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Residential Landlord-Tenant Appeals in the Appellate Term

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Residential Landlord-Tenant Appeals in the Appellate Term

By Gerald Lebovits

I. Introduction

Attorneys who prosecute or defend residential landlord-tenant appeals encounter a thicket of rules along the way to affirmance, reversal, or modification. Some rules apply uniquely to appeals to the Appellate Terms for the First and Second Departments, which hear residential appeals from the New York City Civil Court, Housing Part (called Housing Court), in New York City; from the district and justice courts in Nassau and Suffolk counties; and from the city and justice courts in Dutchess, Orange, Putnam, Rockland, and Westchester counties. Different rules apply elsewhere in New York State, where appeals are heard not in the Appellate Term but in county court.

This article is designed to move practitioners through the Appellate Term thicket, from deciding whether to appeal, to exhausting appellate remedies, to winning a residential landlord-tenant appeal. This article focuses on appeals from the Housing Court, but similar and often identical rules apply to city and district court procedures.

II. From the Appellate Term to the Court of Appeals

After the practitioner obtains a Housing Court order or final judgment under Real Property Actions and Proceedings Law (RPAPL) Article 7, the first appeal is to the appropriate Appellate Term of the Supreme Court. That appeal is as of right.¹ The term “as of right” distinguishes an appeal the Constitution or a statute authorizes from one that must be undertaken by permission, or by leave to appeal—*certiorari* in the federal system. Appeals then go from the Appellate Term by leave (even if there is a dissenting opinion in the Appellate Term) to the Appellate Division, and from there by leave (even

if there are dissenting opinions in the Appellate Division) to the Court of Appeals, and by *certiorari* to the U. S. Supreme Court. For appeals from the Appellate Term to the Appellate Division and, later, to the Court of Appeals and the U.S. Supreme Court, “[t]here generally are no restrictions on the types of orders and judgments (whether interlocutory, final, etc.) for which permission to appeal may be sought.”²

Each department of the Appellate Division may create an Appellate Term.³ Only the Appellate Division’s First and Second Departments have done so. Outside the First and Second Departments—meaning the Third and Fourth departments—residential appeals go from city and justice courts (where they are heard in first instance) to county court (not Supreme Court)⁴ and, from there, by right to the Appellate Division,⁵ by leave to the Court of Appeals, and then by *certiorari* to the U. S. Supreme Court.

The Appellate Term for the First Department covers New York and Bronx Counties. Housing Court judgments and orders from Manhattan and the Bronx go to the Appellate Term, First Department, located at 60 Centre Street, 4th Floor, New York, New York 10007.⁶ The clerk’s office’s telephone number is (646) 386-7763.

The Second Department has two appellate terms, one for the Second and Eleventh Judicial Districts, which cover Kings, Richmond (Second Judicial District), and Queens (Eleventh Judicial District) Counties, and the other for the Ninth and Tenth Judicial districts, which cover Dutchess, Nassau, Putnam, Rockland, Suffolk (Tenth Judicial District), Orange, and Westchester (Ninth Judicial District)

Counties. Housing Court judgments and orders from Brooklyn, Queens, and Staten Island are argued in the Appellate Term, Second Department, Second and Eleventh Judicial Districts, located at 141 Livingston Street, Brooklyn, New York 11201, and at 88-11 Sutphin Boulevard, Queens, New York 11435.⁷ Once a year, the justices of the Appellate Term, Second Department, Second and Eleventh Judicial districts, preside in Staten Island at the Richmond County Clerk’s Office, Juror Assembly Center, 126 Stuyvesant Place, Staten Island, New York 10301.⁸ The central clerk’s office for both Appellate Terms in the Second Department is located at 141 Livingston Street, 15th Floor, in Brooklyn. The telephone number is (347) 401-9580.

Every Appellate Term justice is an elected Supreme Court justice chosen by the Chief Administrator of the Courts with the approval of the presiding justice of the respective Department of the Appellate Division.⁹ Appellate Term justices are part-time appellate judges who also handle a Supreme Court caseload. A maximum of three justices serve on each panel. Two justices constitute a quorum to render a final order and opinion. Both must concur to render any final order and opinion.¹⁰

To appeal an Appellate Term order, an appellant must seek and obtain permission from the Appellate Term and, if the Appellate Term denies that application, then from the Appellate Division.¹¹ The Appellate Division will hear only Appellate Term orders that decide an appeal. To appeal from an order granting a new trial or hearing, the appellant must stipulate that judgment absolute will be entered if the Appellate Division affirms the Appellate Term’s judgment.¹²

Motions to reargue Appellate Term orders must be made within 30 days after the court made the order, except for good cause shown.¹³ These motions are rarely granted. Leave to appeal to the Appellate Division must be sought within 30 days after service of the Appellate Term order with notice of entry.¹⁴ Appeals to the Appellate Division are governed by CPLR Art 57.

Appeals to the Court of Appeals can be as of right or by permission. If the decision below involves only the constitutionality of a statutory provision under the New York or the U. S. Constitution, an appeal may be taken as of right directly from the court that issued the decision.¹⁵ A case that originates in the Supreme Court goes to the Court of Appeals as of right if two Appellate Division justices dissent on a matter of law.¹⁶ Appeals that originate from Civil Court judgments go to the Court of Appeals by leave regardless whether or how many Appellate Division Justices dissent. Unless an appeal is of right, permission—in the form of a leave application—is required to appeal from the Appellate Division to the Court of Appeals.¹⁷ Leave to the Court is granted in either of two ways. Two judges of the Court of Appeals must grant leave before the Court may hear a civil proceeding.¹⁸ Or two Appellate Division justices may grant leave to the Court.¹⁹ CPLR Art 56 governs appeals to the Court of Appeals.

III. Appealable Judgments, Orders and Paper

When a Housing Court judge renders an adverse decision, the practitioner's first step, after consoling the client, is to decide whether the decision constitutes an appealable order or judgment.²⁰ If not, the practitioner must first exhaust civil court remedies by making the appropriate motion in the Housing Court. That way the practitioner will seek the relief the client needs and create an appealable order.

It is often necessary to file a notice of appeal concurrently with a Housing Court motion to preserve appellate remedies. On the other hand, if the order is appealable directly, a notice of appeal must first be filed if there is any possibility that the client will appeal or if, having failed to console the client, the client will no longer be using the practitioner's services.

