PRESERVATION OF ISSUES FOR APPEAL

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It is important for litigating attorneys to recognize that they are integral parts of the appellate process. An appeal does not begin with the Notice of Appeal, nor even with the order or judgment from which appeal is taken. In effect, the appeal begins at the same time as does the preparation of papers for the motion leading to the order which is the subject of appeal, and with the trial preparations undertaken before the trial practitioner enters the court and selects a jury. Every step along the litigation process should be taken with the recognition that the ultimate order or judgment may be the subject of an appeal, which could bear the fruit of or ultimately frustrate all of your litigation efforts.

A critical manifestation of this concern for an eventual appeal must be the preservation of appellate rights. In Wilson v. Galicia Cont. & Restoration Corp., 10 N.Y.3d 827 (2008), the Court of Appeals reiterated that "the requirement of preservation is not simply a meaningless technical barrier to review." The Court added that it is not up to the courts to do the "lawyering" for a party. As a practical matter, there is nothing so frustrating to an appellate counsel as reviewing motion papers and finding critical documents or arguments omitted, or reviewing a transcript while muttering "PLEASE object, PLEASE ...", only to find no objection at a critical moment in the course of trial.

Notably, the obligation to preserve appellate arguments applies with equal force to parties opposing appeals (see, American Industrial Contracting Co., Inc. v. Travelers Indemnity Co., 54 A.D.2d 679 [2nd Dept. 1976], aff'd, 42 N.Y.2d 1041 [1977]).

1. **Preparation of a Motion**

Preservation of issues raised on a motion for the purposes of appeal requires both careful preparation of the documentation submitted and a breadth of vision sufficient to recognize and predict all potential issues which may arise on appeal from the ensuing order. As a general rule, an appellate court cannot consider an argument which was not raised in the lower court (Gayz v. Kirby, 41 A.D.3d 782 [2nd Dept. 2007]).

In the first instance, your motion must include all appropriate documentation in support of the relief you request. A motion for summary judgment, for example, must include copies of the pleadings (CPLR 3212 [b]; see Thompson v. Foreign Cars Ctr., Inc., 40 A.D.3d 965 [2nd Dept. 2007]; Riddell v. Brown, 32 A.D.3d 1212 [4th Dept. 2006]; Hamilton v. City of N.Y., 262 A.D.2d 283 [2nd Dept. 1999]). Although a lawyer's affidavit suffices to introduce annexed documentary evidence (see Finnegan v. Staten Island Rapid Transit Op. Auth., 251 A.D.2d 539 [2nd Dept. 1998]), it cannot be used to assert any factual information of which the lawyer has no first-hand knowledge (Salas v. Town of Lake Luzerne, 265 A.D.2d 770 [3rd Dept. 1999]). Transcripts of depositions relied on must have been signed by the witness or be accompanied by affidavits of service and lack of timely return (Pina v. Flik Intl. Corp., 25 A.D.3d 772 [2nd Dept. 2006]; but see Boadu v. City of N.Y., 95 A.D.3d 918 [2nd Dept. 2012] [Where no challenge to accuracy, consideration of unsigned EBT acceptable]). Affirmations of doctors or attorneys must be affirmed to be true “under penalties of perjury” (CPLR 2106; Offman v. Singh, 27 A.D.3d 284 [1st Dept. 2006]), but cannot be used if the affiant is a party – then the affidavit form must be employed (Muniz v. Katlowitz, 49 A.D.3d 511 [2nd Dept. 2008]). Other experts must use the affidavit/jurat form (Mazzola v. City of N.Y., 32 A.D.3d 906

[2nd Dept. 2006]). NOTE: a recent amendment to CPLR 2106, effective next year, permits an affirmation to be signed by any person while overseas. Hospital records and other annexed documents must be in admissible form (Banfield v. New York City Transit Auth., 36 A.D.3d 732 [2nd Dept. 2007]). A motion addressing insurance must include all relevant insurance policies (Tower Ins. Co. of N.Y. v. T&G Contr., Inc., 44 A.D.3d 933 [2nd Dept. 2007]).

In the effort to ascertain that all necessary documentation is provided, some tips:

- Never presume that the court has before it or is familiar with prior orders and/or previously submitted documents. The Record on Appeal from an Order includes "the papers and other exhibits upon which the ...order was founded" (CPLR 5526). If papers were not submitted on the motion leading to the order appealed from, as a general rule, they are not properly part of the record.
- Specifically, upon a motion for renewal or reargument, you should include all papers which were submitted by you on the initial motion (Biscone v. Jet Blue Airways Corp., 103 A.D.3d 158 [2nd Dept. 2012]).

