

# **HOW AN APPEAL IS DECIDED**

## **I. INVOKING THE JURISDICTION OF THE COURT—CIVIL APPEALS**

The jurisdiction of an appellate court is invoked when a notice of appeal is timely and appropriately filed.

### **(A) When to File the Notice of Appeal**

The notice of appeal must be filed and served upon the adverse party within 30 days after service by a party upon the appellant of a copy of the judgment or order appealed from with written notice of its entry (CPLR 5513 [a]; 5515 [1]), or, when the appellant has served the notice, within 30 days thereof. If the judgment or order was served by mail, add an additional five days, and if served by overnight mail, an additional day (22 NYCRR 730.3[c]). In small claim and commercial claim cases commenced in the New York City Civil Court, or in the District Courts, City Courts and Justice Courts outside of NYC, the 30-day period within which to take an appeal begins to run when (1) the court serves the order upon the appellant, (2) a party serves the order upon the appellant, or (3) the appellant serves the order on the party, whichever occurs first (NYC Civil Court Act § 1703[a]; Uniform City Court Act § 1703[a]; Uniform Justice Court Act § 1703[a]; Uniform District Court Act § 1703[a]).

Unlike criminal cases, in civil appeals the 30-day rule is nearly absolute. The statute does not permit the court to grant extensions of time, except in limited circumstances set forth in CPLR 5514. However, if an appellant either timely serves or timely files the notice of appeal, but does not do the other act in a timely manner, the court may grant the appellant an opportunity to correct that omission (*see* CPLR 5520[a]).

### **(B) Where to File the Notice of Appeal**

The notice of appeal must be filed in **the office where the judgment or order of the court of original instance is entered** (CPLR 5515 [1]).

In contrast to criminal cases, the notice of appeal in a civil case is not immediately sent to the Appellate Term upon its filing. In fact, the Appellate Term does not receive notice that an appeal has been taken until (1) one of the parties to the appeal makes a motion in the Appellate Term, or (2) the record on appeal is sent to the Appellate Term by the clerk of the lower court. Thus, in a civil appeal, until one of these two instances occur, the Appellate Term will not be aware of the specifics of your appeal, or even that a notice of appeal has been filed.

### **(C) What to File**

The notice of appeal must be filed, along with proof of service upon the adverse party. There is a fee for the filing of a notice of appeal in a civil matter. The fee is paid to the clerk of the lower court. This is in contrast to the criminal notice of appeal, for which no fee is charged. There are no fees charged in the Appellate Term in any instance.

### **(D) What is Appealable**

The right to appeal is, by and large, statutory. There are several statutes that you can consult, chief among them section 1702 of the NYC Civil Court Act; Uniform City Court Act; Uniform Justice Court Act; or the Uniform District Court Act. Specifically, section 1702 (a) of the respective Court Acts enumerate what judgments and orders are appealable as of right. Section 1702 (c) of the Acts set forth those orders which may be appealed by permission of the court.

It must be stressed that a **decision after trial is not appealable** (even if it says that it “constitutes the decision and order of the court”). Before a party can appeal after trial, a judgment must be entered pursuant to CPLR 5016. The judgment must be signed by the clerk, and must bear the date of entry. To be appealable as of right, an order must determine a motion made on notice (*see* § 1702 of the NYC Civil Court Act; Uniform City Court Act; Uniform Justice Court Act; or the Uniform District Court Act). A motion is considered to be made on notice when an order to show or notice of motion is served (CPLR 2211). An order must comply with the CPLR definition of an order (*see* CPLR 2219), in that it must be in writing, and “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 of or direction in such detail as the judge deems proper.”