It is for the client, not the lawyer, to decide whether to appeal.²¹ But spending the \$30 fee to file the notice of appeal will bring peace of mind to both practitioner and client. Advising a client in writing of appellate options is good practice.

A. CPLR 5501: The Court's Jurisdiction

A final judgment is always appealable.²² When a final judgment is appealed, any non-final judgment or order that affects the final judgment may be reviewed during the appeal.²³ The Appellate Term reviews both law and fact²⁴ and the Housing Court's exercises of discretion.²⁵ The Appellate Division reviews Appellate Term decisions on the law and facts, while the Court of Appeals reviews only questions of law, unless the Appellate Division has found new facts.²⁶

B. CPLR 5501: Interlocutory Appeals

Before a final judgment is rendered, an appellant may appeal as of right non-final judgments or orders, called interlocutory orders.²⁷ Non-final orders that affect a final judgment include orders adverse to the prevailing party below, orders denying a new trial or hearing, rulings to which an appellant objected or had no opportunity to object, and a judge's remark to which the appellant objected.²⁸ Only an interlocutory order that "necessarily affects the final judgment" may be appealed.²⁹

To determine whether an intermediate order or interlocutory judgment "necessarily affects the final judgment," the practitioner should ask whether, assuming the

interlocutory judgment is erroneous, its reversal would overturn the final judgment. If it would, "it is a reviewable item; if it would not, and the judgment can stand despite it, it is not reviewable."³⁰

Although interlocutory Housing Court orders may be appealed immediately, a direct appeal from an interlocutory order terminates when a final judgment is entered.³¹

After a final judgment is entered, an appeal must be taken from it, although a non-final order that affects the final judgment can be reviewed at that time.³² The right to appeal a pre-trial order ends if no appeal is taken within 30 days after a final judgment is entered.³³

Because the Housing Court handles summary proceedings with relative speed, it is unlikely that the Appellate Term will decide an interlocutory appeal before the Housing Court renders a final judgment. As a result, many appeals from interlocutory orders are accompanied by a request to stay the summary proceeding pending the appeal.³⁴ But there is no right to a stay while an appeal is pending. Absent special circumstances, the Housing Court and the Appellate Term are reluctant to grant a stay pending an appeal of an interlocutory, prejudgment order in a summary proceeding, even to avoid unnecessary trial time and expense. By the time the Appellate Term considers an interlocutory order, the Housing Court will likely render a final judgment if the case is not stayed and if the order is not merged into the judgment. That alone makes it inefficacious to commence most interlocutory appeals from orders entered during summary proceedings.

The right to perfect an appeal from an interlocutory order is typically exercised at the end of the summary proceeding. This strategy is sound because an appeal from a final judgment brings up for review all prior orders and decisions.³⁵ If the practitioner appeals an interlocutory

order and a final Housing Court judgment is rendered while the appeal is pending, the Appellate Term has the discretion under CPLR 5520(c) to treat the notice of appeal from the non-final order as a notice of appeal from the judgment.³⁶ The Appellate Term will dismiss the interlocutory order because the right of direct appeal terminates with the entry of the final judgment.³⁷

IV. Nonappealable Orders and Paper

Only an aggrieved party may appeal from the court of original jurisdiction.³⁸ To be aggrieved, a party must have a direct interest in the controversy and be bound by the lower court's adjudication.³⁹ If the appellant's interest in the subject matter of controversy ceased *pendente lite*, the appeal will be dismissed because the party is no longer aggrieved under CPLR 5511.⁴⁰ A partly successful party is "aggrieved" and may appeal to obtain all the relief to which the party is entitled.⁴¹ Conversely, a judgment or order embodying a decision that "may contain language or reasoning which those parties deem adverse to their interests does not furnish them with a basis for standing to take an appeal"⁴² if the prevailing party obtains the relief it sought in first instance.

Similarly, only an order or judgment is appealable.⁴³ No appeal lies from a conclusion of law, finding of fact, order denying a motion to resettle, pre-trial motion *in limine* on an evidentiary point (which is merely an advisory opinion if it does not affect a substantial right), recommendation, report, ruling (even if reduced to a written order), or verdict.⁴⁴ The appeal is taken from the order or judgment that contains a conclusion of law, finding of fact, order denying a motion to resettle, pre-trial motion *in limine*, recommendation, report, ruling, or verdict.

Many Housing Court outcomes are not appealable. Not merely the appellant and the respondent but also judge of first instance must know

what is appealable. A respondent faced with an appeal over something not appealable can either move to dismiss the appeal after the appellant files a notice of appeal or wait to raise the point in the respondent's brief.

The following list illustrates Housing Court outcomes that may not be appealed without further motion practice or which require a motion for leave to appeal.

Stipulations. Stipulations of settlement or consent judgments are not appealable.⁴⁵ Litigants often stipulate to judgments in the Housing Court. Stipulations are strictly enforced.⁴⁶ A stipulation negotiated by represented litigants and so-ordered by a judge in open court is difficult to vacate unless a party committed fraud, illegality, or overreaching, or unless the stipulation is unconscionable or violates public policy.⁴⁷ Only the resulting order denying or granting the motion to vacate the stipulation of settlement is appealable.

Orders on Default. An order or judgment entered on default is not appealable,⁴⁸ whether in a nonpayment, a holdover, a lockout, or a Housing Part (repair) proceeding. A respondent-tenant's failure to appear at a holdover trial will result in an inquest—which, if the inquest is sustained, will result in an unappealable judgment entered upon default.⁴⁹ An unappealable default judgment without an inquest will ensue in a nonpayment proceeding on the respondent-tenant's failure to answer the petition or, having answered the petition, to appear at trial. As to a petitioner who does not appear on a court date, the court will issue an unappealable order of dismissal. If an appellant fails to file opposition papers to a motion requesting final judgment, the appellant is deemed in default, even if the appellant argued orally against the motion.⁵⁰ In this case, the appellant is considered a non-aggrieved party.

The party against whom a default is entered must move in the Housing Court under CPLR 5015 to set aside

the default. If service was improper, the default will be vacated because the court would have lacked jurisdiction to enter the default. Otherwise, the movant must set forth a valid excuse for the default and a meritorious cause of action or defense to the proceeding.⁵¹ The resulting order may be appealed.