With respect to exhibits, err on the side of over-inclusion. The entirety of the contract, and not merely pages containing a particular clause, should generally be included. Include entire deposition transcripts as opposed to excerpts. Courts view with skepticism "brief portions of [transcripts] cut at unnatural intervals and lacking context" (Abdelaal v. Gindi, 8 A.D.3d 410, 411 [2nd Dept. 2004]; see also, Esteva v. City of N.Y., 30 A.D.3d 212 [1st Dept. 2006]). Over-inclusion is significant for another

reason. While the general rule prevents consideration on appeal of issues not raised in the lower court, there is a body of appellate case law which holds that an exception to the general rule exists if the issue appears on the face of the record and could not have been refuted by your adversary if raised at the proper juncture (Rochester v. Quincy Mut. Fire Ins. Co., 10 A.D.3d 417 [2nd Dept. 2004]; In Re Application of Allstate Ins. Co. v. Perez, 157 A.D.2d 521 [1st Dep't 1990]).

- When photographs are marked as exhibits at the deposition, attach them to your motion papers. Use color photographs, if available. The courts have little patience for mere black and white photocopies of color photographs (see, e.g., Gennaro v. Cord Meyer Dev. Co., 57 A.D.3d 725 [2nd Dept. 2008]). Videotapes must be properly authenticated (Read v. Ellenville Nat'l Bank, 20 A.D.3d 408 [2nd Dept. 2005]).

- It is for the affidavit of a client to make statements of fact, the affidavit of an expert to make statements of opinion, and the affidavit of an attorney to introduce legal arguments. Do not confuse the function of each.

- Make certain that the copies of documents submitted are free of extraneous markings - - for example, do not include "marked pleadings" as exhibits. (As a related matter, do not mark up the original documents received from your adversary - - they may be necessary for inclusion in a Record on Appeal. Make a copy if you need to place comments on your adversary's work product.)

Beyond the mechanics of including appropriate documentation, it is important to take a step back and a broader view of that which you hope to accomplish by your motion. All potential grounds available for the motion (or in opposition to a motion by your adversary) should be considered, and where appropriate included. As previously noted, it is the rare occasion in which an appellate court will consider an argument which was not raised before the court below (see, e.g., Glielmi v. Toys 'R Us, 94 A.D.2d 663 [1st Dept. 1983], affd 62 N.Y.2d 664 [1984]). Nor may one hold a significant issue in support of a motion for presentation in reply papers; the appellate courts are savvy to that and will reject consideration of that issue on appeal (see Travelers Indem. Co. v. LLJV Dev. Corp., 227 A.D.2d 151 [1st Dept. 1996]).

The issues which are to be presented must appear in papers which will make up part of the Record on Appeal. As we will note, Memoranda of Law are not usually included in the Record on Appeal. Many Judges in New York State Courts have come to accept affirmations or affidavits which include recitation of case law - - a combined affidavit and memorandum of law. Even purists, however, who submit separate affidavits and memoranda of law, should include in the affirmation or affidavit of counsel a statement identifying the legal issues addressed in the Memorandum of Law, so that there can be no question that the issues were appropriately raised.

Consideration of the types of issues to be raised necessarily depends upon the nature of the motion. Whatever its nature, however, care must be taken to raise all potential issues. You often have but one clear opportunity to seek the relief you are requesting and, therefore, to make an appellate Record in the event such relief is denied. For example, there is a “one-motion” rule with regard to CPLR 3211 dismissal

motions, which will be enforced (see Swift v. New York Med. Coll, 48 A.D.3d 671, [2nd Dept. 2008]). Of greater import, multiple motions for summary judgments are discouraged (see Marine Midland Bank v. Fisher, 85 A.D.2d 905 [4th Dept. 1981]). As a practical matter, furthermore, such motions are typically made in a brief window of opportunity between the filing of a note of issue and the last date upon which such motions can be made pursuant to court rules; a second motion would be untimely. A motion for renewal on additional evidence now requires presentation of a reasonable justification for failing to include that evidence in the first instance (CPLR 2221 [e][3]). In other words, a motion for summary judgment can usually be made only once; hence, it must include all issues and evidentiary support by which you could hope to achieve your client's objective. Go beyond the issue which initially caused you to consider making the motion (e.g., the absence of a defect) and explore inclusion of evidence and argument supporting additional or alternative grounds (absence of notice; absence of proximate cause).

