

YOU LOST. . . . NOW WHAT?

An Olio of Options:

Move to Renew, to Reargue and/or Appeal



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Defense Association of New York
November 17, 2004

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You Lost . . . Now What Can you Do?

- 1. Step One: Ask yourself what the paper is that you are looking at. Is it a decision or order? Was the motion fully litigated or was a decision entered on default? Is it an ex parte order? Does it matter?**

Yes! These and other items will be explored in greater detail herein but briefly it is important for the following reasons: a decision is not appealable but an order may be; if the order is one entered on default an appeal is not an option (you must move to vacate the default and, if that is denied, appeal from that order); if the order involves ex parte relief, you may be able to utilize CPLR 5704. So it does matter.

After looking at the "paper," there are a lot of choices open to you. They are:

- Leave it alone (In other words, you were supposed to lose.)
- Enter into Settlement Discussions.
- Prepare the Case for Trial.
- Make a Motion to Renew or Reargue or Vacate; or consider Appeal

- 2. Fully Litigated Motions: Reargument/Renewal/Resettlement/ Appeal**

A. What Is The Difference Between Reargument And Renewal?

CPLR 2221 is the Statute that governs "Motions affecting prior Motions," and that is the Statute under which Motions to Renew, Reargue, Resettle, and a few other motions are made. When considering which motion fits your needs, read the statute carefully. Then, when actually drafting the motion, use the language in the statute – "**track the statute**" – you selected. This aids not only the Court, but it assists you when you draft your motion.

For example, if your motion reads:

". . . there has been a change in the law that would change the prior determination . . ."

then not only are you making a Motion to Renew, but you know to cite the new law and argue it in your affirmation.

Motions to Reargue

A motion to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (but shall not include any matters of fact not offered on the prior motion). CPLR 2221(d)(2); Everready Ins. Co. v. Farrell, 304 A.D.2d 830, 757 N.Y.S.2d 852 (2d Dep't 2003); Spinale v. 10 West 66th St. Corp., 193 A.D.2d 431, 597 N.Y.S.2d 345 (1st Dep't 1993). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented. Amato v. Lord & Taylor, 10 A.D.2d 374, 781 N.Y.S.2d 125 (2d Dep't 2004);

If you have chosen to Move to Reargue, make sure that you do, indeed, have valid points for reargument. When the cases stress that reargument is not a vehicle for rehashing what you just argued, they meant it. Reargument is designed to help a party because the court may really have "misapprehended or overlooked matters of fact or law." The advocate's role is to find those "overlooked matters" and point them out, diplomatically, in the motion to reargue.

Motion to Renew

Renewal is based upon new facts not offered on the prior motion that would change the prior determination or upon a demonstration that there has been a change in the law that would change the prior determination. CPLR 2221(e)(2). If a Motion to Renew is more suited to the case at hand, state clearly, and with authority, which law has been changed.

If new facts are being brought to the Courts attention, be ready with a good reason for the lack of those facts the first time you made the motion. With a motion to renew, the movant must set forth a reasonable justification as to why the new facts were not submitted on the prior motion. Where no reasonable justification is given for the failure of a party to present the new facts, the Supreme Court is without discretion to grant a motion to renew. Greene v. New York City Hous. Auth., 283 A.D.2d 458, 724 N.Y.S.2d 631 (2d Dep't 2001).

B. Can You Seek Both Types Of Relief At The Same Time?

Yes. CPLR 2221(f) provides that a: "combined motion for leave to reargue and leave to renew shall identify separately and support

separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made"

C. When Must The Motion Be Made?

A motion for leave to reargue must be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2221(d)(3). (NOTE: This does not necessarily apply to motions to reargue decisions of the appellate divisions or the Court of Appeals; see those court rules).

While there is no time limit for a *Motion to Renew based on new evidence*, the best practice is to make the motion within 30 days. The reason for this is because the Court may deem that your "Motion to **Renew**" is actually a "Motion to **Reargue**," regardless of what you named it. The Court is free to treat a Renewal motion as one for Reargument (and vice versa) if the substance so warrants (see, e.g., *Holmes v. Hanson*, 286 A.D.2d 750, 730 N.Y.S.2d 528 (2nd Dept. 2001)). Therefore, if you are hoping that the denial of the "motion to renew" will not affect your time to appeal – and therefore will not affect your case – it will be an unpleasant surprise to find out that you may not be even permitted to appeal if the Court treats your Renewal motion as one for Reargument.

A motion to renew based on a change of law can only be made if the case is still "*sub judice*." This means that if a judgment has been entered, or if the time to appeal has passed, the case is no longer *sub judice* and a motion to renew based on a change of law cannot be made at that juncture.

D. Where Do I Make The Motion To Reargue/Resettle?

Returnable before the same judge who determined the prior application. Because this is this case, it is important to Watch Your Audience. That should not immediately discourage anyone from moving to renew or even to reargue. However, the approach or "tact" to take should be far different than in your initial motion.

Obviously you believe that your position is the correct one, so much so, that you think that the Court should – and still can – see your position. If **reargument** is available to you, and dependent on different factors – such as how the Court's earlier reaction to your position was (if the

motion was argued), the motion has to be handled much more sensitively if you intend to win. Remember: You are making a "direct attack" on someone's decision, and telling him or her that they "missed something." The words "missed" and "overlooked" even appear in the Reargument Statute ("...based on matters of fact or law allegedly **overlooked** or **misapprehended** by the court...").

One way of approaching this in a reargument motion -- especially if you were fortunate to hear the judge misspeak on a fact or point of law -- is to use the judge's words in your motion, but say "my **adversary might argue "A"**, but the fact [or law] is really "**B**", and the following is why." This is not a guarantee of success, but it certainly takes the "sting" out of a reargument motion when presented to the Court again.

E. Can You Appeal An Order Which Decides A Motion For Reargument Or Renewal?

An order denying a motion to reargue is not appealable. However, if the court grants reargument but either adheres to its original decision or changes its decision, that order will be appealable.

An order which either grants or denies a motion to renew is appealable.

F. What Is Resettlement? Can I Appeal From An Order Granting Or Denying Resettlement"

"Resettlement is a procedure designed solely to correct errors or omissions as to form, or for clarification. It may not be used to effect a substantive change in or to amplify the prior decision of the Court." Foley v. Roche, 68 A.D.2d 558, 566, 418 N.Y.S.2d 588, 593 (1st Dep't 1979); see also, Gesvantner v. Dominquez, 273 A.D.2d 383, 710 N.Y.S.2d 903 (2d Dep't 2000) (preferred remedy when a party alleges that an order or judgment does not accurately incorporate terms of stipulation is by motion in the trial court for resettlement); Pivnick v. Fraley Realty Corp., 157 A.D.2d 466, 549 N.Y.S.2d 394 (1st Dep't 1990) (court may properly resettle judgment to reflect proper disposition of claims as set forth in decision).