For example, an order awarding attorney fees at an inquest on a failure to appear does not give the losing party a right to appeal.⁵² The remedy is to move to vacate the default in Civil Court and, in case of a denial, to appeal the decision on that motion.⁵³

Tenant-respondents typically use orders to show cause to set aside defaults. Doing so can afford them an interim stay, if the signing judge agrees, that prevents an eviction before the tenant's motion is heard and resolved. If obtaining a stay is not at issue, a practitioner for a landlord or a tenant who seeks to vacate a default may move by regular motion to vacate the default order or judgment.⁵⁴ The resulting order, from an order to show cause or a motion, is appealable directly or on appeal from a final judgment.⁵⁵

Conditional Defaults. If a litigant fails to answer timely or to respond to an order compelling disclosure, called discovery in the federal system, the Housing Court may order the litigant defaulted but vacate the default on condition that the defaulting litigant pay costs. An attorney might be tempted to deposit the check immediately, but doing so waives the right to appeal the order granting a conditional default.⁵⁶

Reargument. An order denying reargument is not appealable.⁵⁷ Litigants may, however, appeal orders that deny reargument but which expand on the court's original reasoning. In addition, litigants may appeal an order entered after a judge agrees to hear reargument but then denies the motion and adheres to its original determination. If the order determining reargument is appealed, or if the judge grants a motion to renew, CPLR

5517 triggers extended time limits to appeal.⁵⁸

Before bringing a motion for reargument, the practitioner should file a notice to appeal the underlying judgment or order. If reargument is granted, that order is appealable, even if the Housing Court adheres to its decision in the prior order and even if no appeal is taken from the prior order.⁵⁹

Renewal. An appeal as of right lies from the grant or denial of a motion to renew.⁶⁰ An order denying a motion without prejudice to renew is also appealable as of right.⁶¹ The reason an order resolving a renewal motion is appealable but an order denying reargument is not appealable is that a motion to renew puts new material before the court and a motion to reargue does not.

Ex Parte Orders. An *ex parte* order is not appealable.⁶² Similarly, a denial of an *ex parte* order is not appealable directly, although it is reviewable under CPLR 5704(b).⁶³ Thus, no appealable issue arises if a judge denies an *ex parte* subpoena in a nonprimary-residence holdover proceeding. If the judge rules against a litigant at the end of the case, the final judgment may be appealed on the ground that an earlier ruling, such as the court's failure to sign a subpoena, affected the judgment.⁶⁴ Counsel should make a record about the court's decision not to sign a subpoena. Otherwise, the error will not be preserved.

Orders to Show Cause. The court's refusal to sign an order to show cause that contains a stay is not appealable.⁶⁵ If a Housing Court judge declines to sign an order to show cause, which is submitted *ex parte* (although the court may hear argument from both sides before it signs or declines it), the practitioner may seek a stay from Appellate Term under the *ex parte* procedures in CPLR 5704(b). If the court signs an order to show cause with a stay, the opposing party, *ex parte*, may in the

First Department either seek to vacate the stay or use the *ex parte* procedures of CPLR 5704(b) to vacate the order. In the Second Department, a practitioner who seeks to vacate a stay must ask the signing judge to vacate the stay under CPLR 2221(a)(2) before requesting CPLR 5704(b) relief. Once the court determines the order to show cause, which typically contains a stay but need not contain a stay, the order the court issues is appealable.

Sua Sponte Orders. No appeal lies from a *sua sponte* order. The remedy is to move in the Housing Court to vacate the order and then appeal if the motion is denied.⁶⁶

Hearings. A motion may result in an order that a hearing be held to resolve a contested issue of fact. No right exists to appeal as of right from an order that directs a hearing.⁶⁷ A mere order that directs a hearing does not affect a substantial right. The party dissatisfied with the order directing a hearing might prevail at the hearing and therefore is not yet aggrieved.

Moot Issues. An appeal will be dismissed if the issue on which the appeal is based becomes academic.⁶⁸ Here are some examples of cases in which appeals are rendered moot: A subsequent order dismissing the case on Statute of Limitations grounds;⁶⁹ the execution of a warrant of eviction while the appeal is pending if the appeal concerns a motion regarding that warrant;⁷⁰ the appellant's consent in a subsequent order to the relief appealed from a previous order;⁷¹ and the expiration of the stay of an eviction warrant's issuance while the appeal is pending if the appeal concerns whether the warrant could properly issue before its expiration date.⁷² Additionally, an appealed order will be rendered academic if the parties enter into a stipulation in a subsequent holdover summary proceeding involving the same premises.⁷³

The Court of Appeals has formulated a mootness-doctrine exception that arises if the appellant can show

three things about the issue under potential appellate review: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues."⁷⁴

Death of a Party. The death of a party divests an appellate court of jurisdiction. The court must stay the proceedings until a substitution is done under CPLR 1015(a).⁷⁵ The court may hold the appeal in abeyance pending the substitution.⁷⁶

Decisions. A trial court's decision is not appealable unless it is reduced to an order or a judgment.⁷⁷ To be appealed, the order must also constitute a final determination of an issue.⁷⁸ An order that does not accurately incorporate a decision may not be appealed directly.⁷⁹ An order that does not reflect the decision should be resettled.

Housing Court judges typically issue one-paper opinions that combine the decision and order and which merge the decision into the order as an appealable document. The decision and order will often call for the issuance of a judgment. The judgment becomes the appealable paper.

Sometimes a judge will decide a case orally from the bench and issue an order written as an abbreviation on the front page of the court file or somewhere else on some court papers. If so, the practitioner will need to transcribe the tape, the digital recording, or the court reporter's minutes to appeal the order successfully. Orders and oral rulings, even when transcribed, are not appealable unless the judge signs the transcript and the order is entered.⁸⁰ A clerk's extract of trial minutes may not serve as an appealable order.⁸¹

If a judge delivers an order from the bench but does not reduce it to writing, the practitioner must prepare an order for the judge's signature or ask the court to reduce an order to

writing.⁸² The Appellate Term accepts a file notation if the Housing Court judge signs and dates it.