If a party moves for affirmative relief that would inure to your benefit, file a motion in support by notice of motion and supporting papers. Otherwise, you may be precluded from participating in the appeal (see, Villatoro v. Talt, 269 A.D.2d 390, 391 [2nd Dept. 2000] ["The brief submitted by the third-party defendant Hicksville Auto Wash, Inc., has not been considered on the appeal, as that party did not submit any papers on the motion and cross motion which resulted in the order dated April 20, 1999"]; see also, Maglione v. Seabreeze By Water, Inc., 116 A.D.3d 929 [2nd Dept. 2014]). A "me, too" motion can go a long way in preserving your client's appellate rights. However, a cross-motion does not suffice in this respect since a cross-motion is an inappropriate

vehicle for seeking affirmative relief against a non-moving party (Mango v. Long Island Jewish Hillside Medical Center, 123 A.D.2d 843 [2d Dept. 1986]).

For the same reasons, if a motion is made which may, directly or indirectly, impact negatively on your client, you must submit opposition; do not rely upon the opposition submitted by another party (co-defendant, indemnitor, indemnitee), because it may not preserve your right to appeal from an adverse determination (e.g., Alfieri v. Empire Beef Co., Inc., 41 A.D.3d 1313 [4th Dept. 2007]; Benitez v. Olson, 29 A.D.3d 503 [2nd Dept. 2006]).

An appeal from a final judgment brings up for review any previously unreviewed non-final judgment or order which necessarily affects the final judgment (CPLR 5501[a][1]). In a plenary action, in an appeal from an adverse final judgment, an appellant can seek review of a prior adverse non-final order, and the Appellate Division will limit its review to the record material before the lower court at the time that the prior motion was made (Icon Motors Inc. v. Empire State Datsun, Inc., 178 A.D.2d 463 [2nd Dept. 1991]). However, an important exception to this rule exists: if a notice of appeal was filed with respect to the prior order and the appeal was dismissed for failure to prosecute, the Court may refuse to consider issues which could have been raised on that appeal (Bray v. Cox, 38 N.Y.2d 350, 353 [1976]; see Chiu v. Chiu, 67 A.D.3d 975 [2nd Dept. 2009]).

2. **Preservation of Issues at Trial**

Like the preparation of a motion, preparation for trial should be undertaken with the recognition that an appeal may (is likely to?) entail. The issues which are expected to arise, whether raised by you or your adversary, should be recognized in advance to the extent possible, so that preparations can be made for timely and appropriate

objection. The basic premise behind preservation of errors for appellate review at trial is a simple one: arguments must appear in the transcript at the trial in order to be preserved for appellate review (Venancio v. Clifton Wholesale Florist, Inc., 1 A.D.3d 505 [2nd Dept. 2003]; Smith v. M.V. Woods Const. Co., 309 A.D.2d 1155 [4th Dept. 2003]). If anything you wish to raise on appeal went unrecorded, see CPLR 5525(d).

(a) How to Object.

The point at which various objections must be made to preserve issues for appeal will be noted, but in virtually every case, the objection must be "appropriate". That is, an objection must state the basis, and that basis must ultimately be the one raised for argument on appeal (see, e.g. Donaldson v. County of Erie, 209 A.D.2d 947 [4th Dept. 1994]; see also People v. Gray, 86 N.Y.2d 10 [1995]). **A general objection to the admissibility of evidence, or to the inconsistency of a verdict, or to the impropriety of a charge usually will not suffice** (see People v. Tevaha, 84 N.Y.2d 879 [1994]; People v. Clarke, 81 N.Y.2d 777 [1993]; Robillard v. Robbins, 78 N.Y.2d 1105 [1991]; Bichler v. Eli Lilly & Co., 55 N.Y.2d 571 [1982]).

If the Judge trying your case refuses to allow you to make a statement concerning the grounds for your objection, **have the court so state on the Record**. Appellate courts do not want counsel to argue with or defy the trial court's instructions if they clearly appear on the record (see 22 NYCRR §§604.1[d][4]; 700.4[d]). If the court states on the Record that only the term "objection" is to be stated with reasons to be put on the Record after the jury departs, **make sure that you take the time to state the grounds for objection after the jury leaves**.

(b) When to Object.

If there is an objection to the jury selection process, the objection must be made immediately and prior to the seating of the jury if it is to be preserved for appellate review. Please note that a party as an absolute right to have a judge present during jury selection (CPLR 4107). The Appellate Division, Second Department has held that it is a reversible error to deny a party's request in this regard (Brooks v. City of Mount Vernon, 280 A.D.2d 631 [2nd Dept. 2001]).

If your adversary has made an inappropriate comment in an opening or summation, you must object (see Alston v. Sunharbor Manor, LLC, 48 A.D.3d 600 [2nd Dept. 2008]). It is improper for a trial judge to prohibit objections during openings or summations (Binder v. Miller, 39 A.D.3d 387 [1st Dept. 2007]). If the Court has nevertheless advised you to refrain, again, ask the Court to so state on the Record, and ask for the opportunity, after the openings or summation, to make a record of your objections. If you believe a mistrial is warranted, you must request that relief (Bonila v. New York City Health & Hospitals Corp., 229 A.D.2d 371 [2nd Dept. 1996]). In the event curative instructions are given which are deemed for any reason insufficient, you must object to those instructions (Dennis v. Capital District Transp. Auth., 274 A.D.2d 802 [3rd Dept. 2000]).