## **II. STAYING THE EFFECT OF THE ORDER OR JUDGMENT APPEALED FROM**

As with criminal appeals, the fact that the notice of appeal has been filed generally does not automatically stay compliance with the order or judgment appealed from. The exceptions to this rule may be found in CPLR 5519 (a), and generally involve situations where the appellant is a municipality or where the judgment appealed from directs the payment of a sum of money and that judgment has been bonded (in Landlord & Tenant cases, a stay without court order is accomplished when an undertaking, a sum fixed by the lower court, is paid by the appellant as per CPLR 5519 [a] [6]). Also, the Appellate Term or the court from which the appeal is taken may grant a discretionary stay upon a showing of a potentially meritorious appeal (CPLR 5519 [c]). If the appellant obtains a stay pending appeal to the Appellate Term, and then is wholly or partially unsuccessful on that appeal, the

stay remains in effect for five days after service upon the appellant of a copy of the Appellate Term order with notice of entry. If the appellant makes a motion for leave to appeal within that five-day period, the stay remains in effect (1) if the motion is granted, until five days after the appeal is determined, or (2) if the motion is denied, until five days after the movant is served with the order denying leave to appeal with notice of its entry (CPLR 5519 [e]).

### **III. INVOKING THE JURISDICTION OF THE COURT—CRIMINAL APPEALS**

Where the appeal is from a local criminal court in which the proceedings were recorded stenographically, the jurisdiction of an appellate court is invoked when duplicate copies of a notice of appeal are timely and appropriately served upon the adverse party and filed with the local criminal court. Where the appeal is from a local criminal court in which the proceedings were not recorded by a court stenographer, the defendant may invoke the court's jurisdiction by either filing a notice of appeal *or* filing an affidavit of errors (CPL 460.10 [3] [a]).

#### **(A) When to File the Notice of Appeal**

The notice of appeal from a judgment must be filed within 30 days of the imposition of sentence (CPL 460.10 [1] [a]). Therefore, a defendant who has been found guilty, whether by plea or by verdict after trial, **must await the imposition of sentence** before he can file a notice of appeal. An appeal taken before sentence is imposed will be dismissed.

If the sentence imposed is a fine, the defendant may file a notice of appeal **even if the fine has not been paid**, just as if the sentence imposed is one of incarceration, the defendant does not have to wait until he has served his sentence before he can file a notice of appeal.

Please note, however, that the fact that the notice of appeal has been filed **does not stay the defendant's obligation to pay the fine**, just as it does not stay his obligation to serve his jail sentence.

In criminal cases only, the defendant may seek relief from the 30-day rule by making a motion **to the Appellate Term** seeking **leave to file a late notice of appeal** (CPL 460.30 [1]). The motion must be made within a year and 30 days of the imposition of sentence, or else the court does not have jurisdiction to grant it, and the defendant must establish that the failure to timely file the notice of appeal resulted from “(a) improper conduct of a public servant or improper conduct, death or disability of the defendant’s attorney, or (b) inability of the defendant and his attorney to have communicated . . . , concerning whether an appeal should be taken” within the initial 30-day period.

### **(B) Where to File the Notice of Appeal**

In general, the notice of appeal cannot be filed in the Appellate Term Clerk's Office. Instead, the notice of appeal must be filed **with the clerk of the criminal court in which sentence is imposed** (CPL 460.10 [1] [a]). However, if the court in which the defendant was convicted does not employ a clerk, one copy of the notice of appeal must be filed with the judge of the court and a duplicate copy must be filed with the Appellate Term by the appellant.

When the notice of appeal is filed in the local criminal court, a copy of the notice of appeal is forwarded to the Appellate Term by the clerk of the local court immediately upon its filing (CPL 460.10 [1] [e]). This is unlike a civil appeal, where the clerk prepares the record on appeal, which includes the notice of appeal, and then forwards the record to the appellate court.

### **(C) What to File**

The notice of appeal must be filed in duplicate, along with proof of service upon the adverse party, which, in the case of a criminal appeal, would be the local prosecutorial authority.

There is **no fee** for the filing of a notice of appeal on a criminal matter. The imposition of court fees is statutory, and no statute authorizes the charging of a fee to file a notice of appeal in a criminal case, unlike a civil case.

## **IV. PERFECTING A CIVIL APPEAL**

### **(A) When to Perfect the Appeal**

When a record on appeal is received by the Appellate Term, it is checked for completeness and the appeal is given an Appellate Term docket number and placed on the court's general calendar. The appellant then has **90 days** within which to perfect the appeal. A printed "90-day notice" is sent by the court to the appellant notifying the appellant of this deadline, and also notifying him or her that if the deadline is not complied with the appeal will go on a specified dismissal calendar and will be dismissed for lack of prosecution (*see* 22 NYCRR 731.8 [a] & [c] or 732.8 [a] & [c]).

