the court of costs in any matter shall be deemed to include disbursements in accordance with CPLR 8301(a).

(c) Remittitur. Unless otherwise ordered by the court, an order determining an appeal shall be remitted, together with the record on appeal, to the clerk of the court of original instance.

(d) Motion for Reargument or Leave to Appeal to the Court of Appeals.

(1) Time of motion. A motion for reargument of or leave to appeal to the Court of Appeals from an order of the court shall be made within 30 days after service of the order of the court with notice of entry.

(2) Reargument. An affidavit or affirmation in support of a motion for reargument shall briefly set forth the points alleged to have been overlooked or misapprehended by the court.

(3) Leave to appeal to the Court of Appeals.

(i) An affidavit or affirmation in support of a motion for leave to appeal to the Court of Appeals shall briefly set forth the questions of law sought to be reviewed by the Court of Appeals and the reasons that the questions should be reviewed by the Court of Appeals.

(ii) In a civil matter, a motion for leave to appeal to the Court of Appeals shall, to the extent practicable, be determined by the panel of justices that determined the appeal.

(iii) In a criminal matter, a motion for leave to appeal to the Court of Appeals may be submitted to any member of the panel of justices that determined the appeal. The affidavit or affirmation in support of the motion shall state that no other application for leave to appeal to the Court of Appeals has been made. Service of a copy of an order on an appellant as required by CPL 460.10 (5) (a) shall be made pursuant to CPLR 2103.

1250.17 Fees of the Clerk of the Court

(a) Fees. The clerk of the court shall be entitled to the following fees, which shall be payable in advance:

(1) upon the filing of a record on a civil appeal or statement in lieu of record on a civil appeal and upon the filing of a notice of petition or order to show cause commencing a special proceeding, $315.

(2) upon the filing of each motion or cross motion with respect to a civil appeal or special proceeding, $45, except that no fee shall be imposed for a motion or cross motion which seeks leave to appeal as a poor person pursuant to CPLR 1101 (a).

(3) such other fees as the court shall direct.

(b) Exemptions. Notwithstanding the foregoing, no party shall be required to pay a filing fee hereunder where such party demonstrates entitlement to an exemption from the payment of such fee under statute or other authority.

Daughter of the Empire State: Lessons in Legal Writing From New York Chief Judge Judith S. Kaye

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks Matthew Goldstein (Columbia Law School), his judicial fellow, for his research.
This is Judge Lebovits's final column. He has served as the Journal's Legal Writer for 20 years.

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Judith S. Kaye[1] was born in 1938 in rural Sullivan County, New York. Forty-five years later, Governor Mario Cuomo appointed her associate judge of the Court of Appeals, New York's highest court.[2] A decade later, in 1993, Kaye took charge of the court — and with it New York's court system — as the court's first female chief judge.[3] From Monticello High School through her retirement from the judiciary in 2008, Kaye established herself as a litigator, a firm partner, and a prescient judge.[4] Her opinions, majorities and dissents alike, survive with a clarity and force typical only of America's greatest judges.[5] Her familiarity with the law was complete, even at home: Stephen Rackow Kaye, her husband of 42 years with whom she had three children, was a Proskauer Rose partner who wrote "the definitive work on commercial litigation in New York State."[6]

The chief judge was respected across the nation. President Bill Clinton considered her both for attorney general and to fill the Supreme Court seat left open by Justice Byron White's 1993 resignation.[7] Kaye declined both positions,

citing her post as chief judge—at the time, less than one month old and yet, in her words, a "commitment and responsibility" and "magnificent opportunity."[8] She would spend the next 23 years making good on that commitment. She asked of herself and the entire state, "[H]ow can we do better?"[9] Her consequent administrative and logistical remodeling of the New York court system was, like her jurisprudence, a testament to her thoughtful, systematic, and thorough nature.

Kaye was also a scholarly writer with an effective—and affecting—pen. The consummate New Yorker, she tried throughout her career to publish in as many New York legal publications as possible.[10] The written word was a natural refuge for the judge, who had a "lifelong desire to be a world-class journalist."[11] After editing her high school newspaper and serving as editor-in-chief of Barnard College's campus *Bulletin*, Kaye began her career reporting for the *Hudson Dispatch* out of Union City, New Jersey.[12] Only the "thought that a law degree would enhance her chances of becoming an international reporter"[13] compelled Kaye to attend New York University School of Law, her beloved alma mater. The lessons of journalism, no less than the experience of law, informed her every written work. "[M]y success in law school," she said, "was largely attributable to skills I honed as a journalist, like diagnosis—what are the core issues, what's most important, what's the lead paragraph—and clear, articulate expression in the English language."[14]

Kaye's articles, essays, and speeches tackled issues ranging from state constitutionalism and jury reform[15] to women's progress in big law firms[16] to legal education and scholarship.[17] She inspired significant revisions to New York's official legal-style manual, the Tanbook,[18] and was America's leading advocate for gender-neutral language in the law.[19]

Sometimes the subject of Kaye's writing was legal writing itself.[20] But perhaps even more varied than the subject matter of her writings is the style: "Some of her articles are highly theoretical, some are intensely practical, some are intensely personal."[21] At all times, though, her writing is lucid and accessible. It's hard enough to convey one complex point in one writing style. Yet from the beginning to the end of her career, Kaye succeeded in conveying complex points in different styles, each precisely chosen and perfectly suited to the issue that prompted her publication. Words, to Kaye, are "critical to the practice of [law]; the better used the better the practice."[22] Few used them better. By the time of her death in 2016, Judith Kaye's words had not only furthered the law, but also taught others—from students writing papers[23] to judges writing opinions[24]—how to do just that. Not bad, the chief judge might say, "for a girl who grew up in Monticello."[25]

Here's what the chief judge wrote about legal writing.