If the opening statements are not recorded, the appellate courts will not, in most cases, be willing to accept appellant's characterization of improper comment made by the adversary (see, e.g., Stanton v. Price Chopper Operating Co., Inc., 243 A.D.2d 934 [3rd Dept. 1997]). Failure to have the opening statements recorded may also prevent you from moving to dismiss based upon the opening statements, unless the record

contains colloquy between court and counsel as to what transpired (see, Egan v. Boenig, 222 A.D. 836, 226 N.Y.S. 748 [2nd Dept. 1928]).

If the trial court excludes evidence which you wish to offer, a timely pertinent offer of the evidence must be given in order to permit appellate consideration of the objection and its exclusion. The offer of proof must include a showing of the nature of the evidence, the purpose and object of the evidence and all of the facts necessary to establish its admissibility, including its relevance. A proper voire dire on the record permits the appellate court to undertake a meaningful review (see, Bergamaschi v. Gargano, 293 A.D.2d 695 [2nd Dept. 2002]). The failure to make an offer of proof prevents appellate counsel from arguing that the excluded evidence could have altered the outcome of the trial (Nieves v. Tomonska, 306 A.D.2d 332 [2nd Dept. 2003]).

Similarly, if the trial court prevents one of your witnesses from testifying, ensure that your arguments concerning the witness take place on the record, or they cannot be reviewed on appeal (Venancio v. Clifton Wholesale Florist, Inc., 1 A.D.3d 505 [2nd Dept. 2003]).

If you disagree with a Court-imposed time limitation for examination of a witnesses (or group of witnesses), you must object at that time; you cannot wait to raise the issue in a post-trial motion (Lahren v. Buehmer Transp. Corp., 49 A.D.3d 1186 [4th Dept. 2008]).

Objections to evidence must be made when such evidence is proffered. Evidence submitted without objection will be conclusively presumed to be unobjectionable (see Iorizzo v. Dyker Emergency Physicians, P.C., 278 A.D.2d 280 [2nd Dept. 2000]). If an objection is raised to evidence that you seek to adduce, you must

ascertain that the Court's ruling on that objection is on the record (see Hamilton v. Raftopoulos, 176 A.D.2d 916 [2nd Dept. 1991], lv den 79 N.Y.2d 753 [1992]).

Take photographs of physical exhibits and have them marked as exhibits. If the judge does not allow a certain exhibit into evidence, make sure to have it marked for identification.

After the trial, if the court allows, immediately retrieve your exhibits from the court and keep them in an exhibit folder. Otherwise, retrieve the exhibits from the court at the earliest opportunity. Keep an accurate list of all parties' exhibits.

Where exhibits are submitted at the beginning of trial and there is no request for redaction until after the jury has begun deliberations, the redaction request is deemed to be waived (Novikov v. Zambdorg, 79 A.D.3d 833 [2nd Dept. 2010]).

(c) Pre-Verdict Motions.

If an issue of law exists which would warrant determination without submission to a jury (e.g., the absence of evidence to support a defect or proximate causation), **you must move to dismiss at the close of plaintiff's case, and again at the close of evidence, and you must specify the legal basis upon which that motion is made** (People v. Gray, supra, 86 N.Y.2d 10; Suria v. Shifman, 67 N.Y.2d 87, 96 [1986]). The failure to so move, in effect, concedes that an issue of fact has been presented for jury determination (People v. Lane, 7 N.Y.3d 888 [2006]; Kayser v. Sattar, 57 A.D.3d 1245 [3rd Dept. 2008]; DeSimone v. Royal GM, Inc., 49 A.D.3d 490, [2nd Dept. 2008]; Kamara v. City of N.Y., 299 A.D.2d 316 [2nd Dept. 2002]).

These motions must be made prior to the case going to the jury, with the specific grounds articulated, as follows:

1) At the end of plaintiff's case, move to dismiss based upon plaintiff's failure to make out a prima facie case, stating specific grounds (CPLR 4401). These motions are usually held in abeyance. (If you are a third-party defendant, such motions should be made after plaintiff's case and after third-party plaintiff's case). If you fail to make such a motion, you will be precluded from arguing on appeal that the evidence was legally insufficient as a matter of law (Smith v. M.V. Woods Constr. Co., Inc., 309 A.D.2d 1155 [4th Dept. 2003]). Keep in mind, however, that on appeal, the reviewing court will consider all of the evidence adduced at trial, including the evidence adduced by the movant. If that evidence filled a gap in your adversary's prima facie case, the appellate court will take that into account (see, Beck v. Northside Med., 25 A.D.3d 631 [2nd Dept. 2006]). A motion for a directed verdict is premature if made before the completion of the adversary's case. If the motion is not renewed after the close of the adversary's case, it is not preserved for appellate review (Bodge v. Red Hook Senior Hous. Dev. Fund Co., Inc., 85 A.D.3d 1073 [2nd Dept. 2011]).