As to whether an order dealing with resettlement is appealable reference is made to 4 N.Y. Jur2d Appellate Review at §57 which sets forth as follows:

Although it has been broadly said that an order denying a motion to resettle a previous order is not appealable, the more accurate statement of the rule is that while an order denying a motion to resettle a previous judgment which does not modify any substantive or decretal portion of the judgment is appealable, no appeal may be had from an order which fails to decide a motion to resettle, denies a motion to resettle the substantive or decretal paragraphs of a judgment, or which is made on reargument and adheres to a determination in an order denying a motion to resettle the decretals paragraphs of a judgment.

The purpose of resettlement is correction or clarification of the order to express correctly the decision of the court; it is not a procedure to change or to amplify the direction of the court, and when such a motion is properly confined to matters appropriate for resettlement, its denial is appealable. Thus, an order denying a motion to resettle an order so as to recite all papers used upon the original motion, or facts appearing upon the record which the moving party asked to have recited, or so as to strike out recitals inserted therein which could be construed as a determination or adjudication of questions in dispute between the parties, but not before the court upon the motion, is appealable. An appellate court, however has been held to be justified in reviewing the action of the lower court in determining the proper recital in an order made by it, only when there is no dispute as to what took place before the latter court.

G. Appeals – If You Opt To Appeal The Decision Below There Are A Number Of Things You Must Consider

(i) How Much Time Do I Have To Appeal?

CPLR 5513(a) provides that an appeal as of right must be taken within thirty (30) days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of entry. Thus, you get the benefit of the time for mailing. Note, however, that if you serve the notice of entry yourself, the notice of appeal must be filed within thirty (30) days thereafter

The Notice of Appeal Form is actually very, very short. Even the Second Department, which requires the four page "RADI" (Request for **Appellate Division** Intervention), is not difficult. This is why the 30 day period within which to serve and file the Notice of Appeal is unwavering.

(ii) Where Does My Appeal Need To Be Taken (see Chart in handout)

(iii) What Do I Need To Take The Appeal?

In the First Department you will need a notice of appeal, a Pre-Argument Statement, a copy of the order or judgment, and the \$65 filing fee. The contents of the Pre-Argument Statement are delineated in Section 600.17 of the First Department's Court Rules. Simply, the statement must include:

1. Title of the action;
2. Full names of original parties and any change in the parties;
3. Name, address and telephone number of counsel for appellant or petitioner;
4. Name, address and telephone number of counsel for respondent;
5. Court and county, or administrative body from which the appeal is taken;
6. Nature and object of the cause of action or special proceeding (e.g., contract-personal services, sale of goods; tort – personal injury, automobile accident, malpractice, equity – specific performance, injunction, etc.);
7. Result reached in the court or administrative body below; and
8. Grounds for seeking reversal, annulment or modification. Where appropriate, the statement must indicate whether there is any related action or proceeding now pending in any court of this or any jurisdiction, and if so, the status of the case. If an additional appeal is pending in the same action, indicate the date of entry of the order or judgment and attach a copy of the notice of appeal of the preargument statement.

The Second Department requires the notice of appeal, a copy of the order or judgment, and RADI (Request of Appellate Division Intervention) (a copy of which is annexed) and the filing fee.

(iv) How Much Time Do I Have To Perfect My Appeal? (as measured from the date of the notice of appeal)

First Department – 9 months

Second Department – 6 months

(v) Websites And Available Information

www.Courts.state.ny.us

www.nycourts.gov

3. What About Orders or Judgments Entered On Default?

An order or judgment entered on default is not appealable. See, CPLR 5511. You will need to move to vacate the default and then, if that relief is denied, appeal from that order.

4. What Recourse Do I have If My Adversary Obtains Some Relief Exparte?

Ex parte orders are not appealable. However, section 5704(a) of the CPLR provides that:

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

The Appellate Divisions have their own rules which govern 5704 applications. For example §7 of the Guide to Civil Practice as promulgated by the Appellate Division – Second Department provides as follows:

CPLR 5704(a) gives this court authority to review ex parte orders of a Justice of the Supreme Court, a Judge of a Family Court or Court of Claims, or a Surrogate. If both parties appeared before or were heard by the Justice, Judge, or Surrogate, the order is not ex parte and CPLR 5704(a) review does not lie.

If the trial court granted relief ex parte (e.g., granted a temporary restraining order in an order to show cause), then one Justice of the Appellate Division may vacate or modify the order. A panel of the Justices is needed to grant relief that the trial court declined to grant.

Section 670.5(e) of the Rules requires that the party seeking relief pursuant to CPLR 5704(a) gives his or her adversary reasonable notice of the date, time and place that the application will be made and of the relief being requested. The papers must include an affidavit describing the notice given and the position of the other party. If the party submitting the application is unwilling to give notice, he or she must state the reason for such willingness.

The Appellate Division will not review an ex parte order to show cause applied for at the Appellate Term of the Supreme Court.

5. Decisions – You Cannot Appeal From A Decision

No appeal lies from a decision. Schumann v. City of New York, 242 A.D.2d 616, 662 N.Y.S.2d 777 (2d Dep't 1997).

CPLR 2219 sets forth the requirements for the form of an order:

The order shall be in writing and shall be the same in form whether made by a court or a judge out of court. An order determining a motion made upon supporting papers shall be signed with the judge's signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper.

6. What About Sua Sponte Orders?

No appeal lies from a trial court's sua sponte order, with no notice of motion. Shules v. Meagher, 100 N.Y.2d 333, 763 N.Y.S.2d 522 (2003).

If a plaintiff's complaint is dismissed by a sua sponte order, consider moving on papers to confirm the dismissal.

7. What About Orders Entered On Consent?

Again, no appeal lies from an order entered on consent. **Reserve right to make motion.**

*exp PC Order) sign
"all rights reserved
Move to vacate PC Order*

8. Appellate Stays: What If You Just Got The Decision And The Case Is Quickly Coming Up For Trial?

Automatic Stays: While some practitioners believe the filing of a notice of appeal will automatically stay proceedings in any case it does not. Section 5519(a) of the CPLR deals with these (limited) instances where a matter is stayed automatically simply with the filing of the notice of appeal.

In the vast majority of cases what is required is a stay of trial. As will be more fully discussed, in the First Department this can be done by motion seeking "expedited relief" on your motion for a stay. In the Second Department, this is accomplished by presenting an Order to Show Cause for a stay.

When you move for a "Stay," you are moving for:

- (1) A Stay of the upcoming Trial; and, if necessary;
- (2) A Stay in the Meantime – or a "TRO"

Actually making a Motion for a Stay is not difficult – it can just be complicated because there are a lot of steps involved. Those steps are set out in the attached Article "When the Court Asks – Have You Moved For a Stay?" Briefly, those major steps if you are seeking a TRO include:

- Draft your Motion. Tell the Court why you want the trial stayed.
- While working on the motion, telephone your adversary, and advise him or her that you are going to be at the courthouse that day (or the next morning).