Practitioners who wonder whether their order is appealable should attach the Housing judge's memorandum writing to their notice of appeal and then obtain a written order. This situation will occur only if the court dismisses the proceeding. Any other outcome will involve a judgment the clerk writes and the judge signs. That judgment is an appealable paper. Signing a judgment is a ministerial act that can, if necessary, be compelled by a CPLR Article 78 petition.⁸³

Inspections. Housing Court judges often exercise their discretion to inspect the location at issue, to assign a resource assistant (a Civil Court clerk) to inspect the premises, or to ask an inspector from the New York City Department of Housing Preservation and Development or other city agency to inspect to determine whether there are violations of the Housing Maintenance Code or other city code affecting the premises or the health and safety of the occupants and guests. A decision and order concerning inspection of the subject premises is not appealable.⁸⁴

Supreme Court Orders and Judgments. The Appellate Term is a part of the Supreme Court. It may not review or overrule another Supreme Court order or judgment.⁸⁵ A Supreme Court order or judgment must be appealed to the Appellate Division.

Motion on Notice. No right to appeal lies for an order that does not decide a motion made on notice, but the Appellate Term may exercise its discretion to treat the notice of appeal as an application for leave to appeal.⁸⁶

Accepting Benefits. An appellant who accepts the benefits of the order he or she wishes to appeal waives its right to appeal the order.⁸⁷

V. Standards of Appellate Review

A. Appealing Findings of Fact and Credibility Determinations

An appeal may be predicated on Housing Court's findings of fact, including credibility determinations. But these appeals are rarely successful. Appellate courts are loath to substitute their own findings on a cold record. Deferring to the Housing Court's findings of fact strengthens the power of that court, which sees and hears witnesses, and limits appellate review.⁸⁸

Courts of intermediate appellate jurisdiction, such as the Appellate Term and the Appellate Division, will not ordinarily vacate findings of fact unless the record clearly does not support them.⁸⁹ A trial court's credibility determinations are entitled to "the greatest respect"⁹⁰ and will not be disturbed if they are reached by "any fair interpretation of the evidence."⁹¹

The Appellate Term's review of facts is necessarily based on the Housing Court's making findings of fact. If the Housing Court does not do so, the "finding must be predicated on a determination of credibility, then the matter [will be] remanded for a new trial"⁹² or other proceedings because appellate courts do not decide credibility issues in first instance.

In the end, however, the scope of review of a court of intermediate appellate jurisdiction over a nonjury-trial determination is as broad as that of the trial judge. It allows the appellate court to substitute its judgment if the evidence fails to support the trial court's findings.⁹³

B. Appealing Discretionary Determinations

Courts of intermediate appellate jurisdiction, such as the Appellate Term or the Appellate Division, are vested with broad equity powers to "review a determination for abuse

of discretion or substitute its own discretion."⁹⁴ The practitioner must always consider whether the ruling appealed from was initially subject to Housing Court's discretion. If it was, the Appellate Term may reverse by invoking its own discretion in the court's interest-of-justice prerogative or by finding that the Housing Court judge committed an abuse of discretion.⁹⁵

The Appellate Term's authority is as broad as the trial court's.⁹⁶ In this sense, "the appellate court shall have full power to review any exercise of discretion by the court or judge below."⁹⁷ Some Housing Court issues, though, such as whether the court should have permitted an adjournment to allow a party to obtain counsel, lend themselves to reversal only if the Appellate Term finds not merely an abuse of discretion but a clear abuse of discretion.⁹⁸

C. Appealing Unpreserved Issues

Countless cases hold that an appellate court may not consider for the first time on appeal legal issues unpreserved below.⁹⁹ The justification is that defects and errors should be pointed out to the court below to give the court an opportunity to correct them. But courts of intermediate appellate jurisdiction, like the Appellate Term, may exercise their interest-of-justice prerogative to consider legal issues not raised below. To do so, the Appellate Term will require the advocate to advance a strong reason.

To allow the court to reach a just and proper determination, moreover, an issue need not be preserved below "if the question presented is one of law which appeared on the face of the record and which could not have been avoided by the respondents if brought to their attention at the proper juncture."¹⁰⁰ In that sense, the Appellate Term may chart a course different from the litigants' course by deciding a case on grounds never raised below or even on appeal.¹⁰¹

VI. Notice of Appeal

A. The Notice of Appeal for Appeals "As of Right"

Appellate courts can forgive, for good cause shown, any technical mistake in perfecting an appeal except either a failure to serve or file a notice of appeal or a request for leave to appeal.¹⁰²

If appellant incorrectly pursues an appeal as of right, the Appellate Term may deem the notice of appeal as a motion for leave to appeal and grant leave in the interest of judicial economy.¹⁰³

If a litigant appeals a judgment or order "as of right," the practitioner must file a notice of appeal within 30 days after the prevailing party serves the adversely decided order or judgment, with notice of entry under CPLR 2220(a).¹⁰⁴ If the order with notice of entry is served by mail, the appellant has an extra five days to serve and file the notice of appeal.¹⁰⁵ The same five-day extension for service by mail is granted if the side that lost below serves the notice of entry.¹⁰⁶

The time requirement to serve a notice of appeal may not be waived, enlarged, or extended, even on consent by a so-ordered stipulation.¹⁰⁷ If the notice of entry is irregular, not served on all the parties, or served improperly, the time to appeal will not start to run with the defective entry or service.¹⁰⁸ Rather, if notice of entry is not effected or served, or effected or served irregularly, the time to appeal will extend indefinitely, barred only by laches.¹⁰⁹

The 30-day time limit to serve and file a notice of appeal has a few limited exceptions, such where there exists a substitution of parties;¹¹⁰ wrong method of appeal, such as serving a notice of appeal when a request for leave should have been made;¹¹¹ death, suspension, removal, or disability of the appellant's attorney;¹¹² either late service or late filing of the notice of appeal, but not both;¹¹³ and an automatic stay under the Bankruptcy Code.¹¹⁴ A practitio-

ner faced with an oral decision can start the time running by serving a shortform cover sheet with notice of entry.¹¹⁵ To start the time, the winning party need only copy the cover page, enter the judgment, and serve the notice of appeal. If the case was tried, the judgment, not the order, is the appealable paper. Beware a judge's handwritten changes, which, if they are absent from the order served, will prevent the time from beginning to run.¹¹⁶ It is best to photocopy the order with the handwritten changes.

