Commentary on The Rules of Practice of the Court of Appeals 22 NYCRR part 500, Effective September 1, 2005

A. Structure

The Rules of Practice of the Court of Appeals apply to civil and noncapital criminal appeals, motions, criminal leave applications and certified questions from the Supreme Court of the United States, United States courts of appeal and state courts of last resort.

The Court of Appeals recently rescinded in its entirety 22 NYCRR part 500 and approved a new part 500 which will be effective September 1, 2005. In addition to reflecting substantive changes and additions to the old Rules of Practice, the new Rules are organized into broad categories to eliminate duplication and provide a more logical sequence. New Rules 500.1 through 500.8 set out requirements applicable to all filings under these Rules. New Rules 500.9 through 500.19 relate to civil and noncapital criminal appeals. New Rule 500.20 contains procedures concerning criminal leave applications. Motions are addressed in new Rules 500.21 through 500.24. Orders to show cause, the Primary Election Session and certified questions are addressed in new Rules 500.25, 500.26 and 500.27, respectively. Finally, old Rule 500.13, relating to real property actions, was deleted as unnecessary.

B. General Requirements

500.1 General Requirements [Old Rule 500.1]

New Rule 500.1 states the general requirements for papers submitted to the Court of Appeals. The Rule generally applies to "papers filed," which is defined in section 500.1(b) as all briefs, papers filed pursuant to sections 500.10 (Examination of Subject Matter Jurisdiction) and 500.11 (Alternative Procedure for Selected Appeals), motion papers and appendices. The typeface and font requirements match those recently adopted by the Appellate Division Departments following repeal of the portion of CPLR 5529 that set out specifications for such matters.

New Rule 500.1(h) informs self-represented litigants that illegible papers will not be accepted.

New Rule 500.1(i) discourages litigants, especially those self-represented, from sending ex parte communications relating to an appeal or motion directly to a Judge or Judges and clarifies that any submission filed with the Court must be served on all parties.

New Rule 500.1(j) states the procedure to be followed by all, including self-represented, litigants for requesting an acknowledgment of receipt of filings.

New Rule 500.1(k) restates old section 500.11(h).

500.2 Companion Filings on Compact Disk, Read Only Memory (CD-ROM) [Old Rule 500.1(b)]

This section basically tracks the procedure contained in old Rule 500.1(b), but

clarifies that the CD-ROM filing shall be identical to the printed version, in content and format, shall be word-searchable and shall contain hyperlinks to the text of cited authorities and all record materials. To accommodate litigants desiring to jointly file their briefs, records and appendices on one CD-ROM, new Rule 500.2(e) designates "10 days after the final due date for filing appellant's reply brief" as the latest date for such filing.

500.3 Fees [Old Rule 500.14]

By order dated June 25, 2003, the Court promulgated old Rule 500.14 to reflect amendments to CPLR 8022, which increased the filing fee on civil appeals to $315 and instituted a filing fee of $45 for civil motions. New Rule 500.3 is essentially a restatement of the old Rule.

500.4 Pro Hac Vice Admission [New Rule]

The old Rules did not contain any information about admission of out-of-state attorneys seeking to appear on particular matters pending in this Court. This Rule tracks current practice.

500.5 Sealed Documents [New Rule]

The old Rules did not address the procedure for sealing documents in the Court of Appeals. This Rule sets out current practice and requires that sealed documents be reproduced in separate volumes of the record on appeal.

500.6 Developments Affecting Appeals, Certified Questions, Motions and Criminal Leave Applications [New Rule]

This new Rule identifies those post-submission written communications that may be submitted to the Court without prior permission, and is a companion to new Rule 500.7.

500.7 Post-Briefing, Post-Submission and Post-Argument Communications [Old Rule 500.12]

The new Rule restates old Rule 500.12, and is expanded to include reference to new Rule 500.6.

500.8 Withdrawal of Appeal, Motion or Criminal Leave Application [Old Rule 500.16]

This new Rule generally restates old Rule 500.16, treating procedures for withdrawal of appeals and motions, now separated into subsections (a) and (b) for clarity. The current procedure for withdrawing a criminal leave application is stated for the first time in subsection (c).

C. Appeals

The new Rules governing appeals differ from the old Rules in several major respects. First, new Rule 500.9 requires appellant to file a preliminary appeal statement form, instead of the 500.2 jurisdictional statement previously required. In addition, new Rule 500.12 increases from 20 to 25 the number of copies of briefs and record material

filed on normal course appeals.