- If you are the adversary? Just show up at court – No papers are due yet.
- As moving party, show up at Court with your motion papers, including ^{must do} the Order and Notice of Appeal and speak to the Clerk.
- First Dept. Only: ~~Fill out the "Interim Relief Form"~~ at the Courthouse (unless you have already done so at the office – most lawyers have not)
- Advise the Clerk (both First and Second Dept.) that you contacted your adversary, in case no adversary appears. See §600.2(a)(7) of the First Department Rules; §8.3 of the Second Department Guide to Civil Practice
- Appear before a Court Attorney or Judge and argue your motion. (If the Court Attorney does so instead; just wait patiently and nervously.)
- If the Court grants your interim stay (i.e., TRO or "stay pending the stay"), then the main Motion must still be served and answered by other parties.
- No appearance is required on the return date
- Second Department usually calls – a written decision is not always individually immediately available
- Bring a copy of that Appellate Division Order to the next Supreme Court Conference so that the trial does not go forward, for now, anyway.
- Finally, a decision will be rendered telling you whether the Stay of the trial pending the entire Appeal has been granted or not.

Some further notes on Stay Applications:

Both the **First and Second Departments** have conference days for the judges. On these days all the judges meet to discuss cases, issues before the Court, etc. It is extremely difficult to get a judge to review an order to show cause as these sessions last all day. The bottom line: Conference day in the First Department is Monday; in the Second Department it is Wednesday. **AVOID** presenting an application on these days.

Second Department: ^{use o/s/c} If your trial date is a few weeks out, you should still get to the Appellate Department as soon as possible. However, you need not necessarily require a TRO. In such a case, you also need not have your adversary be present. Rather, draft the Order to Show Cause for a stay without the TRO language and present it to the court only to get a return date (usually one week later).

150 Dept
Notice
of Motion
have date
Monday
you'll get
Summary
of decision
Relief

First Department: Notice your motion with a shortened return date (i.e. with no reply) and submit it with an expedited relief form.

MONEY, MONEY MONEY: The **Second Department** will accept cash, checks and money orders when submitting a motion. The **First Department** will not accept cash. *#65*

In the Second Department a docket number gets assigned (See 4.3 of the Second Department Guide to Civil Practice). Again, bring extra copies of notice of appeal if the appeal was recently decided.

9. A Note About Trials

- Notice of Appeal
- Motion to Set Aside – standard generally – CPLR 4401 & 4404

"A jury verdict in favor of a defendant should not be set aside as against the weight of the evidence" unless the jury could not have reached the verdict on any fair interpretation of the evidence." *Kallon v. Lamauk*, ___ A.D.3d ___, 782 N.Y.S.2d 672 (2d Dep't 2004).

Nicastro v. Park
113 AD2d

10. CAMP Conferences/Pre-Appeal Conferences/Settlement

The First Department conducts Pre-Appeal Conferences in an effort to settle cases on appeal (See §600.17 of the First Department Rules). In the Second Department, they are called CAMP (Civil Appeals Management Program) Conferences.

Be Forewarned: these conferences are taken quite seriously by the courts. The attendance by your client at the conference is required. If your client is out of state (or in poor health), immediately contact the CAMP Administrator to inform them of such.

11. MISCELLANEOUS ISSUES

▪ Enlargements – Second Department

See, §5.3 of the Second Department Guide to Civil Practice. In essence, two enlargements may be obtained via letter application. Any additional time may only be obtained via motion (Rule 670.8(d)).

- **Withdrawing An Appeal**

If you settle a case while an appeal is pending you must notify the Appellate Division immediately.

In the **Second Department**, if you filed a notice of appeal but did not perfect, merely send a letter to the Second Department asking that the appeal be deemed withdrawn.

If the appeal has been perfected, you will need a stipulation by all parties to the appeal agreeing that the appeal is deemed withdrawn without costs or disbursements to the parties.

In the **First Department**, you need only advise the Court of the Settlement if the appeal has been perfected (since unlike the Second Department they are not even aware the appeal exists until the case is perfected).

Other Reasons: If you decide not to appeal at this juncture but may wish to address the issue later, withdraw the appeal so it is not deemed dismissed so you can pursue an appeal from a judgment.

- **Decisions – Look first to the Websites**

Rule 2221. Motion affecting prior order.

- (a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:
1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and
 2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.
- (b) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule.
- (c) A motion made to other than a proper judge under this rule shall be transferred to the proper judge.
- (d) A motion for leave to reargue:
1. shall be identified specifically as such;
 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought.

The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

CPLR Rule 2221. Motion affecting prior order. [*Annotated*]

- (a) A motion for leave to renew or to reargue a prior motion, for leave [leave means: *permission*] to appeal from, or to stay, vacate or modify, an order shall be made, on notice [*“on notice” simply means that one has to go by “Notice of Motion” and not “Order to Show Cause,” which is a motion made without notice*], to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:
1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and
 2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.
- (b) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule. [*So check the Rules of the Court in which you practice to see if, after all this, what is actually permitted.*]
- (c) A motion made to other than a proper judge under this rule shall be transferred to the proper judge. [*Therefore, even if the Motion {also known as “Application”} was sent to the wrong judge, the Court would simply send the Motion to the correct judge.*]
- (d) A motion for leave to reargue:
1. shall be identified specifically as such; [*if you arguing the same motion, but are claiming the Court overlooked something? Name the Motion a “Motion to Reargue”;*]
 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(d) A motion for leave to renew:

1. shall be identified specifically as such; [*if you are bringing up new information? Name the Motion a "Motion to Renew."*]

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately [*Again, If you are making both motions in one? Name the Motion "Motion to Renew and Reargue."*] and support separately each item of relief sought.

The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____**

Index No.: _____

NOTICE OF APPEAL

S I R S / M E S D A M E S :

PLEASE TAKE NOTICE, that the Defendant _____, appeals to the Appellate Division of the Supreme Court, First Department, from an Order of the Supreme Court, _____ County (_____, J.) entered on or about _____, 200__.

PLEASE TAKE FURTHER NOTICE, that the appellant appeals from each and every part of said Order, as well as from the whole thereof, on the facts and on the law.

**Dated: New York City
_____, 200__**

Yours, etc.

**TO: PETER JONES, ESQ.
Attorney for Respondent-Respondent
123 Broadway
New York, N.Y. 100
(212) ___ - ___**

**JANE DOE, ESQ.
Attorney for Petitioner-Appellant
____ Street
New York, N.Y. 100
(212) ___ - ___**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____**

Index No.:

PREARGUMENT STATEMENT

1. The title of the action appears in the above caption. There has been no change in the parties.

2. Counsel for Appellant:

**JANE DOE, ESQ.
Attorney for Petitioner-Appellant
_____ Street
New York, N.Y. 100
(212) ___ - ___**

Counsel for Respondent:

3. The appeal is taken from an Order of the _____ Court, _____ County entered on or about _____, 200__.

4. There is no other appeal pending in this action.

5. There is no related action or proceeding pending in any court of this or any other jurisdiction.

6. This action was brought to _____.

7. Order against [Petitioner . . .]

8. Appellant seeks reversal, *inter alia*, on the grounds that

**Dated: New York City
May 16, 200__**

Yours, etc.