KNOW YOUR CASE; KNOW YOUR AUDIENCE

"*It hardly seems necessary to underscore the importance of written and oral communication in the law—especially for the audience gathered here this afternoon.*"[26]

Kaye understood that legal writing is often meant to persuade and that persuasion comes in different flavors. Lawyers seek to persuade courts to adopt this rule of law and reject that one; judges seek to persuade readers of their opinions that their decisions are correct.[27] Authors of law review articles seek to shape what lawyers and judges do.[28] Even if they advance the same position, the advocate's argument before the bench should not resemble the academic's argument before a committee of student journal editors. At all times, legal writers must keep in mind *what* and *before whom* they argue.

On the topic of effective brief writing, Kaye advised legal writers to avoid "irrelevant fact recitations . . . and 'kitchen sink' legal argument"[29]—that is, reciting each and every possible argument. "You get no extra points" for doing so, she said, "and your best arguments may disappear."[30] Good, focused brief writing "condition[s] the reader to feel that justice is on your side" and includes only those facts that "advance the legal argument you plan to make."[31] Kaye's advice frequently centered on appellate briefing, but her lessons are universal. No matter the context, if lawyers don't know their "objectives, and the major points leading to them,"[32] how can they expect to persuade their readers of anything beyond the profession's need for remedial writing courses?

A piece of legal writing should take shape in view of what it aims to achieve and with due regard for its audience. The advocate before a court, for example, "can safely assume that all judges have a lot of briefs to read," and should therefore aim to compose a "clear, concise, cogent presentation of the pertinent facts and contentions."[33] That cogent presentation is also a matter of structure. As Kaye said, "I never resent being told what the brief writer plans to say . . . and finally being gently reminded of what the writer has established."[34]

But that's just step one. Kaye advised advocates to take note of the forum for which they write; for example, "[a]n argument resting solely on 'fairness' . . . cannot carry the day" in a court of law with "no 'interest of justice' jurisdiction."[35] And, finally, a piece of legal writing must account for the constraints and pressures on its audience—especially an audience like Chief Judge Kaye's Court of Appeals. An appellate opinion "resolves a controversy between litigants to be sure, but it also purports to lay down a rule, establish a principle, give guidance to others in similar circumstances."[36] An appellate advocate's brief may provide a resolution to the instant case

that a judge "can follow easily and have confidence in,"[37] but Kaye recognized that it will not win the day if the rule of law it proposes is not "stable, sensible, and predictable . . . [and] equal to the demands of a changing, maturing, progressing society."[38]

Or, at least, those demands as the audience sees them.

THINK AGAIN . . . AND AGAIN

"*An effective brief is fully thought through before a word is set to paper*."[39]

To avoid destruction by earthquakes, houses built near geologic fault lines must be sturdy from the foundation up. Kaye believed that a piece of legal writing, too, must be built on solid foundations, lest it crumble amid another seismic event—an experienced lawyer's close reading. For the legal writer, words put to the page should follow, not precede, a full understanding of the propositions to which they are meant to give effect. In Kaye's view, words are "how I clothe my thoughts."[40] Without a clear initial view of the thoughts that words are meant to clothe, how can legal writers ever be sure that their diction best fits the occasion of writing?

Legal writing, unlike some other written forms, is intensely goal oriented. Through it, the lawyer tries to effect a specific result: promoting justice,[41] extolling the virtues of court reform,[42] or winning a case. Without understanding what they seek to accomplish, legal writers cannot know how best to accomplish it. Kaye thought it was better to confront this problem early on, before uncapping her pen. Otherwise, what hope does the legal writer have to "hold [a judge's] attention . . . establish credibility, win confidence, and ultimately persuade that judge"[43] that her conclusion is the correct one?

KEEP IT SHORT, KEEP IT CLEAR, AND KILL YOUR DARLINGS

"A brief is a private oral argument, your time alone with the judge."[44]

Reading is a solitary activity. Particularly in the law, however, it is a conversation between writer and recipient—whether advocate and judge or petitioner and respondent. Kaye's advice therefore directs legal writers to ask themselves what their writing would look like if they were standing before its intended reader and making their case in person. Would they use "humor," "sarcasm," or "wild rhetoric"?[45] Likely not.[46] In person, they would likely be "clear and communicative," as their "[w]riting should be."[47]

Kaye knew that in addition to style, "[b]revity and clarity are also essential ingredients to strong writing."[48] Generally, and especially in the lives of busy lawyers, "as the length of writings grows, the number of people who actually read them likely dwindles."[49] A clear, cohesive brief, Kaye said, "will rivet my attention, tend me to the writer's position, and linger in my mind."[50] Recalling her days as a journalist, Kaye pointed to clarity done right: "Incomprehensible though the news may sometimes be, you don't see a lot of semicolons and Latin on our front pages."[51] Indeed, Kaye's own "front pages"—the first few sentences of her opinions—briefly and clearly "answer[ed] the question that has beset readers for generations: What is going on here?"[52]

Clarity also means cutting fat.[53] No matter how sweetly a favorite sentence sings, the legal writer should not be afraid to excise it. After all, according to Kaye, styles "come and go, and therein lies a danger in reaching for immortal phrases."[54] How can the legal writer avoid this pitfall? Put a draft "aside for a day or two"—it'll help "to insure against those literary flights that shouldn't survive the blue pencil."[55] Yet Kaye reserved a role for style in legal writing: "[A]ppellate judges must struggle to find the elusive phrase, the expression that will capture and fix the principle that controls the case. To make a rule and make it memorable," she said, "occurs only at the intersection of law and literature."[56]

SWEAT THE SMALL STUFF

"Why risk losing a judge's confidence, or patience, on account of mechanical matters that are wholly within your control?"[57]

Courts create and enforce generally applicable legal rules, but they also have rules of their own.[58] These rules are exacting. The legal writer may, for example, confront a requirement that each page number in an appendix must be "preceded by the letter A,"[59] or that each heading in an argument section must be "distinctively printed."[60] These rules warrant strict adherence. Judges may not notice if a submission belongs in a museum of modern design, but "they surely do notice one that is sloppy."[61] With all the time required to draft a legal document, Kaye reasoned, "you might as well spend the minimal extra time required to do it right."[62]

The demand for perfection extends beyond the brief writer. Kaye also had advice for other judges, who she said must pay scrupulous attention to every word and piece of punctuation in their opinions lest a "careless comma, a stray phrase, a fanciful footnote . . . come back to haunt in the cases and years ahead."[63] Further, no legal writer, whether student or chief judge, "can afford to fudge the facts."[64] Doing so is "suicidal" if it offers the writer's opponent unearned opportunities.[65] And it's downright homicidal if it foists false conclusions on "appellate judges . . . [who] shape the law and sometimes even make" it.[66]

Like those judges, Judith Kaye changed the law. But, as she herself wrote about Chief Judge (and later Justice) Benjamin N. Cardozo, Chief Judge Kaye also "changed

the way many thought about the law."[67] The lasting appeal of her writing makes it clear she still does. And if it's true of a judge's work that "what is good in it endures,"[68] she will for a long time to come.