The Appellate Term has some powers granted to it whether or not a party files a notice of appeal. For example, the court may search the record and grant summary judgment to a non-appealing party—the party that does not file a notice of appeal from the denial of the motion.¹¹⁷

B. Where and Whom to Serve the Notice of Appeal

The notice of appeal must be served on the adverse party and filed personally or by mail with proof of service in the Housing Court Clerk's Office in which the order or judgment was issued.¹¹⁸ Attach to the notice of appeal a copy of the order or judgment appealed from. The \$30 filing fee, payable to the Civil Court Clerk's Office, is waived if permission to proceed as a poor person is granted under CPLR Article 11. Obtaining poor-person relief is helpful for pro bono practitioners in the First Department because doing so allows a simplified appeal on the original record, using hand-written briefs, rather than on the full record or by appendix. (All appeals in the Appellate Term, Second Department, are on the original record.¹¹⁹) If there are multiple parties, a notice of appeal must be served on all of them. A practitioner who is unsure whether the decision is adverse to a particular party should serve everyone and let them decide whether the appeal affects them.

Service on a party not represented by counsel may be effected personally; otherwise, serve the attorney of record.¹²⁰ If served on an attorney,

the notice may be served by ordinary mail, although some attorneys prefer to use registered, certified, overnight, or priority mail. The appeal is formally taken when the addressed and stamped envelope carrying the notice is dropped into a mailbox.¹²¹

In the Appellate Division, First Department, the appellant must serve and file a preargument statement with the notice of appeal.¹²² In the Appellate Division, Second Department, the appellant must serve and file a Request for Appellate Division Intervention (RDAI).¹²³ Housing Court appeals to the Appellate Term have no such requirements.

C. Drafting Tips for the Notice of Appeal

A notice of appeal must contain a caption of the proceeding, the name of the appealing party, the judgment or order being appealed, and the court to which the appeal is taken.¹²⁴

Be careful not to waive appellate issues. If only part of an order is appealed from, an appeal from the balance of the order is foreclosed once the 30-day period elapses.¹²⁵ Picking and choosing issues or framing the notice of appeal too narrowly can cause problems later.¹²⁶ The appeal should therefore be from "each and every part" of the order or judgment.¹²⁷

A litigant may appeal not only the judgment or order but also the amount of a judgment. For example, if the appeal concerns an award of attorney fees, the practitioner should also appeal the amount of the award. The appellant's first argument is that fees should not have been awarded. The second argument, made in the alternative, is that even if fees were properly awarded, the amount awarded was too high. The issue will be waived if the amount awarded is not challenged timely.¹²⁸

If a later order may affect the appeal, it is necessary to appeal all later orders. However, CPLR 5517(b) permits the Appellate Term to review

any subsequent order not appealed from if the first order is appealable as of right.¹²⁹ A single record will serve for all the appeals taken. All that is required is that the practitioner serve and file an additional notice of appeal from each of the later orders, include the orders in the record with their underlying papers, and add further argument to the brief.

VII. Stays Pending Appeal

It is often necessary for practitioners to obtain a stay while a post-judgment appeal is pending. Stays are frequently sought when a judgment is entered against a tenant-respondent. Judgments against tenants may encompass eviction from their residence. For example, a tenant who loses a nonprimary-residence proceeding will be evicted unless a stay is obtained while the appeal is pending. Similarly, if a judgment is entered against a tenant-respondent in a nonpayment proceeding, the tenant's failure to tender the entire amount to the prevailing landlord before the warrant of eviction issues will result in immediate eviction unless a stay is obtained. The Appellate Term is often receptive to granting a stay in a residential proceeding to avoid an immediate eviction if the status quo can be maintained, "lest the one appeal 'as of right' be frustrated."¹³⁰ Losing landlord-petitioners also often seek stays. This may happen if a tenant is awarded a large abatement, treble damages, counterclaim, or legal fees, or if the Housing Court directs the landlord to make repairs.

A stay may be sought at any point during an appeal after a notice of appeal is served and filed. Stays pending interlocutory appeals of pre-trial motions are rarely granted. The Appellate Term will review a Housing Court's decision on the motion after final judgment.

In a close case, an appellant who needs a stay should first speak to the respondent. If the respondent agrees not to enforce the order or judgment, no court order for a stay is necessary.

A. Discretionary Stays

There are two types of stays: automatic and discretionary. Litigants mostly seek discretionary stays, found by combining CPLR 2201 with Civil Court Act § 212 and in CPLR 5519(c), the latter of which applies if the automatic-stay provisions of CPLR 5519(a)(2)-(6) do not apply.¹³¹ CPLR 5519(c) lets the Appellate Term modify or vacate a stay motion without the need to appeal a Housing Court stay. The party seeking the stay may move either in the Housing Court under CPLR 5519(c) or in the Appellate Term by affidavit of the party, affirmation of the party's attorney, or both. Where to seek the stay is a matter of strategy. Because the appellant obtained an unfavorable decision from a Housing Court judge, the application for a stay is usually made to the Appellate Term.

The notice of appeal must be served and filed before a stay is sought in the Appellate Term or Civil Court. The motion should include a copy of the judgment or order being appealed, the notice of appeal, and any related orders or decisions. The practitioner should also attach any exhibit that demonstrates why the stay is needed. A brief procedural history and a statement of the merits of the appeal should appear in the affirmation or affidavit or, better, in an attached memorandum of law that is both succinct and concise. The motion should further state when the movant will perfect the appeal and why a stay of enforcement will not irreparably harm the respondent. A competent tenant's counsel in a hold-over proceeding will offer to pay all back and current use and occupancy or explain why the tenant cannot or should not do so.

The Appellate Term often conditions granting a discretionary stay on the respondent's perfecting the appeal by the next term or, in the Second Department, by a specific date. The court will also set an undertaking, usually paying or posting the judgment and monthly sums for ac-

cruing rent or use and occupancy, to maintain the status quo. If a tenant-appellant fails to comply with the Appellate Term's conditions of the discretionary stay, then the landlord-respondent may move to vacate the stay and dismiss the appeal.¹³² The Appellate Term's order granting the stay will set the conditions to how a stay may be vacated. A practitioner who represents tenant-appellants should advise them to abide by the terms of the discretionary stay. One consequence of failing to adhere to the Appellate Term's conditions is dismissal of the appeal before its merits are determined. Another is an eviction that follows quickly on the heels of the dismissal or the vacatur of the stay.