**JANE DOE, ESQ.
Attorney for Petitioner-Appellant
_____ Street
New York, N.Y. 100
(212) ___ - ___**

_____ Court of the State of New York
County of _____

NOTICE OF APPEAL

Index No.:

PLEASE TAKE NOTICE that *(insert your name)* _____
hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second
Judicial Department, from a *(insert judgment, order, decree, etc.)* _____ of the
_____ Court, _____ County, dated
_____.

Dated: _____, New York
_____, 200__

Yours, etc.,

Signature

(Print Name)

(Address)

(Telephone Number)

To: *(Insert below the name and address of the clerk of the trial
court and the names and addresses of all opponents)*

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

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.	For Court of Original Instance
	Date Notice of Appeal Filed
	For Appellate Division

Case Type <input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	Filing Type <input type="checkbox"/> Appeal <input type="checkbox"/> Original Proceeding	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR 5704 Review
Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.			
A. Administrative Review <input type="checkbox"/> 1 Freedom of Information Law <input type="checkbox"/> 2 Human Rights <input type="checkbox"/> 3 Licenses <input type="checkbox"/> 4 Public Employment <input type="checkbox"/> 5 Social Services <input type="checkbox"/> 6 Other	D. Domestic Relations <input type="checkbox"/> 1 Adoption <input type="checkbox"/> 2 Attorney's Fees <input type="checkbox"/> 3 Children - Support <input type="checkbox"/> 4 Children - Custody/Visitation <input type="checkbox"/> 5 Children - Terminate Parental Rights <input type="checkbox"/> 6 Children - Abuse/Neglect <input type="checkbox"/> 7 Children - JD/PINS <input type="checkbox"/> 8 Equitable Distribution <input type="checkbox"/> 9 Exclusive Occupancy of Residence <input type="checkbox"/> 10 Expert's Fees <input type="checkbox"/> 11 Maintenance/Alimony <input type="checkbox"/> 12 Marital Status <input type="checkbox"/> 13 Paternity <input type="checkbox"/> 14 Spousal Support <input type="checkbox"/> 15 Other	F. Prisoners <input type="checkbox"/> 1 Discipline <input type="checkbox"/> 2 Jail Time Calculation <input type="checkbox"/> 3 Parole <input type="checkbox"/> 4 Other G. Real Property <input type="checkbox"/> 1 Condemnation <input type="checkbox"/> 2 Determine Title <input type="checkbox"/> 3 Easements <input type="checkbox"/> 4 Environmental <input type="checkbox"/> 5 Liens <input type="checkbox"/> 6 Mortgages <input type="checkbox"/> 7 Partition <input type="checkbox"/> 8 Rent <input type="checkbox"/> 9 Taxation <input type="checkbox"/> 10 Zoning <input type="checkbox"/> 11 Other	I. Torts <input type="checkbox"/> 1 Assault, Battery, False Imprisonment <input type="checkbox"/> 2 Conversion <input type="checkbox"/> 3 Defamation <input type="checkbox"/> 4 Fraud <input type="checkbox"/> 5 Intentional Infliction of Emotional Distress <input type="checkbox"/> 6 Interference with Contract <input type="checkbox"/> 7 Malicious Prosecution/Abuse of Process <input type="checkbox"/> 8 Malpractice <input type="checkbox"/> 9 Negligence <input type="checkbox"/> 10 Nuisance <input type="checkbox"/> 11 Products Liability <input type="checkbox"/> 12 Strict Liability <input type="checkbox"/> 13 Trespass and/or Waste <input type="checkbox"/> 14 Other
B. Business & Other Relationships <input type="checkbox"/> 1 Partnership/Joint Venture <input type="checkbox"/> 2 Business <input type="checkbox"/> 3 Religious <input type="checkbox"/> 4 Not-for-Profit <input type="checkbox"/> 5 Other	E. Miscellaneous <input type="checkbox"/> 1 Constructive Trust <input type="checkbox"/> 2 Debtor & Creditor <input type="checkbox"/> 3 Declaratory Judgment <input type="checkbox"/> 4 Election Law <input type="checkbox"/> 5 Notice of Claim <input type="checkbox"/> 6 Other	H. Statutory <input type="checkbox"/> 1 City of Mount Vernon Charter §§ 120, 127-f, or 129 <input type="checkbox"/> 2 Eminent Domain Procedure Law § 207 <input type="checkbox"/> 3 General Municipal Law § 712 <input type="checkbox"/> 4 Labor Law § 220 <input type="checkbox"/> 5 Public Service Law §§ 128 or 170 <input type="checkbox"/> 6 Other	J. Wills & Estates <input type="checkbox"/> 1 Accounting <input type="checkbox"/> 2 Discovery <input type="checkbox"/> 3 Probate/Administration <input type="checkbox"/> 4 Trusts <input type="checkbox"/> 5 Other
C. Contracts <input type="checkbox"/> 1 Brokerage <input type="checkbox"/> 2 Commercial Paper <input type="checkbox"/> 3 Construction <input type="checkbox"/> 4 Employment <input type="checkbox"/> 5 Insurance <input type="checkbox"/> 6 Real Property <input type="checkbox"/> 7 Sales <input type="checkbox"/> 8 Secured <input type="checkbox"/> 9 Other			

Appeal

Paper Appealed From (check one only):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court:

County:

Dated:

Entered:

Judge (name in full):

Index No.:

Stage: Interlocutory Final Post-Final

Trial: Yes No If Yes: Jury Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? Yes No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? Yes No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: Order to Show Cause Notice of Petition Writ of Habeas Corpus

Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:

County:

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:

County:

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

Issues Continued:

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1			
2			
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7			
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20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be

provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention [Form A, this document], (2) any required Additional Appeal Information Forms [Form B], (3) any required Additional Party and Attorney Information Forms [Form C], (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance, if any.



New York State Unified Court System

- Introduction to the Courts
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- Court of Claims (cases against NYS)
- Town & Village Courts
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Appellate Divisions

There are four Appellate Divisions of the Supreme Court, one in each of the State's four Judicial Departments. These Courts resolve appeals from judgments or orders of the superior courts of original jurisdiction in civil and criminal cases, and review civil appeals taken from the Appellate Terms and the County Courts acting as appellate courts.

Find your county below in order to determine which Appellate Department has jurisdiction over your locality.