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1. Though her middle name was Ann, Kaye—née Smith—published with the initial S.

2. Governor Cuomo's confidence in Kaye was so complete that when he declined President Clinton's overtures to appoint him to the Supreme Court, he recommended Kaye in his place. *See* Jon Lentz, *Setting a Precedent: A Q&A with Judith Kaye*, New York Nonprofit Media (Jan. 6, 2015), https://nynmedia.com/articles/personality/interviews-and-profiles/setting-a-precedent-a-q-and-a-with-judith-kaye.html ("And did you hear that when he withdrew, he told them to call me?").

3. *See generally* Sam Roberts, Judith S. Kaye, *First Woman to Serve as New York's Chief Judge, Dies at 77*, N.Y. Times (Jan. 7, 2016), https://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html.

4. *See Hernandez v Robles*, 7 N.Y.3d 338 (2006) (Kaye, Ch. J., dissenting) (characterizing as a "misstep" the Court's decision to uphold New York's prohibition on gay marriage just seven years before the Supreme Court, in *United States v. Windsor*, 570 U.S. 744 (2013), held a federal heterosexual-only definition of marriage unconstitutional as an equal-protection violation).

5. *See id.*; Janet DiFiore, *A Tribute to Chief Judge Judith S. Kaye*, 81 Brook. L. Rev. 1379, 1380 (2016) (listing "elegantly written, well-reasoned opinions" in "so many . . . critical areas").

6. The Associated Press, *Stephen R. Kaye, 75, Litigation Lawyer, Dies*, N.Y. Times (Nov. 3, 2006), https://www.nytimes.com/2006/11/03/nyregion/03kaye.html.

7. *Kaye Rules Out Supreme Court Post*, Washington Post (Apr. 8, 1993), https://www.washingtonpost.com/archive/politics/1993/04/09/kaye-rules-out-supreme-court-post/78e6f30f-4f72-4800-abe8-7906d24d1cbc/.

8. *Id.*

9. Judith S. Kaye, *Problem-Solving Courts: Keynote Address*, 29 Fordham Urb. L. J. 1925, 1926 (2002).

10. The journals in which she published range from the New York Law School Law Review, *see* Judith S. Kaye, *Juvenile Justice Reform: Now is the Moment*, 56 N.Y.L. Sch. L. Rev. 1300 (2011–2012), to the Albany Law Review, *see, e.g.*, Kaye, *infra* note 43. Her work is found in journals and reviews upstate, downstate, and everywhere in between.

11. Judith S. Kaye, *Reflections on Opportunity in Life and Law*, 81 Brook. L. Rev. 1383, 1384 (2016).

12. Steven C. Krane, *Judith Smith Kaye*, Historical Society of the New York Courts (2007), https://history.nycourts.gov/biography/judith-smith-kaye/.

13. *Id.*

14. Judith S. Kaye, *James P. White Lecture on Legal Education: A Chief Judge's After-Life: Reflections on Educating Lawyers Today*, 45 Ind. L. Rev. 291, 300 (2012) [hereinafter *Educating Lawyers Today*].

15. *See, e.g.,* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399 (1987) (arguing that state constitutional jurisprudence need not parallel federal courts' interpretations of the federal Constitution); Judith S. Kaye, *Rethinking Traditional Approaches*, 62 Alb. L. Rev. 1491, 1494-96 (1999) (explaining New York's improvements to its jury system during Chief Judge Kaye's tenure).

16. *See, e.g.*, Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 Fordham L. Rev. 111 (1988); Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 Fordham L. Rev. 1941 (2008) (revisiting and revising Kaye's earlier work in light of new literature and statistics).

17. *See, e.g.,* Kaye, *Educating Lawyers Today*, *supra* note 14; Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. Legal Educ. 313 (1989) [hereinafter *Law Review Writing*].

18. In her foreword for the 2002 Tanbook, Kaye "applaud[ed]" the edition's "decisive step toward clearer, cleaner, more readable decisions, unencumbered by needless, distracting material." Gerald Lebovits, *New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8, 8 (Mar.-Apr. 2002) (quoting New York Law Reports Style Manual Foreword at iii (2012)). During Kaye's tenure, and "with [her] enthusiastic support . . . the Tanbook began its evolution from an in-house style sheet to" a comprehensive citation and style guide. William J. Hooks, *The Tanbook: A Guide and a Resource*, 90 N.Y. St. B.J. 62, 62 (Oct. 2018). (The current edition of the Tanbook can be found at http://www.nycourts.gov/reporter/style-manual/2017/2017-SM.htm.).

19. *See* Judith S. Kaye, *Perspective, A Brief for Gender-Neutral Brief-Writing,* N.Y.L.J., Mar. 21, 1991, at 2, col. 3 ("[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize."); Judith S. Kaye, *Effective Brief Writing*, New York Appellate Practice 625, 625 (N.Y. St. B. Ass'n 2013), https://nysba.org/NYSBA/Coursebooks/Fall%202013%20CLE%20Coursebooks/F2013NYAppellateMelvilleRochesterAlbany/F2013MelvRochAlbany.NYAppellate.Coursebook.pdf [hereinafter *Brief Writing*] ("'Gendered' writing . . . [is] so unnecessary."). Because of Chief Judge Kaye, New York courts strongly encourage gender-neutral language in judicial opinions. *See* N.Y. St. Jud. Cttee. on Women in the Courts, Fair Speech: Gender Neutral Language in the Courts (2d ed., N.Y. St. Unified Ct. Sys. 1997). The Legal Writer has long championed the chief judge as America's most important advocate for gender-neutral language in the law. *See* Gerald Lebovits, *He Said—She Said: Gender-Neutral Writing*, 74 N.Y. St. B.J. 64, 64 (Feb. 2002).