Given the currency of the Court's calendar, the Clerk's office now sets filing dates in most cases for briefs and record material, superceding the automatic filing dates the old Rules prescribed. New Rule 500.12(a) describes that, generally, the Clerk's office will issue a scheduling letter setting filing dates for record material and briefs. When the Clerk's office does not issue a scheduling letter, new Rule 500.12 provides that appellant's papers shall be served and filed within 60 days after the appeal is taken, respondent's papers shall be served and filed within 45 days after service of appellant's papers, and reply briefs shall be served and filed within 15 days after service of respondent's brief. This schedule closely follows the filing dates in the old Rules (see old Rules 500.5[a], 500.7[a][1], 500.9[b], 500.9[c]).

The new Rules also eliminate the automatic 20-day extension for filing all but reply briefs (see old Rule 500.9). In recent years, the automatic extension provision had not applied to most appeals. With the elimination of the automatic extension, an extension request will be determined with regard to the particular circumstances of the case. New Rule 500.15 permits the Clerk's office to grant reasonable extensions of time for "good cause shown."

The Clerk's office previously entertained extension requests only within 20 days before the final due date, to ensure that parties did not request extensions not actually needed. Similarly, new Rule 500.15 specifies that a "request for an initial extension shall be made no earlier than 20 days before the filing deadline set by the Clerk's office or otherwise prescribed by these Rules" (see new Rule 500.15).

The new Rules also change the time period applicable to the dismissal of certain

appeals. The old Rules required that all normal course appeals be perfected within 80 days from the date the appeal was taken, unless an extension was granted. Thus, under the old Rules, where the Court had "no notice from any source of a pending appeal and 80 days pass from the date it was taken," and the appellant failed to comply with the Rules governing appeals, the appeal was dismissed by operation of old Rule 500.9(a) after the Court learned that an appeal was filed. Under new Rule 500.16(a) an appeal will be dismissed if unperfected by the date set forth in a scheduling letter or, if no scheduling letter is issued, within 60 days from the date the appeal was taken, unless an extension was granted (see new Rule 500.12[a], [b]).

New Rules 500.10 and 500.11 change certain aspects, including the titles, of two types of review previously conducted pursuant to Rules 500.3 and 500.4.

New Rule 500.23 sets filing dates for all applications for amicus relief, and subsection (a)(2) clarifies the way amicus curiae relief can be sought on appeals reviewed under the new Rule 500.11 alternative procedure.

New Rule 500.18(a) states that the Court may assign a party any time it deems appropriate for oral argument, or may direct that any party or all parties submit the appeal without oral argument.

500.9 Appellant's Preliminary Appeal Statement [Old Rule 500.2]

This Rule replaces old Rule 500.2, which required the filing of a jurisdictional statement within 10 days after "taking" the appeal and set out in detail the contents of the document. The new Rule changes "jurisdictional statement" to "preliminary appeal statement," states more clearly the time period for filing, and refers appellant to a Court

form promulgated for this purpose. The associated form prompts appellant to provide specific information the Clerk's office requires for initial management of the appeal. Timeliness of the appeal is one matter of specific inquiry on the form.

500.10 Examination of Subject Matter Jurisdiction [Old Rule 500.3]

This new Rule tracks old Rule 500.3, but explains the actual procedure in more detail, specifying that the Clerk's office will notify the parties of its jurisdictional inquiry and will identify, without preclusive effect, the jurisdictional issues the parties should address. The new Rule also adopts a new name for the Court's jurisdictional review, dropping use of the term "sua sponte."

500.11 Alternative Procedure for Selected Appeals [Old Rule 500.4]

This new Rule tracks old Rule 500.4, with a few changes. The new Rule provides respondent on an appeal an early opportunity to request review via the alternative procedure. The new Rule also extends the initial filing dates by five days to offset partially the elimination of the automatic 20-day extension. The new Rule adopts a new name for this review procedure, dropping use of the terms "sua sponte" and "expedited."

500.12 Filing of Record Material and Briefs in Normal Course Appeals [Old Rules 500.5 and 500.7]

Subsection (a) of this new Rule changes the Court's previous practice by establishing a procedure whereby the Clerk's office will set all initial filing dates by

scheduling letter. The new subsection specifies default filing dates when scheduling letters are not issued, and omits the issuance of 20-day notices. Unlike the old Rules, the new Rule specifies in one place the required papers and filing dates applicable to both appellants and respondents. The new Rule also states for the first time the Court's practice of permitting briefs in response to amicus curiae briefs. To meet the Court's needs and archival responsibilities, the new Rule increases from 20 to 25 the number of copies of party briefs and record material to be filed.