Judicial Departments			
First	Second	Third	Fourth
Bronx NY County	Dutchess Kings Nassau Orange Putnam Queens Richmond Rockland Suffolk Westchester	Albany Broome Chemung Chenango Clinton Columbia Cortland Delaware Essex Franklin Fulton Greene Hamilton Madison Montgomery Otsego Rensselaer St. Lawrence Saratoga Schenectady Schoharie Schuyler Sullivan Tioga Tompkins Ulster Warren Washington	Allegany Cattaraugus Cayuga Chautauqua Erie Genesee Herkimer Jefferson Lewis Livingston Monroe Niagara Oneida Onondaga Ontario Orleans Oswego Seneca Steuben Wayne Wyoming Yates

- COUR
- LITIG
- ATTO
- JURO
- CARE
- SEAR





New York State Unified Court System

Introduction to the Courts

Court Administration

Appellate Courts

Trial Courts

Commercial Division

Court of Claims (cases against NYS)

Town & Village Courts

Litigation Coordinating Panel

Decisions

Forms

Rules

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Contact Us

Appeals from Lower Courts

Appellate Terms of the Supreme Court have been established in the **First and Second Departments** to hear appeals from civil and criminal cases originating in the Civil and Criminal Courts of the City of New York. In the **Second Department**, the Appellate Terms also have jurisdiction over appeals from civil and criminal cases originating in District, City, Town and Village Courts.

The **County Courts** in the Third and Fourth Departments (although primarily trial courts), hear appeals from cases originating in the City, Town and Village Courts.

NYC Area	
Appellate Terms	
1st Dept.	2nd Dept.
<p>1st JD NY County</p> <p>12th JD Bronx</p>	<p>2nd JD Kings (Brooklyn) & Richmond (Staten Island)</p> <p>9th JD Dutchess Orange Putnam Rockland Westchester</p> <p>10th JD Nassau & Suffolk</p> <p>11th JD Queens</p>

Upstate NY	
Judicial Districts	
<p>3rd JD Albany Columbia Greene Rensselaer Schoharie Sullivan Ulster</p> <p>4th JD Clinton Essex Franklin Fulton Hamilton Montgomery St. Lawrence Saratoga Schenectady Warren Washington</p> <p>6th JD Broome Chemung Chenango Cortland Delaware Madison Otsego Schuyler Tioga Tompkins</p>	<p>5th JD Herkimer Jefferson Lewis Onelda Onondaga Oswego</p> <p>7th JD Cayuga Livingston Monroe Ontario Seneca Steuben Wayne Yates</p> <p>8th JD Allegany Cattaraugus Chautauqua Erie Genesee Niagara Orleans Wyoming</p>

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[details.\)](#)

Terms & Connectors

Natural Language

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New York State Law Reporting Bureau
One Commerce Plaza, Suite 1750, Albany NY 12210
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Wednesday, September 15, 2004

OUTSIDE COUNSEL

By Elizabeth Anne Bannon

When the Court Asks, 'Have You Moved for a Stay?'

A question that is heard more and more often from trial justices — usually the ones who have denied your motion and know it is up on appeal — is: “Have you moved for a stay?”

A trial date is scheduled. Will the Notice of Appeal not “automatically stay” the trial? You will get it adjourned and get appellate counsel later, right? Well, the answer is “No.” There is usually no automatic stay.¹ Trial justices can even send cases out for trial if a Motion for a Stay Pending the Appeal is made and ... well ... pending. You need interim relief. You can ask for it at the Appellate Division.

On the respondent's side, what if you just received a telephone call from your adversary to appear at the Appellate Division, Clerk's Office the next day — or, that afternoon? Opposing counsel has filed an appeal and is now moving to stay the trial, scheduled for next month. Now, you have been to the Appellate Division; perhaps you have



even argued an appeal before. But appearing on a motion? On one day's notice? What do you do?

First, relax and show up.

No, you will not need papers; yet. Your adversary will most likely hand you a set of motion papers at the clerk's office and you will be given time to respond.

The following is a brief outline of what steps

lawyers, generally unfamiliar with appellate motion practice, can take to successfully handle interim stay applications at the Appellate Division, in the First and Second Departments.

Let us break the procedure for getting an Interim Stay Application at the Appellate Division, First and Second Departments down into 11 steps.

First, as movant, prepare a Motion requesting, in plain language, why your client needs a stay of the trial pending the appeal, and a stay pending the “waiting period” between now and when the Appellate Court actually decides the motion for a stay [“interim stay,”] since Trial Justices can send your case out to select, Notice of Appeal notwithstanding.

Elizabeth Anne Bannon is a solo practitioner in New York.

Continued on page 6, column 4

OUTSIDE COUNSEL

When the Court Asks, 'Have You Moved for a Stay?'

Continued from page 1, column 2

While drafting the motion with exhibits (see, *infra*), telephone your adversaries and tell them that you are going to be at the Appellate Division the next day at the Clerk's Office at 9:30 a.m. to ask for a Stay (of the trial). Or, you can call your adversaries that morning, and tell them to be there at 3:00 p.m. that same afternoon. Include in your affirmation your detailed attempts to contact your adversary. The Second Department requires it.²

Second, have you received that call? No problem. Look at the Notice of Appeal.

Is this an appeal from a Manhattan or Bronx case? That is handled by the Appellate Division, First Department.: Go to 27 Madison Ave, New York, New York, Clerk's Office: first floor, over on the left. Enter on 25th Street — there is no entrance on Madison Avenue.

Is this an appeal from almost any other downstate county? That is the domain of the Appellate Division, Second Department.³ Go to 45 Monroe Place, Brooklyn, New York Clerk's Office: first floor (not the courtroom).

Third, as the moving party, you will show up with papers in the clerk's office, and you then wait to speak with a clerk. The Appellate Division clerks are very helpful. Tell the clerk that you are here to seek a stay of the trial — or that you were telephoned by your adversary because they are moving for a stay.

Fourth, in the First Department Only, the clerk may ask if a form called "Summary Statement On Application For Expedited Service And/or Interim Relief" was filled out. The answer is usually "not yet," because that form is only available at the clerk's office. It is a one-page form, with two sides to fill out and it is self-explanatory. The moving party then fills out this form by hand. The opposing party merely notes their appearance. The Second Department does not have such a form.

Fifth, in both Departments, as movant, if your adversary is not present, advise the clerk that you did advise them of this application. The clerk may contact them to question their non-appearance.

Sixth, in both Departments, you may then be directed to a court attorney. Again, the court attorneys, like the Appellate Division clerks, are very helpful. After the court attorney reviews your papers, he or she may discuss your motion with you. Then, you may see a judge, because you are seeking "interim relief."

If you go before a judge, it will most likely be upstairs in his or her chambers. However, everything is still very formal

instead. Therefore, explain your position clearly to him or her.