20. *See, e.g.*, Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. St. B.J. 10 (Nov. 1997) [hereinafter *Wordsmiths*].

21. Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 Alb. L. Rev. 1977, 1984 (2011).

22. Kaye, *Educating Lawyers Today*, *supra* note 14, at 300.

23. *See id.*

24. *See* Kaye, *Wordsmiths, supra* note 20, at 10.

25. Jeanne Sager, *Judge Kaye's Judicial Legacy Is Assured*, Sullivan County Democrat (Jan. 22, 2010), https://www.scdemocratonline.com/news/002February/17/kaye.htm.

26. Kaye, *Educating Lawyers Today, supra* note 14, at 300.

27. Kaye, *Wordsmiths, supra* note 20, at 10.

28. Kaye, *Law Review Writing, supra* note 17, at 321 ("As Judge Hand observed, judges 'furnish the momentum, [academics] the direction; but each is necessary to the other. . . .'").

29. Kaye, *Brief Writing, supra* note 19, at 625.

30. *Id.* at 626.

31. *Id.* at 627.

32. *Id.*

33. *Id.* at 626.

34. *Id.* at 627.

35. *Id.* at 626.

36. Kaye, *Wordsmiths, supra* note 20, at 10.

37. Kaye, *Brief Writing, supra* note 19, at 627.

38. Judith S. Kaye, *These Are the Days: Lawyering Then and Now*, 82 N.Y. St. B.J. 28, 28 (Jul./Aug. 2010) [hereinafter *These Are the Days*].

39. Kaye, *Brief Writing, supra* note 19, at 627.

40. Kaye, *Wordsmiths, supra* note 20, at 10.

41. *See* Kaye, *These Are the Days*, *supra* note 38, at 30.

42. *See generally* Judith S. Kaye, *Refinement or Reinvention, the State of Reform in New York: The Courts*, 69 Alb. L. Rev. 831 (2006).

43. Kaye, *Brief Writing*, *supra* note 19, at 625.

44. *Id.*

45. *Id.* at 626.

46. Kaye "could be howlingly funny," but she never made jokes during oral argument or at the expense of others, behavior she "would likely call . . . aggravated vanity in the first degree." Albert M. Rosenblatt, *Judith Kaye: Beyond Scholarship, to the World of Style and Mirth*, 92 N.Y.U. L. Rev. 93, 95 (2017).

47. Kaye, *Wordsmiths, supra* note 20, at 10.

48. Kaye, *Educating Lawyers Today, supra* note 14, at 300.

49. Kaye, *Wordsmiths, supra* note 20, at 11.

50. Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 Scribes J. Leg. Writing 1, 12 (2001-2002).

51. Kaye, *Educating Lawyers Today, supra* note 14, at 300.

52. Rosenblatt, *supra note* 46, at 93. Rosenblatt, *id.* at 94, notes that in one of her earliest cases, Kaye simply and clearly set out the rule in her first sentence: "A stipulation of a settlement made by counsel in open court may bind his clients even where it exceeds his actual authority." *Hallock v. State*, 64 N.Y.2d 224, 228 (1984).

53. Kaye furnished a lighthearted example of this principle in recounting her appearance at oral argument before the Second Circuit in 1975. Before she could get out even six words, she was interrupted from the bench: "[I]t will not be necessary to hear further argument. We have decided to affirm." In retrospect, Kaye wrote, "I have come to believe that this was my best oral argument ever, brief and to the point: 'May it please the Court. Thank you, Your Honor.'" Judith S. Kaye, *The Best Oral Argument I (N)ever Made*, 7 J. App. Prac. & Process 191, 192 (2005).

54. Kaye, *Wordsmiths*, *supra* note 20, at 11.

55. *Id.*

56. Judith S. Kaye, Review: *Cardozo: A Law Classic*, 112 Harv. L. Rev. 1026, 1045 (1999) [hereinafter *Cardozo*]. Kaye's colleagues also recognized her idiosyncratic writing style—for example, her the use of the dash as a "stylish substitute for the comma." Rosenblatt, *supra* note 46, at 94.

57. Kaye, *Brief Writing, supra* note 19, at 625.

58. *See, e.g.*, CPLR 5528–5529 (prescribing formal rules for appellate briefs in New York courts).

59. *Id.* R. 5529(b).

60. *Id.* R. 5528(a)(4).

61. Kaye, *Brief Writing, supra* note 19, at 625.

62. *Id.*

63. Kaye, *Wordsmiths, supra* note 20, at 10.

64. *Id.*

65. Kaye, *Brief Writing, supra* note 19, at 627.

66. Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 Cornell L. Rev. 1004, 1013 (1988).

67. Kaye, *Cardozo, supra* note 56, at 1038.

68. *Id.* at 1042.

Thoughts on Legal Writing from the Greatest of Them All: Antonin Scalia and Bryan A. Garner—Part I

The Legal Writer continues its series on what we can learn from the great teachers of writing. In this column, we highlight two masters: Antonin Scalia and Bryan A. Garner. In particular we focus on the advice they give in their preeminent book, *Making Your Case: The Art of Persuading Judges*. In Part I of this column we'll address the principles of persuasion. In Part II, we'll address persuasive-writing techniques and style. No one's better to teach the skills of effective appellate and trial advocacy than Scalia and Garner. These two legal-writing powerhouses teamed up to offer invaluable advice to advocates in *The Art of Persuading Judges*.