500.13 Content and Form of Briefs in Normal Course Appeals
[Old Rules 500.5(d)(3), 500.7(a) and 500.8(a)]

This new Rule collects in one place requirements from several old Rules. The new Rule addresses the content of briefs and brief covers, adding requirements that briefs contain a table of contents, original briefs be signed on both civil and criminal appeals, and original briefs be so designated on their front covers. The new Rule also requires that brief covers be white and that requested argument times be listed on the upper right corner of the brief. As with the old Rules, the new Rule does not impose page or word limitations for briefs.

500.14 Records, Appendices and Exhibits in Normal Course Appeals
[Old Rules 500.5(a)-(c), 500.6, 500.7(b)-(c)]

This new Rule basically tracks requirements now found in several of the old Rules, setting out in one place the Rules applicable to the filing of record material. The new Rule clarifies the Court's power to direct the parties to supplement an appendix with additional parts of the record.

500.15 Extensions of Time - Appeals [Old Rule 500.9(d)]

This new Rule states the Clerk's authority to grant reasonable extensions of time for good cause shown. The new Rule follows the longstanding practice of the Clerk's office not to entertain initial extension requests earlier than 20 days before the party's filing due date.

500.16 Failure to Proceed or to File Appeal Papers [Old Rule 500.9]

As with old Rule 500.9, the new Rule states that the Clerk will issue dismissal or preclusion orders where a party fails to file its papers on time, and that the Court may review such orders by motion on notice.

500.17 Calendar [Old Rule 500.8]

This new Rule treats the calendaring of cases for argument, and specifies for the first time counsel's obligation to notify the Clerk's office of days of known or possible unavailability for oral argument (see subsection [c]). Subsection (d) states the information counsel must provide in requesting an adjournment of a calendared appeal, and informs counsel that adjournments of calendared appeals are not favored.

500.18 Oral Argument [Old Rule 500.8(a)]

This new Rule updates information that was in old Rule 500.8(a) and explains the procedures governing oral argument. Among other things, the Rule reminds counsel that requests for argument time must take into account that the Court is a "hot bench."

500.19 Remittitur [Old Rule 500.15]

New Rule 500.19 essentially restates information contained in old Rule 500.15.

D. Criminal Leave Applications

500.20 Criminal Leave Applications (CPL 460.20) [Old Rule 500.10]

New Rule 500.20 represents a significant reorganization and supplementation of old Rule 500.10 governing criminal leave applications addressed to the Court of Appeals. Unlike the old Rule, the new Rule separately addresses stay requests and, by reference to the Rule governing motions (see new Rule 500.21), applications for extensions of time to seek leave to appeal.

Subsection (a) specifies, and expands, the information that must be provided in the letter application, including to whom it should be addressed, and states that additional submissions will be allowed after the application has been assigned to a Judge of the Court.

Subsection (b) lists specific materials that must be provided with the application. The old Rule, which was promulgated before orders determining applications for writs of error *coram nobis* became appealable, did not treat applications for leave to appeal from those orders. The new Rule addresses such applications separately from applications for leave to appeal from orders of intermediate appellate courts determining appeals taken to those courts.

Subsection (c) advises that the Chief Judge directs assignment of applications through the Clerk, and that counsel may not apply to a Judge or request assignment of the application to a specific Judge. This information was in old Rule 500.10(a). In addition, subsection (c) states that the assigned Judge will advise the parties if oral

argument of the application will be entertained. The old Rule treated requests for oral argument, but did not explicitly state that an applicant has no right to oral argument.

Subsection (d) of the new Rule, concerning reargument or reconsideration, is similar to subsection (b) of the old Rule.

Subsection (e) of the new Rule sets forth provisions regarding counsel previously found in subsection (a) of the old Rule.

Subsection (f) is a new provision regarding stay requests, which were not addressed in the old Rule. The subsection lists the required information and refers the reader to the applicable statutes for further information.

Subsection (g) is a new provision regarding applications for extensions of time to seek leave to appeal. The subsection was added for the convenience of litigants who might expect information on such applications to be in the Rule regarding criminal leave applications, rather than in the Rule regarding motions.

The new Rules also contain a new provision (see new Rule 500.8[c]) pertaining to withdrawal of criminal leave applications.