2) At the conclusion of all of the proof, move for judgment as a matter of law in favor of your client on plaintiff's claim and all cross-claims and third-party claims, specifying the grounds (CPLR 4401). If your adversary's case was incredible as a matter of law, that is the ground on which you would move to dismiss (see, Cruz v. New York City Tr. Auth., 31 A.D.3d 688 [2nd Dept. 2006], aff'd, 8 N.Y.3d 825 [2007]).

(d) Charge to the Jury.

The absence of a request to charge or an exception to the charge stating the matter of the objection and the grounds therefor prior to the jury retiring to consider the

verdict amounts to a waiver of the issue for appeal purposes (CPLR §4110-b; Morgan v. Rosselli, 23 A.D.3d 356 [2nd Dept. 2005]).

An application for a missing witness charge must be made before the close of evidence, preferably, as soon as it is recognized that the witness is not being produced; waiting too long may render the request untimely (see Carrero v. General Fork Lift Co., 36 A.D.3d 577 [2nd Dept. 2007]).

The proper method to preserve an objection to a charge or refusal to charge is indicated by the ruling in Bichler v. Eli Lilly & Co., 55 N.Y.2d 571 (1982). Underlying the mandate in that decision is a critical need for resolution of charge issues on the record. Requests to charge must be marked as court exhibits. The charge conference should be recorded (see Velasquez v. Skory, 49 A.D.3d 1056 [3rd Dept. 2008]); if it is not, you must secure the opportunity to state on the record the grounds for your objections to your adversary's request and the court's ruling on your requests and on theirs (*Id.*). Note: specificity is important; an objection, for example, that the charge is not supported by sufficient evidence is insufficient to preserve the argument that the charge is unavailable under New York Law (Wild v. Catholic Health System, 21 N.Y.3d 951 [2013]).

Generally, the procedure suggested in Bichler requires you to hand up requests to charge (which accurately reflects the law) and to object to those of your adversary's submissions which you deem objectionable. If the Court rules against you on the Record with respect to any specified charge, there is no further need to make objection as to that charge (see Bradley v. Earl B Feiden, Inc., 8 N.Y.3d 265 [2007]. but see Lucas v. Weiner, 99 A.D.3d 1202 [4th Dept. 2012]). If the Court rules in your favor during a

charge conference, but subsequently fails to charge as he or she had previously ruled, you must object before the case is given to the jury (Cancel v. City of N.Y., ____ Misc.2d _____ 2003, N.Y. Misc. LEXIS 1019 [App. T., 1st Dept. 2003]). If the Court fails to rule on a request to charge or objection, you must reiterate your request or objection and obtain a ruling before the jury is allowed to retire to decide the case.

An error in the form of a verdict sheet requires a timely objection (see Goldberg v. Union Hardware Co., 162 A.D.2d 658 [2nd Dept.1990]). If you want detailed interrogatories to be presented to the jury, they must be requested (Suria v. Shiffman, supra, 67 N.Y.2d at 95).

General verdicts should be avoided, as they are fraught with preservation problems for appellate counsel. For example, where two different theories of liability are asserted against a defendant, and the jury finds liability under a general verdict, that defendant may not argue on appeal that one of the theories of liability was not supported by sufficient evidence. Thus, an opportunity to dismiss a claim on appeal may be lost (see, Giunta v. Delta International Machinery, 300 A.D.2d 350 [2nd Dept. 2002]). A general damages verdict will prevent a defendant from arguing on appeal that a particular element of the damages award was excessive (see, Zawacki v. County of Nassau, 299 A.D.2d 542 [2nd Dept. 2002]).

(e) After the Verdict.

In the event of an inconsistent verdict, objection must be raised before the jury is disbanded, and the objection must specify the particular inconsistency which is the

focus of concern (see Barry v. Manglass, 55 N.Y.2d 803, 806 [1982]; Venancio v. Clifton Wholesale Florist, Inc., 1 A.D.3d 505 [2nd Dept. 2003]).[1]

Under CPLR 4404-4406, "in addition to motions made orally after …verdict," a single motion can be made to set aside the verdict and either dismiss the action or direct a new trial; such motion must include "every ground for post-trial relief then available" to the party (CPLR 4406). However, the statutorily designated paper motion must be made within 15 days of the verdict (CPLR 4405), meaning that a complete transcript will not likely be available. Most common, therefore, is the making of an oral motion on as many identifiable grounds as may be available, along with the catch-all "all other grounds" familiar to attorneys, coupled with a request for a more extensive briefing schedule on the oral motion (there being no statutory time limit in that regard).