Practitioners should also carefully examine the term dates; a stay granted shortly before the end of a term may require perfecting an appeal more expeditiously than a stay granted shortly after the beginning of a term.¹³³

As Metz and Gruber explain, "[t]he goal of virtually all pre-appeals motions . . . is to obtain an *interim* stay pending disposition of the motion."¹³⁴ It is possible to move at the Appellate Term, Second Department, for a stay by order to show cause if interim relief is sought. An interim stay is often called a temporary restraining order, or TRO.

In the Second Department, the practitioner should submit the order to the clerk's office at 141 Livingston Street in Brooklyn. The clerk will give a justice the order for possible signature. Motion papers on notice are required if interim relief is not requested.¹³⁵

In the First Department, an interim stay is obtained from one justice *ex parte*, although the entire panel may hear a stay pending appeal.¹³⁶ Applications are processed within 36 hours, and usually the same day. Practitioners should not use an order to show cause. Rather, they should use a short-service notice of motion to ob-

tain an interim stay or a short return date. The papers should include the notice of motion, a supporting affirmation or affidavit, exhibits, a notice of appeal with the filing-fee receipt, and the order or judgment appealed from. Include a blank sheet of paper between the notice of motion and the supporting papers. The Appellate Term will stamp on the blank sheet the return date, thus assigning the return date, and a short stay pending decision. If an interim stay is granted, the adversary must be served.¹³⁷

The adversary may serve responsive (opposition) papers by ordinary mail up to the return date of the motion. There is no right to reply, although replies are considered if they are filed by the return date. As with all motions in the Appellate Term, there is no oral argument. All motions are submitted; no appearance on the return date is contemplated.¹³⁸ As with all motions, lack of service is waived if the nonmovant responds on the merits, not merely on jurisdictional grounds.¹³⁹

Practitioners who represent tenant-appellants should know that the entire money judgment amount awarded below likely will be the amount the Appellate Term will require to be deposited with the Civil Court as an undertaking, payable directly to the landlord or to the Department of Finance by bond, money order, or certified check.

B. Automatic Stays

RPAPL 751(1). Subsection 751(1) contains an automatic-stay provision. A tenant sued for not paying rent can obtain a stay by depositing with the Housing Court the amount of rent due after a judgment is issued but before the warrant of eviction issues. This provision is rarely invoked, though it is effective. Appellate practitioners should be aware that RPAPL 751(1) is a Housing Court remedy, not an appellate remedy. A tenant's counsel who wishes to take advantage of RPAPL 751(1) should request that a warrant not issue forthwith on a judgment, but rather on final judg-

ment that both the warrant and its execution be stayed for five days.

CPLR 5519(a)(1). Other than the automatic stay in RPAPL 751(1), the CPLR's automatic-stay provisions are not always useful. Three subdivisions of CPLR 5519 might apply when appealing a summary proceeding. The first is CPLR 5519(a)(1), which provides an automatic stay for a governmental authority. This stay will usually occur only if the City of New York or the New York City Housing Authority (NYCHA) loses below, most often when the City or NYCHA loses a Housing Part (HP) proceeding and is ordered to make repairs.

CPLR 5519(a)(2). The second automatic stay provision is found in CPLR 5519(a)(2), which requires a deposit of an undertaking with the court from which an appeal is taken.¹⁴⁰ CPLR 5519(a)(2) deals only with a judgment or order that "directs the payment of a sum of money," and landlord-tenant proceedings primarily concern possessory issues, which must exist for the Housing Court to have jurisdiction. Assuming that CPLR 5519(a)(2) applies to Housing Court cases, and it might not, this subdivision enables a litigant to obtain an appeal bond from an insurance company or to deposit the judgment in court under CPLR Article 26.

CPLR 5519(a)(6). The last automatic-stay provision deals with "possession or control of real property which the judgment or order directs be conveyed or delivered."¹⁴¹ The authorities disagree over whether this subdivision applies to Housing Court proceedings. One leading authority suggests that this subdivision refers to selling real property, not possessing real property.¹⁴² In addition, many Civil Court and Housing Part judges believe that this subdivision does not apply to residential landlord-tenant cases, especially holdover proceedings.

Still, many decisions have held that the automatic stay applies to appeals from summary proceedings.¹⁴³ Moreover, at least one author has

opined that CPLR 5519(a)(6) provides that "an appellant is entitled to a stay as of right."¹⁴⁴

If an automatic stay is granted, the appellant will be required to deposit with the court from which the appeal is taken an undertaking to prevent or compensate for waste.¹⁴⁵ It is unclear whether that undertaking must be fixed by noticed motion, by *ex parte* order, or by neither. CPLR 5519(a) concerns stays without court order, unlike the discretionary stays in CPLR 5519(c), which necessarily invite opposition. But a court that grants an automatic stay will likely refrain from fixing an undertaking *ex parte*. Thus, it is recommended that a CPLR 5519(a)(6) application be made by order to show cause. Whether or not a CPLR 5519(a)(6) stay is automatic or discretionary, "the amount of the undertaking is, and the opposing party should be given the opportunity to challenge the amount."¹⁴⁶

There are two significant advantages to making a CPLR 5519(a)(6) motion. The first is that if it succeeds, the tenant-appellant ordered evicted under RPAPL 711(1), 713, or 715 is not automatically required to deposit the entire amount of the judgment as an undertaking. This could aid holdover tenant-appellants, who might pay only the rent specified in the lease and not the fair-market use and occupancy. However, the Appellate Term will often remand for the Housing Court to set the amount of use and occupancy to be paid *pendente lite*, or will issue an order without prejudice to remand, especially when landlords move to modify the conditions for use and occupancy because the lease rent is lower than market rent. The second advantage is that if an automatic stay succeeds in a holdover proceeding, a tenant can remain in possession for a long time pending appeal, even when the likelihood of prevailing on appeal is slim. The disadvantage is that there is no guarantee that this motion will succeed.