Since publication in 2008, *The Art of Persuading Judges* has consistently received positive feedback from lawyers and scholars. One reviewer described it as akin to Strunk and White's seminal *Elements of Style*.[1] Another reviewer wrote that the book is like "a first-rate continuing legal education program."[2]

Antonin Scalia, former Associate Justice of the Supreme Court of the United States, is best known for his straightforward and engaging writing style. Before taking the bench as a Justice, Scalia had a notable career as an assistant attorney general, University of Chicago law professor, and United States Court of Appeals for the District of Columbia Circuit judge. In 2016, Scalia passed away at 79. His legacy as one of the Court's greatest writers lives on.

Bryan A. Garner, the world's leading English-language legal-writing expert, is a lawyer, teacher, and lexicographer. A former director of the Texas/Oxford Center for Legal Lexicography at the University of Texas School of Law, Garner founded LawProse Inc., a nationwide provider of CLE training in legal writing, editing, and drafting for lawyers and judges. In 1995, Garner became the editor in chief of Black's Law Dictionary, America's most widely used law dictionary. Throughout his prominent career, Garner has authored many classics on legal writing, including *The Winning Brief* and *Legal Writing in Plain English.*

Gerald Lebovits (GLebovits@aol.com), an acting Supreme Court justice in Manhattan, is an adjunct at Columbia, Fordham, and NYU law schools. For her research, he thanks Christy Li (St. John's University School of Law), his judicial fellow.

PRINCIPLES OF PERSUASION

> "Lawyers possess only one tool to convey their thoughts: language."[3]

All of Scalia and Garner's 21 pieces of advice on argumentation stand out. They teach the basics — that lawyers must know their audience, their adversary's case, and their most defensible terrain. Below are some of Scalia and Garner's expert suggestions that go beyond the basics.

Attend to the standard of decision

Advocates should pay close attention when varying presumptions and burdens of proof govern issues. For example, in a criminal trial the prosecution must prove the defendant's guilt beyond a reasonable doubt. When the applicable standard favors your case, emphasize that to the court. Remind the court that you and your adversary are on unequal playing fields. Advocates shouldn't treat the standard of review as boilerplate. They should point out that the appellant is applying an incorrect standard. State this clearly in your standard-of-review, introduction, and summary-of-argument sections.

Don't overstate your case

"[S]how the merits of [your] case and the defects of [your] opponents' case — and let the object of the weak-

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ness of the latter speak for itself."[4] Overstating your case can directly harm your credibility. "So err, if you must, on the side of understatement, and flee hyperbole."[5] Avoid stating an unqualified "never" unless you're 100 percent certain of a fact.

Stick to the age-old rule of advocacy

"[T]he first to argue must refute in the middle, not at the beginning or end."[6] By refuting first, you'll be on defense. If you refute last, the judge will "focus on your opponent's arguments rather than your own."[7] But don't refute an argument your opponent might not have thought of.

Make space for the judge to read your argument

If you're arguing after your adversary, "design the order of positive case and refutation to be most effective according to the nature of [your] opponent's argument."[8] Leave room for the judge to listen to your main argument, especially when your opponent makes a convincing case. First, quickly demolish your opponent's compelling argument. Then, deliver "*your* take on the case, *your* major premise, and *your* version of the central facts."[9]

"Don't try to defend the indefensible."[10]

When a legal rule doesn't favor your case, don't spend an undue amount of time defending it. You don't want to convey to the judge that you're unreasonable. That can damage your whole case. Rather, "fess up at the outset." [11] There are two advantages to fessing up. First, the judge won't think that you tried to sweep "unfavorable factors under the rug."[12] Second, the judge will think that you're reasonable and you've "carefully considered these matters but don't regard them as significant."[13]

Be strategic about which arguments to advance

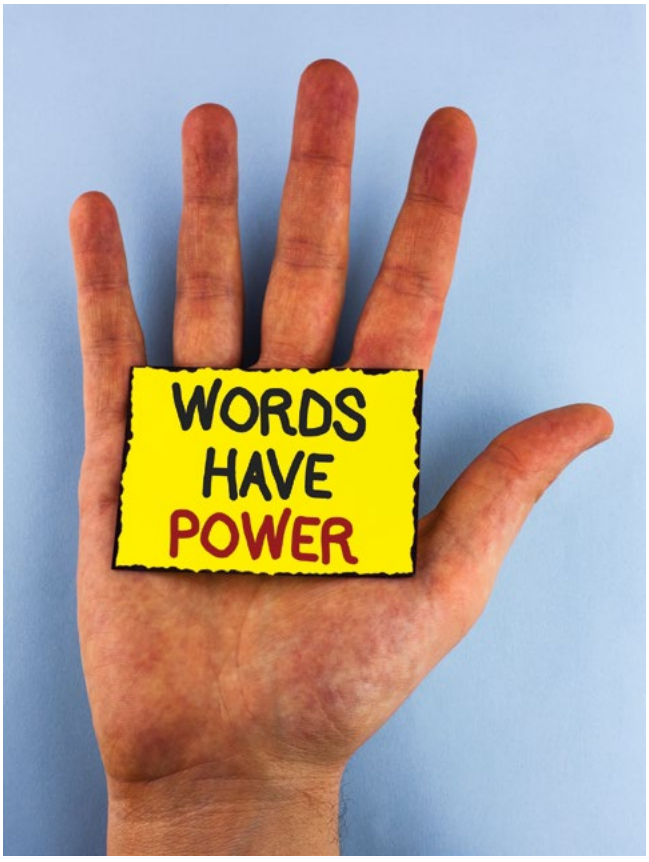
This is one of the most important steps in effective advocacy. "A mediocre advocate defending a good position will beat an excellent advocate defending a bad position nine times out of ten."[14] Don't stick to a rejected point. Doing so might "color [your] judgment about which rulings lend themselves to effective challenge."[15] When strategizing, consult your associates.