Ninth, ... well, this is in two parts, if not two steps. If the judge grants the interim stay (i.e., a "stay pending the stay application" — until the application is decided), then, all other parties will be given deadlines within which to put in opposition papers. This motion to stay the trial pending the appeal must still be opposed. In the First Department, these deadlines are written directly on the back of the Summary Statement On Application For Expedited Service And/or Interim Relief. That sheet is now an Order: Note that it states, on the bottom left, "ALL PAPERS TO BE SERVED PERSONALLY."

If, in the other hand, the judge does *not* grant the interim stay, then all parties may still get deadlines by which to file opposition. At this point, it may appear that the chances of having the application granted are slim, but follow through nonetheless.

Tenth, if you were the moving party and were granted the interim stay, bring a copy of the Stay Order to the next conference or trial date so that the trial justice will know not to send you out to select a jury.

Eleventh, at last, a decision on the motion will come down very quickly, most likely in a week or two, if the circumstances warrant. On occasion, the clerk will telephone the attorneys with the final decision. Remember, just because the interim stay was granted, that is no guarantee that a stay pending the appeal will be granted. And if a stay is granted, it may be conditional on having the appellant file his brief and record earlier than usual. If the appellant has not already volunteered to do this, the opponent of the motion should make this argument.

Additional Practice Notes

At the outset, there must be an order from which to appeal, that order must have been entered in the clerk's office, and a notice of appeal must have been served. The service of the Notice of Appeal gives the appellate court jurisdiction to hear the stay application. Of course, there are exceptions to this rule. Most notably, where leave to appeal is sought and a stay is also sought, no Notice of Appeal can be attached because it has not yet been granted.

If trial is scheduled soon, then a very good reason for not moving for a stay sooner will be required. All too often, valid reasons for stay applications are not advanced until weeks after the Notice of Appeal has been served. (Yes, the Appellate Division sneaks in terms

of Service [of the Notice of Appeal]], and any other exhibits to support the stay (e.g., pleadings) should be attached. In addition, bring a self-addressed stamped envelope.⁵ And, as the Moving Party, bring many copies of this document to the Appellate Division.

Appellate Division: Second Department

- A "standard" Order to Show Cause will be prepared.
- In addition, an Affirmation in Support, Exhibit "A" (the Notice Of Appeal, RADI [Request for Appellate Division Intervention], Order and Affidavit of Service [of the Notice of Appeal]), and any other exhibits to support the stay (e.g., pleadings) should be attached. Again, bring many copies of the Order to Show Cause and supporting papers to the Second Department.

Here is a tip: When you are going to the Second Department, bring one or two extra, separate copies of the Notice of Appeal, RADI & Order. If you forget to do this, you can hope that you brought enough copies of your Order to Show Cause, and simply rip Exhibit "A" out (the Notice of Appeal) for the clerk's use.

Civil Court Cases

Your civil court cases, too, may go up on appeal. They will not go directly to the Appellate Division (although they may eventually find their way there). The first appellate stop for them is the *Appellate Term*, and they, too, may become enmeshed in motion practice. Motion practice in the Appellate Term must await a second article, as their procedure differs from the Appellate Division.

However, as a starting point, appeals from Civil Court cases in Bronx and New York County will go to the Appellate Term (not Division), First Department, located in the main New York County Courthouse, at 60 Centre Street, New York, New York. The Clerk's office is Room 401 and the phone number is (212) 374-8500.

Appeals from Civil Court cases in other downstate counties will first go to the Appellate Term, Second Department, located at 111 Livingston Street, 19th Floor Brooklyn, New York. The Clerk's Office can be reached at (718) 643-5730.

The foregoing does not guarantee that a stay will be granted, but it may assist in getting your application heard in the first instance or opposing your adversary's motion, and may assist you in finding

Third, as the moving party, you will show up with papers in the clerk's office, and you then wait to speak with a clerk. The Appellate Division clerks are very helpful. Tell the clerk that you are here to seek a stay of the trial — or that you were telephoned by your adversary because they are moving for a stay.

Fourth, in the First Department Only, the clerk may ask if a form called "Summary Statement On Application For Expedited Service And/or Interim Relief" was filled out. The answer is usually "not yet," because that form is only available at the clerk's office. It is a one-page form, with two sides to fill out and it is self-explanatory. The moving party then fills out this form by hand. The opposing party merely notes their appearance. The Second Department does not have such a form.

Fifth, in both Departments, as movant, if your adversary is not present, advise the clerk that you did advise them of this application. The clerk may contact them to question their non-appearance.

Sixth, in both Departments, you may then be directed to a court attorney. Again, the court attorneys, like the Appellate Division clerks, are very helpful. After the court attorney reviews your papers, he or she may discuss your motion with you. Then, you may see a judge, because you are seeking "interim relief."

If you go before a judge, it will most likely be upstairs in his or her chambers. However, everything is still very formal. If you do go before a judge, you will then explain — i.e., argue in civilized circumstances — how unfair it would be to have the trial go forward.

Seventh, as the attorney who has received the telephone call, do *not* forget that you are most likely the trial attorney and you know the case better than any appellate lawyer. You are simply in a different building. Just read the adversary's papers. Explain why the trial should go forward. The judge or law assistant already knows that you "just got these papers." You will be given an opportunity to respond in writing.

Eighth, if you do not go before a judge, the court attorney may do so

Eleventh, at last, a decision on the motion will come down very quickly, most likely in a week or two, if the circumstances warrant. On occasion, the clerk will telephone the attorneys with the final decision. Remember, just because the interim stay was granted, that is no guarantee that a stay pending the appeal will be granted. And if a stay is granted, it may be conditional on having the appellant file his brief and record earlier than usual. If the appellant has not already volunteered to do this, the opponent of the motion should make this argument.

Additional Practice Notes

At the outset, there must be an order from which to appeal, that order must have been entered in the clerk's office, and a notice of appeal must have been served. The service of the Notice of Appeal gives the appellate court jurisdiction to hear the stay application. Of course, there are exceptions to this rule. Most notably, where leave to appeal is sought and a stay is also sought, no Notice of Appeal can be attached because it has not yet been granted.

If trial is scheduled soon, then a very good reason for not moving for a stay sooner will be required. All too often, valid reasons for stay applications are not advanced until weeks after the Notice of Appeal has been served. (Yes, the Appellate Division speaks in terms of days and weeks regarding what is undue delay for the attorneys — attorneys who usually speak in terms of months when defining a "reasonable time" to prepare the stay application.)

The minimum papers the movant will need include:

Appellate Division: First Department

- A standard Notice of Motion will be prepared, with the return dates left *blank*: The Court enters the return date and advises you of other filing dates.⁴

- An Affirmation in Support, Exhibit "A" (the Notice Of Appeal, Pleadings Statement, Order, Affidavit

Appeal, Order) if you forget to do this, you can hope that you brought enough copies of your Order to Show Cause, and simply rip Exhibit "A" out (the Notice of Appeal) for the clerk's use.