E. Motions

New Rules 500.21 through 500.24 address all aspects of motion practice included in old Rule 500.11, and contain certain additions. New Rule 500.21 sets out general provisions applicable to all motions. Specific requirements for motions for permission to appeal are covered in new Rule 500.22. Motions for amicus curiae relief are addressed in new Rule 500.23, and motions for reargument are covered in new Rule 500.24.

Each new Rule includes procedures and information not contained in its respective old Rule, including a detailed explanation of the setting of return dates and the procedures for requesting amicus relief on calendared certified questions, appeals selected for alternative review and motions for permission to appeal. New Rule 500.23(a)(1) sets due dates for motions for amicus relief on normal course appeals. New Rule 500.12(e) sets due dates for briefs in response to such amicus briefs.

New Rule 500.22 reduces from ten to seven the number of copies required to be filed on a motion for permission to appeal. Except where poor person relief has been granted, the new Rules increase to two the number of copies for all motions now made on a single copy.

500.21 Motions - General Procedures [Old Rule 500.11(a)-(d); (f);(g)]

New Rule 500.21(b) assists movants in computing the return date for a motion to the Court of Appeals. New Rule 500.21(e) refers to the fee requirement for motions.

500.22 Motions for Permission to Appeal in Civil Cases [Old Rule 500.11(a)-(b); (d)(1, 2)]

The new Rule generally tracks the old Rule, but reduces from ten to seven the number of copies of motion papers filed with the Court.

500.23 Motions for Amicus Curiae Relief [Old Rules 500.4(h); 500.11(e)]

The new Rule tracks old Rule 500.11(e), adding instructions for filing amicus curiae motions on appeals selected for review pursuant to the alternative procedure,

outlined in new Rule 500.11, and motions for permission to appeal. The new Rule will require in all cases inclusion of the proposed submission with the amicus motion, which the old Rule did not. If the amicus motion is granted, the new Rule specifies the number of copies of the amicus brief to be filed.

The new Rule adds a provision allowing the Attorney General to file, without first obtaining leave of the Court, amicus curiae briefs and memoranda on normal course appeals, normal course certified questions, appeals selected for review by the alternative procedure, and motions for leave to appeal. Due dates for filing are set. Any other non-party must obtain permission by motion.

500.24 Motions for Reargument of Appeals, Motions and Decisions on Certified Questions [Old Rule 500.11(g)]

The new Rule generally tracks old Rule 500.11(g), but reduces from ten to seven the number of copies required to be filed, states that only one such motion is available, and includes in its scope reargument of decisions on new Rule 500.27 certified questions.

F. Other Matters

500.25 Emergency Matters; Orders to Show Cause [New Rule]

The new Rule was added to inform counsel of the steps necessary to seek emergency relief pending determination of a civil appeal or motion for leave to appeal. (Stay requests regarding criminal leave applications are covered in new Rule 500.20[f].) The Rule specifies the required content of papers and accompanying documents to be

filed in the Clerk’s office and the Clerk's office procedures after an order to show cause is filed, and states that no fee is required for the filing of an order to show cause. The new Rule sets out current procedure when counsel or self-represented litigants seek emergency relief pending determination of a civil appeal or motion for leave to appeal. The new Rule requires the applicant to notify the Clerk's office prior to submitting an application. Papers are filed with the Clerk's office, and are assigned at random to an individual Judge. Additional papers, if any, are filed in the Clerk's office and notification of the Judge's disposition is given by the Clerk of the Court unless a Judge directs otherwise. An oral hearing may be held, at the discretion of the assigned Judge.

500.26 Primary Election Session Procedures [New Rule]

New Rule 500.26 outlines, for the first time, procedures for taking an appeal or moving for permission to appeal during the Primary Election Session. In the past, instructions have been given only when counsel contacted the Clerk's office after receiving an order from the Appellate Division, and a Notice to the Bar served as the only alert to counsel to contact the Clerk's office upon receipt of such an order. Specifications regarding notice, form, content and filing of the required number of documents are included in the new Rule.

500.27 Discretionary Proceedings to Review Certified Questions from Federal Courts and Other Courts of Last Resort [Old Rule 500.17]

New Rule 500.27 tracks procedures, set out in old Rule 500.17, applicable to the certifying court, the Court of Appeals and the parties. Procedures for obtaining amicus curiae relief concerning certified questions are stated in new Rule 500.23. Reargument

of a decision on a certified question is addressed in new Rule 500.24.