Vacating an Automatic Stay. Only the court that hears the appeal

may vacate an automatic stay granted under CPLR 5519(a).¹⁴⁷ To vacate an automatic stay, the respondent must show that the appeal is without merit or was brought in bad faith or solely to delay, that the stay will cause an undue burden or hardship, or that the appellant failed to comply with the court's order requiring an undertaking.¹⁴⁸

If the Appellate Term affirms the judgment below or dismisses the appeal, the stay, whether discretionary or automatic, continues for five days after the notice of entry is served and filed in the Appellate Term.¹⁴⁹ Another five days are added if the notice of entry is served by regular mail under CPLR 2103(b). Pursuant to CPLR 5519(e), a stay will expire absent a motion for leave to appeal to the Appellate Division made five days after service of the notice of entry and filing. Practitioners who plan to seek leave to appeal from the Appellate Division if they lose in the Appellate Term should regularly call the Appellate Term clerk's office with the term when oral argument took place to determine whether the Appellate Term has rendered a decision. Doing so rather than waiting for a decision published in the New York Law Journal or online on the Law Reporting Bureau's Web site,¹⁵⁰ or by receiving service from opposing counsel will add more time to prepare a leave application and possibly to continue the stay.¹⁵¹ The stay expires once the Appellate Division renders a decision affirming or modifying. A debate has arisen over whether a notice of entry need be served or filed.¹⁵²

C. Stays and Ex Parte Orders under CPLR 5704(b)

The Appellate Term, which has the same power as the courts from which it hears appeals, may review *ex parte* the Housing Court's *ex parte* orders. The result can be twofold: either an *ex parte* order granted below will be vacated or modified or an *ex parte* order denied below will be granted. The *ex parte* order the Housing Court typically considers is an

order to show cause. *Pro se* forms in the landlord-tenant clerk's office are routinely given to tenants who seek judgment relief. A tenant in a non-payment proceeding may be paying out a judgment over time according to a stipulation that allows an eviction to occur on the tenant's failure to pay. If the tenant returns to the Housing Court to request extra time to pay and shows that money is forthcoming, a judge might sign the order to show cause.

A landlord who believes that the tenant did not have a meritorious reason to obtain an order to show cause may file a CPLR 5704(b) motion with the Appellate Term to vacate the order, especially if several orders to show cause have been signed in one proceeding or if the landlord has reason to believe that the tenant has abused the procedure. The landlord may seek to strike and vacate a stay in an order to show cause, to strike the order from the Civil Court calendar, to direct that no additional marshal's notice be required unless required by the Marshal's Handbook, and to direct that no further applications for a stay be sought.¹⁵³ In the Second Department, a landlord, before moving under CPLR 5704(b), must apply to the signing judge to vacate the order or any part of it, such as the stay provision.¹⁵⁴ If the signing judge in the Second Department declines to vacate the order, the landlord may then go to the Appellate Term under CPLR 5704(b). In the First Department, a landlord may bypass the signing judge and go directly to the Appellate Term.

A tenant who brought an order to show cause that the Housing Court declined to sign may go to the Appellate Term to request CPLR 5704(b) review.¹⁵⁵ In a nonpayment proceeding, the Appellate Term might grant the tenant CPLR 5704(b) relief, thus restoring the matter to the Housing Court's calendar, on condition that the tenant deposit money in court.

To file a CPLR 5704(b) motion, the movant prepares a proposed

ex parte order with an affidavit or affirmation and attached exhibits, including the underlying order. Modifying or vacating an underlying order favoring a tenant is drastic and will be granted only on a strong showing of abuse. If granted against a tenant, the Appellate Term justice who considered it will likely require that the eviction be preceded by proof of service on the tenant and filed with the Housing Court's Clerk's Office. Once the tenant is served, the tenant can go to the Appellate Term to read the CPLR 5704(b) application; it is an *ex parte* application, not a sealed document. By then, however, it may be too late to seek reargument before eviction. Reargument may be futile in any event. Another option for the evicted tenant is to move in the Housing Court to be restored post-eviction.¹⁵⁶

Although the Appellate Division will not review interim Appellate Term orders, the tenant may nevertheless try to seek review from the Appellate Division by way of a CPLR 5704(a) *ex parte* motion if the tenant can assert that the landlord itself committed an abuse in its CPLR 5704(b) motion to the Appellate Term. Under CPLR 5704(a), the Appellate Division has the jurisdiction to "vacate or modify an 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." It is uncertain whether this procedure will work, however. No appeal to the Appellate Division lies from anything the Appellate Term does not decide on appeal. The Appellate Division might find that no appeal lies from the Appellate Term's decision on a CPLR 5704(b) motion.

Although a single Appellate Term justice, in chambers or at home, may modify or vacate an *ex parte* stay, the full panel, according to one author, considers whether to grant relief to a party who failed to obtain it below.¹⁵⁷

A CPLR 5704(b) motion must be made to the Appellate Term before the return date in Housing Court on

an order to show cause. If the Housing Court hears both sides on a stay issue, the application is no longer *ex parte*, and 5704 jurisdiction is lost.

In the Second and Eleventh Judicial districts, litigants with orders to show cause go to the court's central clerk's office at 141 Livingston Street. In the Ninth and Tenth Judicial Districts, a local clerk will telephone the central clerk's office at 141 Livingston Street. A clerk in the 141 Livingston office will direct the litigant to a court where a Ninth and Tenth justice sits in chambers. The litigant will then go to the justice's chambers with the papers and await a decision.

D. Stays of Reletting and Restoration

In a 2003 opinion overruling its precedent, the Appellate Term, Second Department, decided that it has the jurisdiction to stay reletting and restore a tenant to possession pending appeal.¹⁵⁸ This power stems from the appellate right to issue a prohibitory injunction under CPLR 6301 to preserve the status quo pending appeal. To obtain this relief, the tenant-movant must show a likelihood of success on the merits, the prospect of irreparable harm (counted as the eviction itself), and a balance of equities in the tenant-movant's favor.¹⁵⁹

VIII. Cross-Appeals

The respondent on appeal may also appeal; the procedure is called a cross-appeal. A respondent may not request any modifications to the Housing Court's order or final judgment unless a cross-appeal is taken.¹⁶⁰ To cross-appeal, the respondent must be an "aggrieved party."¹⁶¹ The exception to that rule is when the judgment or order does not grant the respondent complete relief or when an error occurs below that, if corrected, would support a judgment in the respondent's favor.¹⁶² For example, an award might be less than the respondent sought below, or the judgment might deny an affirmative claim.¹⁶³

The respondent must serve its cross-appeal during either of the following two time periods, whichever is later: 10 days after the appellant serves its notice of appeal or within the original 30-day period following service of the order with notice of entry.¹⁶⁴ A cross-appeal not served within these time limits will be dismissed.¹⁶⁵ In addition, a cross-appeal perfected improperly will be dismissed.¹⁶⁶

The Appellate Term, on application, may order both sides to share the costs of ordering the transcript in a cross-appeal.