Civil Court Cases

Your civil court cases, too, may go up on appeal. They will not go directly to the Appellate Division (although they may eventually find their way there). The first appellate stop for them is the *Appellate Term*, and they, too, may become enmeshed in motion practice. Motion practice in the Appellate Term must await a second article, as their procedure differs from the Appellate Division.

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The foregoing does not guarantee that a stay will be granted, but it may assist in getting your application heard in the first instance or opposing your adversary's motion, and may assist you in finding your way around the Appellate Division courthouses. Additionally, your client cannot be heard to say that you did not try. Stays are not often granted.

However — when the trial court asks whether you have *moved* for a stay — at least now, you can answer: "Yes."

(1) See, e.g., CPLR § 5519(e)

(2) Rules of the Appellate Division, Second Department, § 670.5(e)

(3) The Second Department hears appeals from the following counties: Kings, Queens, Nassau, Suffolk, Richmond, Rockland, Orange, Westchester, Dutchess, and Putnam.

(4) Rules of the Appellate Division, First Department, § 600.2(a)(7)

(5) *Id.*

**SUMMARY STATEMENT ON APPLICATION FOR
EXPEDITED SERVICE AND/OR INTERIM RELIEF
(SUBMITTED BY MOVING PARTY)**

Date _____

Title of Matter _____ Index/Indict# _____

Appeal by _____ from _____ order judgment decree of _____ Supreme Surrogate's Family Court entered on _____, 20__

Name of Judge _____

Notice of Appeal filed on _____, 20__

If from administrative determination, state agency _____

Nature of action or proceeding _____

Provisions of order judgment appealed from _____
decree

This application by _____ appellant respondent is for _____

If applying for a stay, state reason why requested _____

Has any undertaking been posted _____ If "yes", state amount and type _____

Has application been made to court below for this relief _____ If yes, state disposition _____

Has there been any prior application herein in this Court _____ If "Yes", state dates and nature _____

Has adversary been advised of this application _____ Does he/she consent _____

Attorney for Movant

Attorney for Opposition

Name _____

Address _____

Tel. No. _____

Appearing by _____

(Do not write below this line)

DISPOSITION

Justice

Date

Motion Date _____ Opposition _____ Reply _____

EXPEDITE _____ PHONE ATTORNEYS _____ DECISION BY _____

ALL PAPERS TO BE SERVED PERSONALLY.

Law Assistant

[FIRST DEPARTMENT]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

X

Index No.:

NOTICE OF
MOTION

x

S I R S / M E S D A M E S :

PLEASE TAKE NOTICE, that upon the annexed affirmation of Jane Doe, dated the _____ day of _____, 200__, and the exhibits annexed thereto, and upon all prior pleadings and proceedings heretofore had herein, a motion will be made by _____ at the Appellate Division, First Department, at the Courthouse located at 27 Madison Avenue, New York, New York on the _____ day of _____, 200__, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order _____ and for such other and further relief as to this Court may seem just and proper.

DATED: New York City
[date]

Yours, etc.

JANE DOE, ESQ.
Attorney for Third-Party
Defendants/Respondents-
Appellants

New York, N. Y. 100 ____
(212) ____ - ____

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

ORDER TO SHOW CAUSE

Appellate Division Docket No.:

Upon the annexed affidavit of _____, dated _____, 200__, and the papers annexed thereto,

LET _____ SHOW CAUSE BEFORE THIS COURT, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the ____ day of _____, 200__, at 9:30 o'clock in the forenoon of that date or as soon thereafter as counsel may be heard, why an order should not be made and entered:

- 1.
- 2.
3. Granting such other and further relief as to the court may seem just and equitable.

SUFFICIENT CAUSE THEREFOR APPEARING, it is

ORDERED that pending the hearing and determination of this motion

_____ are stayed; and it is further,

ORDERED that service of a copy of this order to show cause and the papers upon which it was made upon _____ by

- personal delivery pursuant to CPLR 2103(b)(1)
- office delivery pursuant to CPLR 2103(b)(3)
- overnight delivery service pursuant to CPLR 2103(b)(6)

on or before _____, 200__, shall be deemed sufficient service thereof.

Dated: Brooklyn, New York

_____, 200__

Associate Justice
Appellate Division: 2nd Department

[AFFIRMATION IN SUPPORT - EITHER DEPARTMENT]

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

_____ X

NEW YORK COUNTY
Index No.:

Petitioner-Respondent,

AFFIRMATION
IN SUPPORT

- against -

Respondent-Appellant.

_____ x

Jane Doe, an attorney admitted to practice in the Courts of this State, affirms under penalty of perjury and pursuant to Rule 2106 of the CPLR that the following facts are true:

I am fully familiar with all the facts and circumstances hereinafter contained, the source of my knowledge and information being the records maintained by deponent's office in the course of the defense hereof.

This affirmation is submitted in support of this application seeking a stay of [TRIAL or ARBITRATION]

[Here, give reason why stay is justified.]

No previous application for the relief sought herein has been made to this Court or any other Court.

WHEREFORE, it is respectfully requested that an Order be granted:

(i) staying the arbitration/trial between and GENERAL ACCIDENT INSURANCE COMPANY pending the hearing and determination of the appeal pending in the captioned proceeding; and further;

(ii) staying the arbitration/trial between and INSURANCE COMPANY pending the hearing and determination of the within application; and further;

(iii) consolidating the two appeals filed under Index Numbers 8396/93 and 8450/94; and

(iv) for such other and further relief as may be just and proper.

WHEREFORE, defendant respectfully requests that this Court issue an Order staying the trial/arbitration of the captioned action pending the hearing and determination of this application, and staying the trial/arbitration of this action pending the hearing and determination of the appeal of the order, and for such other and further relief as to this Court seems just and proper.

Dated: New York City
[date]

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

**GUIDE TO SERVICE, FILING, AND FEES FOR ORDERS TO
SHOW CAUSE SIGNED IN CHAMBERS**

Litigants and their counsel often present orders to show cause for signature to Justices of the Appellate Division, Second Department, at their chambers outside the Appellate Division Courthouse in Brooklyn. The following procedures are applicable to motions and special proceedings initiated by an order to show cause signed in chambers.

CIVIL MOTIONS

Conform Accurate Copies

After an order to show cause presented in chambers has been signed, the original bearing the Justice's signature in ink will be returned to the movant. Sufficient complete copies of the original order to show cause and the supporting motion papers must be made to provide one for each person or entity that the order to show cause directs be served, and to provide a copy for the movant's file. The original order to show cause may be photocopied or previously prepared copies may be conformed to the original for this purpose.

Make Service

The copies of the papers must then be served in accordance with the terms of the order to show cause. An affidavit of service must be prepared and executed.

Tender the Papers for Filing with the Filing Fee

The movant must mail or deliver the original order to show cause (the one that bears the Justice's signature in ink), the supporting motion papers, and the affidavit of service for filing to:

General Clerk's Office – Motion Support
Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Filing in the General Clerk's Office must be accomplished no later than 9:30 A.M. on the day preceding the return date.