The post-verdict motions, in addition to a claim of inconsistency (made before the jury is disbanded), should typically include the following:

1) A motion should be made to set aside the verdict and to direct judgment as a matter of law in favor of your client. Otherwise, the argument is waived for appellate purposes (Garrett v. Manaser, 8 A.D.3d 616 [2nd Dept. 2004]). Further, move separately for a new trial on the grounds that:

(i) The verdict is contrary to the weight of the evidence.

(ii) The verdict should be set aside in the interest of justice.

The grounds for each motion must be articulated (see CPLR 4404).

[1] Notably, however, the fact that an inconsistency in the verdict may not have been preserved for appellate review does not prevent each element of the verdict from being reviewed to determine whether it is supported by or is against the weight of the evidence (see Lockhart v. Adirondack Transit Lines, Inc., 305 A.D.2d 766, 767 [3rd Dept. 2003]; Califano v. Automotive Rentals, Inc., 293 A.D.2d 436 [2nd Dept. 2002]).

The Appellate Division, Second Department has held that a motion for a new trial on the ground that the verdict is against the weight of the evidence is separate from a motion to dismiss for failure to make out a prima facie case. Failure to articulate the former motion amounts to a waiver, notwithstanding that a motion to dismiss is made (Condor v. City of N.Y., 292 A.D.2d 332 [2nd Dept.], lv. den., 98 N.Y.2d 607 [2002]).

2) A motion should be made setting aside the verdict as being excessive, articulating the grounds. Although written in terms of the "Appellate Division," CPLR §5501(c) is applicable to the trial courts as well (see Shurgan v. Tedesco, 179 A.D.2d 805 [2d Dept. 1992]; Wendell v. Supermarkets General Corp., 189 A.D.2d 1063 [3rd Dept. 1993]; Prunty v. YMCA of Lockport, Inc., 206 A.D.2d 911 [4th Dep't 1994]).

Some courts have held that a failure to move to set aside a verdict, pursuant to CPLR 4404, on the ground of excessiveness (or, in theory, insufficiency) of the verdict waives that issue on appeal (see Homan v. Herzig, 55 A.D.3d 1413 [4th Dept. 2008], Smetanick v. Erie Ins. Group, 16 A.D.3d 957 [3rd Dept. 2005]). Those decisions are questionable; the Appellate Divisions' power to review jury verdict amounts is not dependent on the underlying court's conclusion, but is an independent authority statutory (CPLR 5501[c]). Nevertheless, those cases must be respected. The wise practitioner will make a post-trial motion after every verdict by which her or his client is aggrieved.

A motion for judgment as a matter of law or for a new trial should be made where the jury cannot agree after a reasonable time (CPLR 4404).

It is true that the Appellate Division is authorized to consider, in the interest of justice, errors which were not preserved through appropriate objection when the error is

"fundamental", i.e., goes to the heart of the case (see e.g., Pivar v. The Graduate School of the Figurative Arts of the N.Y. Academy of Art, 290 A.D.2d 212 [1st Dept. 2002]). You do not want to force one who may have to handle an appeal from the judgment at the close of your trial to rely on the court's munificence in that regard; such discretion is very seldom exercised. Raise objection when required, make motions as may be required, bear in mind that an appeal may result and preserve the Record accordingly.

3. THE CRITICAL NOTICE OF APPEAL.

The Notice of Appeal is the document by which an appeal is taken (CPLR 5515). The notice must recite the party taking the appeal, the court to which the appeal is being taken, and "the judgment or order or specific part of the judgment or order appealed from" (CPLR 5515 [1]). Two critical points must be noted. First, where you represent more than one party, the Notice of Appeal should specifically recite that it is being taken on behalf of each party who is an intended appellant; an appeal on behalf of one party will not necessarily inure to the benefit of another (see Bravo v. Uvaydov, 10 A.D.3d 668 [2nd Dept. 2004]). Second, the Notice of Appeal should not be limited to specific elements of an order or judgment appealed from, unless it is absolutely intended that this limitation exist. The courts have made clear that a Notice of Appeal which recites that it is limited to a specific element or part of an Order or Judgment, will, in fact, limit the Court's appellate review to those specific elements of the case (see Torres v. City of N.Y., 41 A.D.3d 312 [1st Dept. 2007]; Ilardo v. New York City Transit Auth., 28 A.D.3d 610 [2nd Dept. 2006]; Joslin v. Lopez, 309 A.D.2d 837 [2nd Dept. 2003]; Clark v. 345 E. 52nd St. Owners, Inc., 245 A.D.2d 410 [2nd Dept. 1997]; City of Mt. Vernon v. Mt. Vernon