### **(B) How to Perfect the Appeal**

An appellant perfects an appeal, that is, causes the appeal to be placed on the appeals calendar to be assigned to an appointed term, by filing the original plus five copies of the appellant's brief, with proof of service upon the parties to the appeal, within the 90-day deadline (22 NYCRR §§ 731.4 [c] or 732.4 [c]).

## **V. PERFECTING A CRIMINAL APPEAL**

### **(A) When to Perfect the Appeal**

Unlike civil appeals, a criminal appeal must be perfected within 90 days of the date the notice of appeal is filed (see, 22 NYCRR 731.8 [b] or 732.8 [b]), or shall be subject to dismissal.

### **(B) How to Perfect the Appeal**

An appellant perfects an appeal, that is, causes the appeal to be placed on the appeal calendar to be assigned to an appointed term, by filing the original plus five copies of the appellant's brief, with proof of service upon the parties to the appeal, within the 90-day deadline (22 NYCRR §§ 731.4 [c] or 732.4 [c]).

## **VI. CALENDARING: ARGUMENT AND SUBMISSION CALENDARS**

Once court personnel prepares a confidential report on an appeal, the appeal is placed on the court's appeal calendar. Appeals in which oral argument is permitted are heard, in the Appellate Term for the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts at 141 Livingston Street, 15<sup>th</sup> Floor, Brooklyn New York. Twice each year the court hears arguments in the courthouse in Jamaica, Queens and once each year in Staten Island. For appeals to the Appellate Term for the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts, argument is heard at the Supreme courthouses in Mineola, White Plains and Central Islip on a rotating basis. On occasion, arguments will be heard in New City, Goshen or Poughkeepsie.

The court holds a submission calendar on numerous dates throughout the year for appeals in which argument was not requested or the court has determined not to hear requested argument (22 NYCRR §§ 731.6 [d] or 732.6 [d]).

The clerk's office puts together a formal calendar, generally two weeks before the calendar date, sends it to the *New York Law Journal* for publication, and mails a notice to the parties to the appeal. The calendar is also published on the court's website.

In advance of the calendar date, each Justice on a ready-day calendar receives copies of the briefs of all of the parties for each appeal scheduled for that date, as well as the confidential report prepared for each case. The Justice and his or her chambers staff does additional research as necessary. The Justices exchange their views with the other members of the panel and the Chief Court Attorney and make suggested revisions.

## **VII. CALENDAR DAY**

On those days when the court sits to hear oral argument, the clerk's call of the calendar is at 9:15 AM (in the Appellate Term for the 2<sup>nd</sup>, 11<sup>th</sup> & 13<sup>th</sup> Judicial Districts) and at 9:30 AM (in the Appellate Term for the 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts). The Justices take the bench shortly after the clerk's call, whereupon those matters on which argument was requested and the party requesting argument has appeared are called in calendar order. A party (or attorney) who has not submitted a brief or who has submitted a brief without a request for argument will not be permitted to argue. Rebuttal is not permitted.

Following oral argument, the panel retires to the court's consultation room, to consider each appeal individually. The Justices discuss each case and vote on an appropriate resolution. Their determination is recorded by a deputy clerk. Those cases that are disposed of by unanimous vote in favor of a draft decision are sent back to the Law Department for a final review and eventual release.

If the voting was not completed at the initial consultation, the Chief Court Attorney or his deputy circulates majority, concurring and dissenting opinions drafted thereafter by members of the panel, and records the votes as they are received.

## **VIII. DECISION RELEASE AND REMITTITUR**

Following internal review, the Presiding Justice approves the release of the final lists of decisions to the public. The decisions are then distributed to among others, the *New York Law Journal* and the State Reporter. Decisions are also posted on the court's website.

After the appeal is decided, the original record is returned to the clerk of the court from which the appeal was taken, along with a copy of the decision.