Unless the movant is exempt from the payment of the fees of the clerk (*see e.g.* CPLR 1102[d], 8017), the motion papers must be accompanied by payment of the \$45 filing fee required by CPLR 8022(b). If the papers are mailed or sent to the General Clerk's Office by delivery service, the court suggests that payment of the fee be made by check or money order made payable to "Clerk of the Court." If the correct fee is not tendered, the filing will be rejected and the motion will not be heard.

SPECIAL PROCEEDINGS

An order to show cause is often used in lieu of a notice of petition to bring on a special proceeding. When such an order to show cause is signed in a Justice's chambers, the procedure to be followed differs from the procedure for motions.

Conform Accurate Copies

After an order to show cause made in connection with the initiation of a special proceeding has been signed in chambers, the original bearing the Justice's ink signature will be returned to the movant. Sufficient complete copies of the original order to show cause, the petition, and other supporting papers must be made to provide one for each person or entity that the order to show cause directs be served, and to provide a copy for the petitioner's file. The original order to show cause may be photocopied or previously prepared copies may be conformed to the original for this purpose.

Filing First, Service Thereafter

An order to show cause and supporting papers initiating a special proceeding must be filed in the General Clerk's Office *before* it is served (CPLR 304). The filing must be accompanied by payment of the \$315 filing fee required by CPLR 8022(b) and a completed Request for Appellate Division Intervention form (22 NYCRR 670.3[e]). The petitioner must mail or deliver the original order to show cause, the petition, and any other supporting papers, the fee, and the Request for Appellate Division Intervention to:

General Clerk's Office
Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

If the papers are mailed or sent to the General Clerk's Office by delivery service, the court suggests that payment of the fee be made by check or money order made payable to "Clerk of the Court."

After filing is complete, an Appellate Division Docket Number will be issued to the proceeding. Thereafter, conformed copies of the order to show cause, petition, and any other supporting papers, bearing the docket number issued by the court, must be served in accordance with CPLR 306-b.

FURTHER STEPS

All motions and special proceedings are returnable at the Appellate Division Courthouse in Brooklyn. Do *not* mail or deliver answering or reply papers to the chambers of the Justice who signed the order to show cause or to his or her attention at the courthouse. Mail or deliver answering and reply papers to the General Clerk's Office for filing.

No appearance is permitted on the return date of motions. All motions are submitted without oral argument (22 NYCRR 670.5[b]). The rule is the same for special proceedings, except habeas corpus proceedings and those specifically enumerated in § 670.18 of the court's rules (22 NYCRR 670.18).

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

COMPLETING A CERTIFICATE OF COMPLIANCE

Section 670.10.3(f) of the rules of the court (effective January 1, 2004), requires that all briefs, except those that are handwritten, have at the end thereof a certificate of compliance attesting that the formatting of the brief complies with the court's rules. The certificate may be single spaced and need not be signed. The following examples, when properly completed with the requisite information, will satisfy the rule. *Do not attach this document to a brief! The text of the appropriate certificate should be included as a part of the brief at its end.*

Typewritten Brief

The foregoing brief was prepared on a typewriter. The size of the type is pica and the pitch of the type is 10 characters per inch.

Computer-generated Brief – Proportionally Spaced Typeface

The foregoing brief was prepared on a computer (on a word processor). A proportionally spaced typeface was used, as follows:

Name of typeface: _____
Point size: _____
Line spacing: _____

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is _____.

Computer-generated Brief – Monospaced Typeface

The foregoing brief was prepared on a computer (on a word processor). A monospaced typeface was used, as follows:

Name of typeface: _____
Point size: _____
Line spacing: _____

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is _____.

Completed Example – 14-Point Proportionally Spaced Typeface

CERTIFICATE OF COMPLIANCE PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 12,345.

Completed Example - 12-Point Monospaced Typeface

CERTIFICATE OF COMPLIANCE PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing brief was prepared on a computer. A monospaced typeface was used, as follows:

Name of typeface: Courier

Point size: 12

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 12,345.

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

**A GLOSSARY OF TERMS FOR
FORMATTING COMPUTER-GENERATED BRIEFS, WITH EXAMPLES**

The rules concerning the formatting of briefs are contained in CPLR 5529 and in §§ 670.10.1 and 670.10.3 of the rules of this court. Those rules cover technical matters and therefore use certain technical terms which may be unfamiliar to attorneys and litigants. The following glossary is offered as an aid to the understanding of the rules.

Typeface: A typeface is a complete set of characters of a particular and consistent design for the composition of text, and is also called a font. Typefaces often come in sets which usually include a **bold** and an *italic* version in addition to the basic design.

Proportionally Spaced Typeface: Proportionally spaced type is designed so that the amount of horizontal space each letter occupies on a line of text is proportional to the design of each letter, the letter i, for example, being narrower than the letter w. More text of the same type size fits on a horizontal line of proportionally spaced type than a horizontal line of the same length of monospaced type. This sentence is set in Times New Roman, which is a proportionally spaced typeface.

Monospaced Typeface: In a monospaced typeface, each letter occupies the same amount of space on a horizontal line of text. This sentence is set in Courier, which is a monospaced typeface.

Point Size: A point is a unit of measurement used by printers equal to approximately 1/72 of an inch. The vertical height of type is measured in points. The measurement is somewhat complicated and requires a special ruler. The process of measurement is well explained in *The Chicago Manual of Style* (14th ed.) § 19.43. Suffice it to say that an attorney or litigant may rely on the type size setting of the word processing program used to create the brief. A brief utilizing a proportionally spaced typeface must use 14-point type for the body of the text, but 12-point type may be used for footnotes. A brief utilizing a monospaced typeface must use 12-point type for the body of the text, but 10-point type may be used for footnotes.

Double Spacing: Double spaced text has a blank line between successive lines of type. The space between lines is called leading and is measured in points from the bottom of one line of text to the bottom of the next. Double spaced text should have leading of at least the height of the type. Thus double spaced 14-point type must have at least 14 points of leading, for a total line spacing of 28 points. An attorney or litigant may rely on the line spacing setting of the word processing program used to create the brief.

Serif: A serif is not an angel (a seraph), but rather is a fine cross-stroke at the end of the principal stroke of a letter. Serifs enable the eye to move easily from letter to letter of a line of text and hence improve the readability of a document set in a serified typeface. Sans serif typefaces lack serifs. Times Roman is a serified typeface and Arial is a sans serif typeface. In the following examples, the serifs are the fine lines at the ends of the s, r, i, and f in the word serif, which is set in Times New Roman, and which are missing from the same letters in the words sans serif, which are set in Arial:

Serif

Sans Serif

The rules require the use of a serified typeface to enhance the readability of the brief (22 NYCRR 670.10.3[a]). The use of sans serif fonts is prohibited.