Housing Auth., 235 A.D.2d 516 [2nd Dept. 1997)]; Harvey v. Mazal Am. Partners, 179 A.D.2d 1 [1st Dept. 1992]). As a practical matter, no limitation should ever be included in the Notice of Appeal. If one chooses to describe the order appealed from other than by date (e.g., "... which denied defendant's motion for summary judgment..."), one should conclude the Notice of Appeal with a broad statement of the scope of the appeal, e.g., "[Defendant] appeals from each and every part of the aforesaid order and from the whole thereof, to the extent that it is aggrieved thereby." That should suffice to avoid any misunderstanding that any limitation was intended in respect to the issues presented on appeal.

Pursuant to the rules of the Appellate Division, First, Second and Third Departments, a Notice of Appeal must be accompanied by an additional document termed by the First Department, as a "Pre-Argument Statement" (22 NYCRR § 600.17), by the Second Department as a "Request for Appellate Division Intervention" (22 NYCRR §§ 670.3, 670.24 [a]), and by the Third Department as a "Pre-Calendar Statement" (22 NYCRR § 800.24-a). Each requires a variety of information concerning the case, which will be reviewed for purposes of the court calendar and for consideration for civil appeal settlement programs.[2] The recitation required in each of those forms of the issues being raised on appeal is not binding; nevertheless, it has become customary for practitioners to include, as the last issue to be raised on appeal, "such other issues as may be presented upon a review of the Record on Appeal."

The Notice of Appeal; Pre-Argument, Pre-calendar or Request form; and a copy of the order or judgment appealed from must be served on all parties and filed with clerk

[2] 1t should be noted that attendance at settlement conferences called by an appellate court, unless excused, is mandatory; failure to comply can result in dismissal of the appeal or striking of the brief (see Brecher v. Cong. Shaarey Zion, ___ A.D.2d ___, N.Y.L.J. 5/7/91 [2nd Dept. 1991]).

of the court of original jurisdiction in duplicate (triplicate in appeals going to the Appellate Division, Second Department) along with a required filing fee of sixty-five dollars payable to the clerk of the county from which appeal is taken (CPLR 8022).

Other than the filing of a summons within the statute of limitations, there are no deadlines in the practice of New York law as unforgiving as the time within which to serve and file a Notice of Appeal. CPLR 5513 states:

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

Service of the order with notice of entry by mail or overnight delivery will add five days or one day, respectively, regardless of whether appellant or respondent served the order or judgment (CPLR 5513 [d]). In e-filed cases, service of the Order with Notice of Entry through e-filing is valid service of the Order with Notice of Entry (see 22 N.Y.C.R.R. § 202.5-b[h][5]). The CPLR is adamant that, except for specifically noted unusual circumstances (e.g., death of a party, death of an attorney), "no extension of time shall be granted for taking an appeal" (CPLR 5514 [c]). However, notably, if service is timely made and the filing is delayed, or vice-versa, the court may in its discretion permit the appellant to correct the omission (CPLR 5520 [a]). And errors in the form of the Notice will not necessarily be fatal (CPLR 5520 [c]).[3]

With timing of the appeal hinged to service of the order or judgment with notice of entry, issues frequently arise as to the manner, timing and sufficiency of that service.

[3] There is no need for an appellant to await service of the order or judgment with notice of entry, and certainly no reason for an appellant to serve same, before serving the Notice of Appeal. Service of the order or judgment with notice of entry starts the time running within which to appeal; it is not a prerequisite to an appeal.

There is no required form for the "notice of entry" (although Blumberg conveniently provides one on litigation backs). The Courts recognize the County Clerk's "Entered" stamp on an order served upon an adversary as sufficient notice that the Order has been "Entered" (Norstar Bank of Upstate N.Y. v. Office Controls Systems, Inc., 78 N.Y.2d 1110 [1991]; Johnson v. State of N.Y., 256 A.D.2d 1179 [4th Dept. 1998]).

An immaterial inaccuracy in the notice of entry does not void that document (Deygoo v. Abstract Corp., 204 A.D.2d 596 [2nd Dept.], lv den 84 N.Y.2d 920 [1994]). And the service of an order with notice of entry will be effective even though the order served refers to a transcript or decision which is not annexed (see, Corteguera v. City of N.Y., 179 A.D.2d 362 [1st Dept. 1992]). What is more, service of the Order marked "entered" as an exhibit to a motion will constitute service of the Order with Notice of Entry (Reralta v. City of N.Y., 92 A.D.3d 554 [1st Dept. 2012]).

