

## APPEALS FROM TOWN & VILLAGE COURTS



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As I review the many appeals we receive from the Town & Village Courts in the Second Judicial Department, it reaffirms the great respect I have for the work you do – you are truly on the front lines in providing justice to those who are most in need of it. Move over Judge Judy, you are truly the “People’s Courts.”

In preparing this article, I went to the epicenter of the Appellate Term’s operation – its clerks office. They suggested that I review what we are looking for from the trial courts in preparing an appeal for transmittal to the Appellate Term. This is the area where we receive most of our inquiries from trial courts and where most of the errors are made.

The Appellate Term, Second Department is unique in at least one important respect. It is the only intermediate appellate court of which I am aware of that hears *all* of its appeals using the original court file. In every other appellate court, it is generally the responsibility of the parties to prepare and have printed, a *Record on Appeal*, which is reviewed by the appellate court. While this makes it significantly easier for our self-represented court users, it often becomes problematic for the trial court clerks and the Appellate Term.

### CRIMINAL APPEALS

When a criminal defendant files a notice of appeal with the trial court (with proof of service upon the prosecutor), CPL 460.10 (e) requires the court to forward a copy of the notice of appeal to the Appellate Term *immediately*. At that point, the trial court need do nothing until:

- a) The appellant purchases the official court transcript, or
- b) The Appellate Term orders minutes to be typed and the appellant is granted poor person relief, or
- c) The appellant files an affidavit of errors. This can be done if there were no official minutes taken by an official court stenographer. <sup>1</sup>

### Preparing the Record if Official Minutes Taken:

The appellant must buy the minutes of the trial or plea and sentence, plus minutes of any hearings. Unless required by either side or it is an issue on the appeal, minutes of arraignments and adjournments are not needed.

If poor person relief is granted by the Appellate Term, the court reporter must prepare the minutes in compliance with the court’s order. With assigned counsel cases, attorneys have experienced frequent difficulties in securing the minutes. The intervention of Justice Charles Apotheker and his Principal Court Attorney Arielle Schoenberger has really been a great help in facilitating the more expeditious transcription of minutes, resulting in fewer delays in Appellate Term criminal dispositions.

When the appellant receives his/her copy of the minutes, they must be settled by judge. The settlement can be done in any way chosen by the judge (see 22 NYCRR 732.1 [b] [1]). Some judges conference the case with the parties to settle the minutes, others take written submissions with proposed corrections from the parties. Please note that even where the minutes are settled by stipulation of the parties, the judge must settle them in writing. The Appellate Term will be happy to provide you with forms for settlement of the minutes by the judge.

Once settlement is complete, the clerk’s certification must be signed and the entire record forwarded to the Appellate Term. You are now done with the case – it has become *our* headache, unless it is sent back for a hearing, a report of the court or is reversed and remanded for some reason. When it is sent back for a hearing or a report “with all due speed” or within a prescribed period of time, it is critical that the work be done in a timely manner. Here, communication with the Appellate Term is critical. If our order is unclear or the trial court is unable to comply with the Appellate Term’s order in the time prescribed, notifying the Appellate Term in advance would likely alleviate potential problems.

### Preparing the Record if No Official Minutes Taken:

The appellant must serve and file an affidavit of errors (within 30 days of the sentence). The judge must then, within 10 days, write an answer to the affidavit of errors. If the judge wishes a transcript of his/her

personal notes or minutes to stand as his/her answer to the affidavit of errors, he/she must so state in writing. The judge's answer must be sent to both parties. Once this is done the clerk's certification must be signed and the entire record forwarded to the Appellate Term.

A full record on appeal filed by the clerk of the lower court with the Appellate Term should contain:

- A clerk's return
- A notice of appeal
- The transcripts and settlement thereof (or the affidavits of answer)
- All the original papers, including the information(s), motions, answering papers and orders
- An extract setting forth: (a) the date of the plea or verdict and what the defendant was convicted of; and (b) the sentence date and what the sentence was on each count.

It should be noted that the defendant must be sentenced before he/she can take an appeal. If the People are the appellant, they are ordinarily appealing from an order – this order must be in writing and made as part of the record.

### CIVIL APPEALS

In contrast to criminal appeals, the Appellate Term does *not* immediately receive a copy of the notice of appeal in a civil case. As a result, we do not become aware of the existence of the appeal until the trial court forwards a Clerk's Return to the Appellate Term. The only other way the Appellate Term becomes aware of the existence of a potential civil appeal is where a litigant interposes an application to the Appellate Term in connection with the appeal. This would typically take the form of an application for a stay pending a determination of the appeal.