Avoid disorganized arguments

Instead, pick three independent reasons why you should win, and develop them fully. Making 10 different arguments will tell the judge that you're making scattershot arguments. On the surface, 10 different arguments might seem as if the lawyer overanalyzed something, but "in reality, it has been under analyzed."[16] Under analyzed because "counsel has not taken the trouble to determine which arguments are strongest or endured the pain of eliminating those that are weakest."[17]

"Never, never waste the court's time."[18]

Make arguments as clear and concise as possible. Minimize the risk of irritating the judge. Once you've conveyed your argument, don't linger "over [it] like a fine glass of port."[19] Successful legal arguments rarely contain



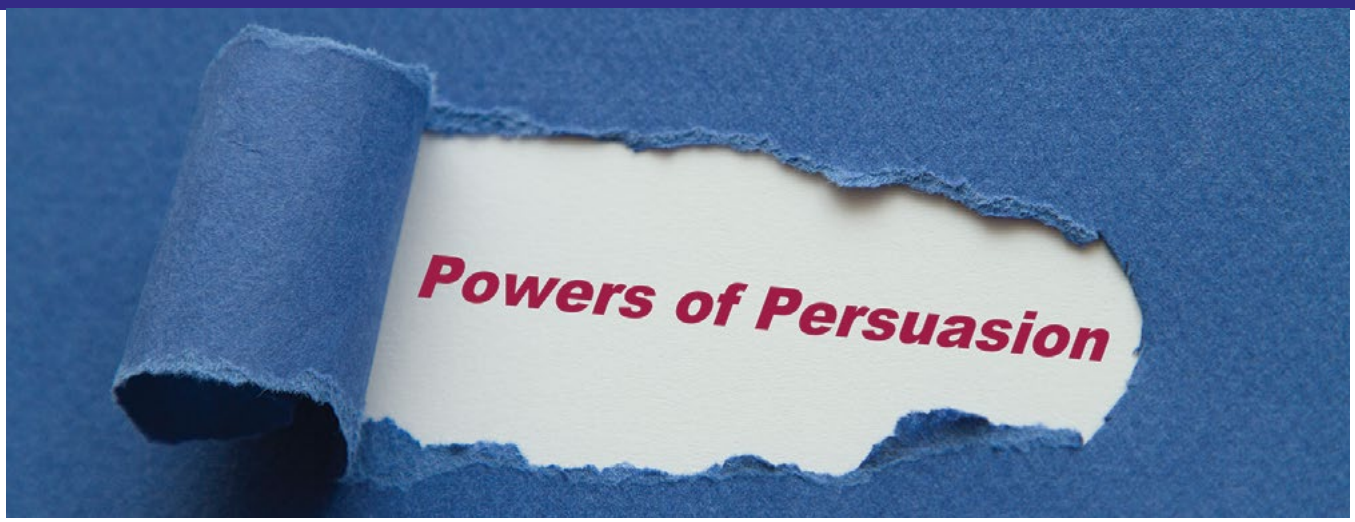
"iteration and embellishment."[20] Don't assess the brevity of your arguments on a page or word count, either. It's good to have a "reputation as a lawyer who often comes in short of the limits."[21] The judge knows that the writing contains no padding.

Show how your client prevails under the law and this result is reasonable

"Explain why it is that what might seem unjust is in fact fair and equitable."[22] Some judges might decide based on their "moral sense" favoring a change in the law. But most will decide based on governing authorities.[23] How a judge ultimately decides is never certain. So strive to both convey to the court that you prevail under the law and that the result you seek is rational. Make it easy for the judge to explain its rationale to a non-lawyer friend.

Don't attempt emotional appeals

An emotional appeal is "misguided because it fundamentally mistakes [the judge's] motivation."[24] Avoid making a "jury argument" before a judge. But there's a difference between an overt appeal to emotion and presenting facts



in a way that might unintentionally appeal to emotion. For example, "you may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home."[25]

Close powerfully

Tell the court what you think it should do. Don't use trite phrases like "for all the foregoing reasons." Treat the conclusion as a reminder to the judge of your principal arguments on the rule of law, and why the judge should rule in your favor. Argue that a court's ruling otherwise would leave lower courts with uncertainty or produce frivolous litigation in the future.

LEGAL REASONING

> "Leaving aside emotional appeals, persuasion is possible only because all human beings are born with a capacity for logical thought."[26]

The most persuasive and rigorous form of logic is syllogism

The clearer the syllogism, the better. The winning party is the one who can convince the judge that its syllogism is closer to the main legal issue. Identify the main legal issue and convince the court of it. Don't spend time arguing for a rule that applies to a subordinate issue.

Master the weight of precedent

It's impossible to cite case law without knowing its precedential weight.[27] Governing authorities strengthen an advocate's persuasiveness. At the appellate level, the most important decisions to a case will be the ones decided by that same court. At the trial court level, the most important decisions will be the ones immediately superior to that trial court.[28]

DON'T IGNORE DICTA

"The most persuasive nongoverning case authorities are the dicta of governing courts . . . and the holdings of governing courts in analogous cases."[29] Moreover, the most persuasive cases will be the ones in which a litigant who's similar to your client lost at the trial level but won on appeal.[30]

This column continues in the next edition of the *Journal* with Part II. The *Legal Writer*, in which we address Scalia and Garner's techniques and style of persuasive writing.

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1. David F. Herr, Making Your Case: The Art of Persuading Judges By Antonin Scalia and Bryan A. Garner, 56 Fed. Law. 61, 62 (2009) (book review).
2. Catherine M. Grainger, Making Your Case: The Art of Persuading Judges By Antonin Scalia and Bryan A. Garner, 40 Colo. Law. 89, 89 (2011) (book review).
3. Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 61 (4th ed. 2008).
4. *Id.* at 13.
5. *Id.*
6. *Id.* at 15.
7. *Id.*
8. *Id.* at 17.
9. *Id.* at 18 (emphasis in the original).
10. *Id.* at 20.
11. *Id.* at 21.
12. *Id.*
13. *Id.*
14. *Id.* at 22.
15. *Id.*
16. *Id.* at 23.
17. *Id.*
18. *Id.* at 24.
19. *Id.*
20. *Id.*
21. *Id.* at 25.
22. *Id.*
23. *Id.* at 27.
24. *Id.* at 32.
25. *Id.*
26. *Id.* at 41.
27. *Id.* at 52.
28. *Id.* It's useless to argue to a trial court that Supreme Court case sustained your point if the "intermediate appellate court to which an appeal would be taken has already rejected that reading. Of course, when the intermediate appellate court has not spoken on that point, supreme-court opinions will be the most important." *Id.*
29. *Id.*
30. *Id.*

Thoughts on Legal Writing from the Greatest of Them All: Antonin Scalia and Bryan A. Garner — Part II

The Legal Writer continues its series on what we can learn from the great teachers of writing. In this column, we continue our focus on Antonin Scalia and Bryan A. Garner's preeminent book, *Making Your Case: The Art of Persuading Judges*. In Part II of this two-part column, we address Scalia and Garner's suggestions on writing persuasively and using an effective writing style.