Nevertheless, the courts have recognized that without the proper service of an order with notice of entry, the time within which to appeal never expires (see, Mirza v. Justin Hacking Corp., ____ A.D.2d _____ [2nd Dept., N.Y.L.J., 5/13/98]. [Service of an order misdescribed as being with "notice of settlement" insufficient to start time running; notice of appeal served nine months after order deemed timely]). A notice of entry which recites the wrong date of entry has been held to be insufficient to start the time running within which to appeal (Lum v. YMCA, 136 A.D.2d 972 [4th Dept. 1988]; Nagin v. Long Island Savings Bank, 94 A.D.2d 710 [2nd Dept. 1983]).

The Court of Appeals has confirmed that strict compliance with the requirements of service of the order or judgment with notice of entry will be exacted from those

seeking dismissal of an appeal as untimely. In Matter of Reynolds v. Dustman, 1 N.Y.3d 559 (2003), the Court held:

> "Compliance with CPLR 5513 (a) requires a notice of entry that refers to the appealable paper and the date and place of its entry [citations omitted]."

Since the cover letter in Reynolds misdescribed the Order as a "Decision", and did not specifically reference the enclosed copy of the Order, it was held insufficient.

A series of cases had held that the service of an order with notice of entry by one party upon the appellant does not begin the time running within which to take an appeal as against any other party. Thus, if summary judgment is granted in favor of numerous defendants dismissing the complaint, service by one of those defendants of the order with notice of entry upon the plaintiff will not, under these determinations, start the time running within which an appeal must be taken as against every other defendant (see Mancini v. Mormile, 229 A.D.2d 542 [2nd Dept. 1996]; Blank v. Schafrann, 206 A.D.2d 771 [3rd Dept. 1994]; Williams v. Forbes, 157 A.D.2d 837 [2nd Dept. 1990]; cf. People v. Washington, 86 N.Y.2d 853 [1995]).

However, in a 1996 amendment, CPLR 5513 (a) was changed. It had previously stated that the appeal had to be taken "within thirty days after service upon the appellant..." Now it recites "within thirty days after service by a party upon the appellant..." (emphasis supplied). One may well argue that the language as amended requires service of the Notice to Appeal within thirty days after service of the order upon the appellant by any party, not by each party. The legislative history of that amendment shows quite clearly that the intention was merely to exclude service of the order with notice of entry by the Judge or Clerk of the Court (as occurs in some upstate and Long

Island venues). Nevertheless, it would be quite dangerous to presume continued vitality of those prior decisions in light of the plain language of the current statute.

As a general rule the submission of a duly notarized affidavit of service creates a presumption of proper mailing, which applies to orders with notice of entry, and which will not be normally defeated by a mere denial of receipt (See, e.g. Strober King Building Supply Centers, Inc., v. Merkley, 266 A.D.2d 203 [2nd Dept. 1999]; Hull v. Feinberg, 113 A.D.2d 964 [3rd Dept. 1985]). Nevertheless, if, in addition to denial, there are circumstances surrounding the affidavit of service which render it suspect, the presumption can be overcome (see, DeLeonardis v. Gaston Pavin Co., 271 A.D.2d 839 [3rd Dept. 2000]). We are familiar with a number of instances in which service of the order with notice of entry was contested, and a traverse hearing was directed in connection therewith (e.g., Ward v. New York City Housing Auth., ___ A.D.3d ___, 2003 N.Y. App. Div. LEXIS 10398 [1st Dept. 2003]).

This bears out a practical mandate applicable to all who serve orders with notice of entry**: DO IT RIGHT**. The person signing the affidavit should be the one who physically places the envelope, with adequate postage, into an official depository under the exclusive care and custody of the United States Postal Service within the state (CPLR 2103[f]).

That brings up another important point. Pursuant to CPLR 2103 (b)(2) "service by mail shall be complete upon mailing". However, pursuant to CPLR 2103 (f), the term "mailing" requires that the document be placed into a post office or an "official depository" "within the state" (emphasis supplied). Thus, a paper (including a notice of

appeal) served by mail from outside the State of New York will not be deemed to have been served until such time as it is received (Cipriani v. Green, 96 N.Y.2d 821 [2001]).

In other words, **SERVICE OF A NOTICE OF APPEAL ON THE LAST DAY BY MAILING SAME FROM OUTSIDE OF NEW YORK STATE WILL BE UNTIMELY**.

Incidentally, in determining the date upon which an order with notice of entry was served, the postmark placed upon the envelope by the postal service is not definitive, if the affidavit of service indicates an earlier date (see, Jenny Oil Corp. v. Petro Products Distributors, Inc., 121 A.D.2d 687 [2nd Dept. 1986]).

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