#### Notice of Appeal:

The jurisdiction of an appellate court is invoked when a notice of appeal is timely and appropriately filed. The notice of appeal must be served and filed 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]; 515[1]). If the appellant has served a copy of the judgment or order with notice of its entry, the notice of appeal must be served and filed within 30 days of that service (CPLR 5513[a]). In small claim and commercial claim cases commenced in city and justice courts, 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 (Uniform City Court Act § 1703[a]; Uniform Justice Court Act § 1703[a]).

Unlike criminal cases, in civil appeals the 30-day rule is absolute. The statute does not permit the court to grant extensions of time. 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 trial court or the Appellate Term may grant the appellant an opportunity to correct that omission (see, CPLR 5520[a]).

**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 was entered**, that is, *your* court (CPLR 5515[a]).

**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.

**What is Appealable:** The right to appeal is, by and large, statutory. We often receive calls from trial court clerks who get inquiries from the unsuccessful litigant in their court. There are several statutes that an appellant can consult, chief among them § 5701 of the Civil Procedure Law and Rules, § 1702 of the Uniform City Court Act, and § 1702 of the Uniform Justice Court Act.

Here I would like to stress that a **decision after trial is not appealable**. 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. Also, a **decision on motion is not appealable** (even if the order says that it constitutes the decision and order of the court). 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." (emphasis added)

#### **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. Also, the Appellate Term or the court from which the appeal is taken may grant a discretionary stay (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]).

**The Record on Appeal:**

The Record on Appeal is compiled by the clerk of the lower court and then forwarded to the Appellate Term. The appellant is not required to file a printed record.

The record on appeal in a civil case includes:

1. A clerk's return, signed by the clerk of the court from which the appeal is taken
2. A notice of appeal
3. A copy of the judgment or order appealed from, along with the judge's decision and all intermediate orders brought up for review if the appeal is from a judgment
4. The transcripts, if any, and settlement thereof
5. Exhibits, if any
6. All of the pleadings
7. If the appeal is from an order which decides a motion, all of the papers considered by the court in deciding that motion.

**Settling the Transcript:**

The procedure for settling the transcript in a civil appeal is outlined in § 1704 of the Uniform Justice Court Act and § 1704 of the Uniform City Court Act. I do not wish to bore you with the details of that section, but I would like to highlight that the Clerk's Office at the Appellate Term looks to see that **both parties were given an opportunity to review the transcript and submit objections** and that **the judge signed the clerk's return indicating whether or not he/she accepted the objections.**

In a vast majority of matters, the Town & Village Courts in the Second Department, despite not often getting their cases appealed, do an outstanding job in preparing the cases for appeal. One thing that has improved the quality of the files is improved communication between the trial courts and the Appellate Term. Our staff encourages judges and their non-judicial staff to call anytime you have a question regarding an appeal or potential appeal. After recently conducting a seminar for the Nassau and Suffolk Court Clerks Association, we began to receive more frequent inquiries from trial court personnel *before* preparing the return—and we noticed a marked improvement in the files, meaning fewer rejections of clerk's returns. The improved communication also seems to have resulted in fewer inquiries from litigants for *both* the trial courts and the Appellate Term.

I know there is a lot of information here. As such, I extend an invitation for you to call the Appellate Term whenever you have a question. If you prefer, you can e-mail me at [pkenn@courts.state.ny.us](mailto:pkenn@courts.state.ny.us) and I will see to it that you get your questions answered quickly and accurately. If I am invited to write again, I plan to feature common errors made by trial courts resulting in appeals and applications to the Appellate Term. I hope this was helpful.

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<sup>1</sup>Effective June 16, 2008, by Administrative Order of the Chief Administrative Judge of the Courts, each town and village court is *required* to "mechanically record" *all* proceedings. To facilitate the transcription of these recordings, the Office of Court Administration has contracted with various transcription services throughout the state, known as "certified transcribers."

A January 2008 opinion of OCA Chief Counsel concluded that where mechanical recordings are used in the town and village courts, the proceedings *must* be transcribed in order to perfect the appeal. This would, except in limited circumstances, effectively eliminate the use of affidavit of errors as a method to appeal.