PERSUASIVE-WRITING TECHNIQUES

"The overarching objective of a brief is to make the court's job easier."[1]

Acquire a good desk reference. A good desk reference on proper English usage separates good lawyers from great lawyers. "Essentially, a usage guide is a compilation of literary rulings on common language questions: What's the difference between *consists of* and *consists in*?"[2] Scalia and Garner recommend the fourth edition of William Strunk and E.B. White's *The Elements of Style* and Norman Lewis's *Better English*.[3]

Spend time "getting" your arguments.[4] Review each fact and how it correlates to a legal claim or defense. "Don't start writing until you've turned the case over in your mind for days," they explain, because "[n]ew ideas may occur to you as you read the leading cases and scholarly authorities."[5] Take time to think about your adversary's case — not just your affirmative case.[6] And avoid producing a draft too soon; you can shut off alternative approaches during your deliberative process.[7]

Outline the brief. Avoid using key words as topic sentences in your outline. Rather, using full sentences "has three advantages: (1) it helps you understand your own organization at a glance; (2) it often flushes out redundancies, weak links, and inconsistencies; and (3) once you've completed it, it allows you to feel as though the brief is halfway written."[8] Outlining can also help you identify weak arguments.

"Sit down and write. Then revise. Then revise again. Finally, revise."[9] Writing can be hard to start, but force yourself to stick to your schedule. Start with the question presented, then the body of your arguments, and then the statement of facts. Then write your introduction and conclusion. Finally, write the summary of your argument. "Many judges find the summary of the argument the single most important part of a brief, so don't omit this part — and give it the attention it deserves."[10] Put the draft aside for some time in between each read-through.[11] It's helpful to get some good lawyer friends who know nothing about the case to read your draft. They can "spot gaps and deficiencies" you wouldn't perceive.[12]

"Advise the court by letter of significant authority arising after you've filed your brief."[13] Keep track of developments in your field. Bring to the court's attention any new legislation or new rulings from governing authorities that support your case. Even if they support your adversary's case, you should bring it to the court's attention by letter, with a copy to opposing counsel. Keep your letter to one page.

State the questions presented up front. Put on the first page what the court must resolve.[14] It's the first thing the court will see. "Follow it religiously — even in memorandums in support of motions."[15] "Many advocates fail to appreciate that the outcome of a case rests on what the court understands to be the issue the case presents."[16]

The Statement of Facts "is narrative rather than argument."[17] A Statement of Facts describes the facts and the proceedings to date. Don't omit a crucial fact or misstate a fact. "Nothing is easier for the other side to point out, and nothing can so significantly damage your credibility."[18] The Statement of Facts must also be persuasive. Advance your objective "by your terminology, by your selection and juxtaposition of the facts, and by the degree of prominence you give to each."[19] By doing

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so, you'll "amplify the facts that suggest your desired outcome by placing them prominently in the narrative."[20]

Keep your argument logical and brief. Remember two points when writing your argument: "(1) keep your eye on the ball; (2) be brief."[21] First, write down the "syllogism that wins your case."[22] Every aspect of your argument must support your syllogism. Second, your argument must be brief. Thus, "a brief that is verbose and repetitious will only be skimmed; a brief that is terse and to the point will likely be read with full attention."[23] Brevity means entirely eliminating weak points, unnecessary elaboration, and phrases that "that add nothing but length."[24]

Conclude with more than just a request for relief. Be ambitious. Include the request for relief, but "preface that with a true conclusion to your argument — one or two paragraphs encapsulating your winning syllogism in a fresh and vivid way."[25]

WRITING STYLE

> *"Literary elegance, erudition, sophistication of expression — these and all other qualities must be sacrificed if they detract from clarity."*[26]

"Value clarity above all other elements of style."[27] Blunt, straightforward legal writing is the most persuasive. Avoid "puffed-up, legalistic language."[28] "[N]ever use a word that the judge may have to look up."[29] Clear legal writing makes it harder for your adversary to mischaracterize your arguments.[30] Your opponent won't be able to distort your words. And the court won't be confused.

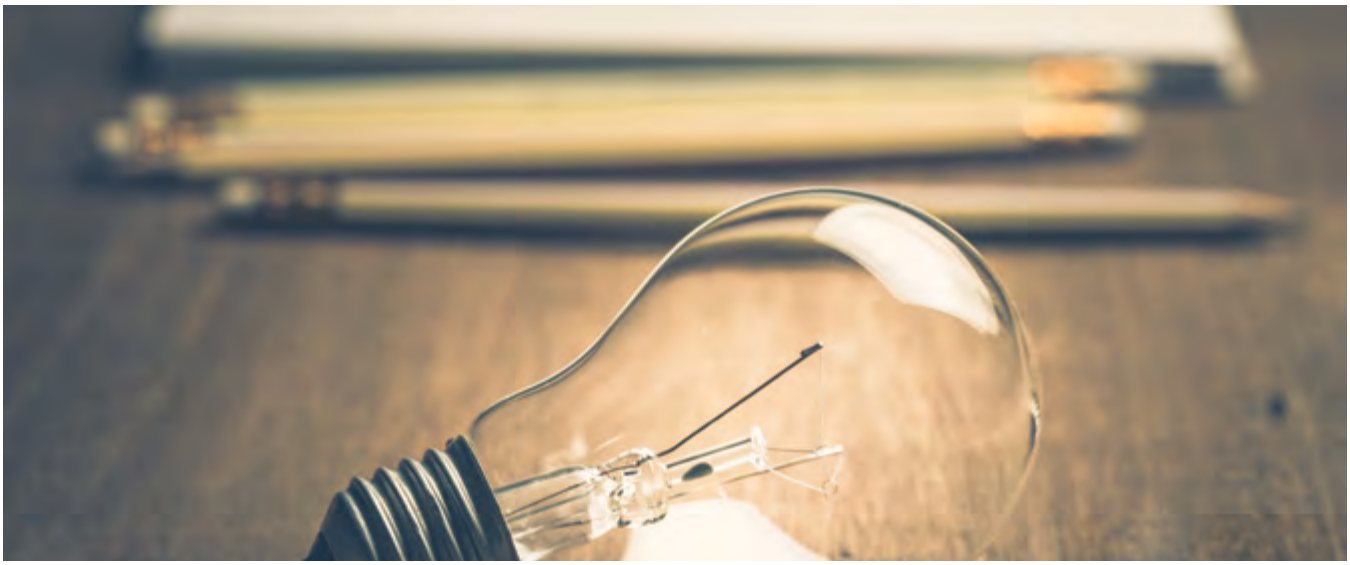
Signpost your arguments. Use guiding words to help the reader follow your arguments — between and within paragraphs.[31] "These words and phrases turn the reader's head, so to speak, in the direction you want the reader to look."[32] For example, using the word "but" tells your reader that your "next thought will somehow qualify the point just made."[33]

Give examples to clarify abstract concepts. Just as your words need to be clear, so do your abstract concepts. One way to clarify difficult concepts is to give the judge examples. For example, the reader probably won't understand a description of the interpretative canon of *noscitur a sociis*. But in giving this example to your reader — "pins, staples, rivets, nails, and spikes" — the reader will know that "nails" don't refer to fingernails.[34]

"Consider using contractions occasionally — or not." Scalia and Garner differ on whether lawyers may use of contractions in their legal writing. According to Garner, lawyers may contractions that enhance the natural flow of writing. Contractions shouldn't be used in every single sentence, but should be used when, in speaking, they'd be spoken naturally.[35] Scalia contends that contractions have no place in legal writing. They serve no benefit and can often offend judges. So, he thought, nothing will be gained, only lost, by contracting.[36]

"Swear off substantive footnotes — or not."[37] Garner and Scalia offered opposing viewpoints on using substantive footnotes. Garner rails against substantive footnotes. If your argument isn't important enough to include in the text, he says, then it doesn't belong in your brief. [38] Some courts have even noted that they won't consider arguments raised exclusively in a footnote.[39] But Scalia supported the use of substantive footnotes because they can support an argument. Substantive footnotes can provide a space for rebuttal to weak counterarguments.

Use the parties' names. Avoid referring to the parties by their "status in the litigation (plaintiff, respondent,



etc.)."[40] This will confuse a judge who might be reading a long brief. Also, this "can make the record on appeal confusing if status-names are used in the briefing and argument at each level."[41] Don't try to "depersonalize the opposing party" by calling it the "Defendant," either. The court will likely be annoyed at your attempt to personalize your client by using this tactic.[42]

Use bold and *italics* sparingly; and never underline. "Don't overuse italics; don't use bold type except in headings; don't use underlining at all."[43] First, when "too much is overemphasized, nothing is."[44] Playing with word order can emphasize the word you're italicizing. For example, "instead of writing 'She held a *knife* in her hand,' write 'What she held in her hand was a knife.'"[45] Second, save bold type for headings only. You don't want to distract the reader by overemphasizing a word in your brief. Underlining is a "crude throwback."[46] When italicizing was unavailable, writers used underlining. Thus, "[n]obody using a computer in the 21st century should be underlining text."[47]

Cite cases accurately. Never distort a case to fit the facts. Doing so will make you look bad, especially if opposing counsel brings it to the judge's attention.[48] Even if a case marginally matches the facts, say so. "Explain why the difference is insubstantial" and shouldn't affect the outcome.[49] Use the accurate conventional introductory signals when citing. After one bad citation, a court will become suspicious about the accuracy of all the citations.

Cite sparingly. A brief isn't "a treatise, a law-review article, or a comprehensive *Corpus Juris* annotation."[50] Citing too many cases will distract the reader. The court doesn't care about how many cases you cite, but how well you use them.[51] Citing one case in your argument for a noncontroversial point is enough. There's no need to show off to the court. But if the argument is central to your case and will probably be contested, "cite the case but [also] concisely describe its facts and its holding."[52] And "follow that description by citing other governing cases."[53]

Use proper typography. Poor typography will hinder the persuasiveness of your brief. That's why "a brief that is ugly in typeface, with crowded lines, will not invite careful perusal."[54] If the court in which you're filing has no printing requirements, refer to the United States Court of Appeals for the Seventh Circuit's website for guidance on typography.[55]

The Legal Writer will continue its series on what we can learn from the great writing teachers — lawyers and non-lawyers.

1. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 59 (4th ed. 2008).
2. *Id.* at 63.
3. *Id.*
4. *Id.* at 69.
5. *Id.*
6. *Id.*
7. *Id.* at 70.
8. *Id.*
9. *Id.* at 80.
10. *Id.*
11. *Id.* at 81.
12. *Id.*
13. *Id.* at 101.
14. *Id.* at 82.
15. *Id.* at 83.
16. *Id.*
17. *Id.* at 93.
18. *Id.*
19. *Id.* at 94.
20. *Id.*
21. *Id.* at 98.
22. *Id.*
23. *Id.*
24. *Id.* at 99.
25. *Id.* at 100.
26. *Id.* at 107.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 108.
31. *Id.* at 110.
32. *Id.* at 111.
33. *Id.* at 110.
34. *Id.* at 112.
35. *Id.* at 116.
36. *Id.* at 118.
37. *Id.* at 129.
38. *Id.* at 130.
39. *Id.* at 131.
40. *Id.* at 121.
41. *Id.*
42. *Id.*
43. *Id.* at 122.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 123.
49. *Id.*
50. *Id.* at 125.
51. *Id.*
52. *Id.* at 126.
53. *Id.*
54. *Id.*
55. *Id.*

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