IX. Perfecting the Appeal

The appellant's time to perfect an appeal—that is, to file the brief and the record—begins to run from the day the notice of appeal is filed in the clerk's office in the county from which the practitioner is appealing. Failure to perfect an Appellate Division appeal will result in dismissal with prejudice.¹⁶⁷ But the Appellate Term has no requirement that an appeal be perfected within a specified term. A respondent must move to dismiss a dilatory Appellate Term appeal. The Appellate Term usually denies these motions unless the appellant defaults in answering or causes an extremely lengthy and unreasonable delay. If the appellant even nominally opposes the motion, the court will typically condition the denial on the appellant's perfecting the appeal by a particular term or date. The respondent should renew the motion to dismiss the appeal if the appellant does not comply with the conditional order. Once an appeal has been perfected, it is rare that an appeal will be dismissed as untimely.

Conversely, the appellant may move to extend, or enlarge, the time to perfect an appeal. One extension is routinely granted on motion for good cause shown. The appellant should explain why the extension is needed. Valid excuses are myriad; they include delays prompted by settlement

discussions, awaiting a decision on a motion to reargue, or a burdensome caseload. A smart practitioner will also briefly argue that the appeal is meritorious, that the delay will not prejudice the respondent, that the appellant is close to perfecting the appeal, and what the estimated date of submission is. The motion for an extension should be served before the expiration date, although the return date may be after the expiration date. The application is brought by motion, not by order to show cause. The motion should include the notice of appeal and the order or judgment that is the subject of the appeal. The court must be advised of the respondent's position regarding the request for an extension. Any stipulation in which the respondent consents to an extension should be annexed as an exhibit.

A respondent's attorney who wishes to object to a request for an extension is well-advised to set out good reasons for objecting, especially in response to an appellant's first motion for an extension.

The respondent may also move to accelerate the final due date.

The Appellate Term may expedite perfection on its own motion. In *McDonald v. Wilson*,¹⁶⁸ for example, the court deemed the papers submitted on a motion for a stay pending appeal to be briefs and set the matter down for oral argument on the next calendar date.

The Appellate Term's broad powers also include the power of summary reversal without the need to perfect an appeal. In *Cruz v. Chan*,¹⁶⁹ the court, on its own motion, treated a notice of appeal as an application for leave to appeal, and on granting leave reversed summarily. In *Cruz*, an HP court struck the landlord's answer for lack of verification, even though the landlord offered to verify the answer *nunc pro tunc* before the time to answer had expired. According to the court, the urgent nature of HP proceedings required summary reversal.

In another unusual case, a tenant filed a post-eviction order to show cause in the Appellate Term, Second Department, seeking to be restored. The court signed it and later amended it *sua sponte* to provide for a hearing on the issues raised in the order to show cause.¹⁷⁰ After the hearing, the court summarily reversed because of what it found to be clear error and exigent circumstances.¹⁷¹

Either side may move by motion or order to show cause for the Appellate Term in its discretion to grant a preference to hear and decide the appeal.¹⁷² The rules of the Second Department, with its current six-month lag time in hearing appeals, specifically contemplate preferences.¹⁷³ Additionally, the parties may stipulate to extensions of time that are “so ordered” by the court to allow late perfection. Either way, perfecting the appeal in the First Department begins with compiling the record and ends with the clerk’s return. In the Second Department the process begins and ends with the clerk’s return.

A. The Clerk’s Return

The Appellate Term, First Department, requires a clerk’s return in addition to one original (signed by the attorney) and four copies of the briefs and the full record or one signed original and four copies of the brief and appendices reproduced as authorized by CPLR 5529.¹⁷⁴ The only exception is if the parties consent to appeal on a statement under CPLR 5527, as explained below.¹⁷⁵ In the Second Department, a landlord-tenant appeal can be brought on the clerk’s return and one signed original and three copies of the brief.¹⁷⁶ In the Second Department, the appellant may, but need not, print copies of the record.¹⁷⁷

The Civil Court appeals clerk prepares a form titled the clerk’s return on appeal, a cover sheet that enumerates the contents of the clerk’s return, and addresses it to the Appellate Term to attest that the record is complete. That form is affixed to the

index (see below), the notice of petition and petition, evidence, the judgment, all necessary papers from the Housing Court’s file, any opinion of the court, transcripts, and the notice of appeal.¹⁷⁸ The form, together with the file to which the form is affixed, is called the clerk’s return.

The appeals clerk is required to give the clerk’s return to the Appellate Term, often through counsel if there is one, after the notice of appeal is filed.¹⁷⁹ The brief may not be filed unless the clerk’s return is filed first. In the First Department, the appellant must procure the clerk’s return within 30 days after the notice of appeal is filed.¹⁸⁰ That requirement, which does not exist in the Second Department (appeals there have no fixed deadlines and thus can wither without being prosecuted), is largely ignored in the First Department because it is often difficult and time-consuming to obtain a full record, especially when the record includes transcripts.

On the other hand, the practitioner should know that although the Appellate Term, First Department, largely ignores the 30-day rule in 22 N.Y.C.R.R. 640.6(a)(1), the court could take a hard line, in its discretion, on a case-by-case basis. So, too, can the Appellate Term, Second Department, in its discretion, dismiss an untimely appeal despite the absence of fixed dates in the Second Department within which an appellant must perfect an appeal.

In the Appellate Division, First Department, Rule 600.11(a)(3) fixes an outside limit for perfecting an appeal “within one year of the date of entry of the judgment or order appealed from,” unless the court extends the time for good cause.¹⁸¹ Undue delay is presumed if perfecting the appeal exceeds a year.¹⁸² Delays in prosecuting appeals frustrate the rights of respondents.¹⁸³ As one court has explained, “[b]y analogy to appeals to the Appellate Division, appeals to the Appellate Term, First Department, not perfected within a year . . .

are best ‘supported by a substantial excuse and a showing of merit to the appeal.’”¹⁸⁴ Therefore, it would be wise for an appellant in an important case to take the initiative to move to extend the time to perfect when it appears likely that additional time is needed to perfect—and in most cases it will be likely because 30 days come and go quickly. Conversely, the respondent would be wise to move to dismiss an unperfected appeal. Otherwise, as in *Cetnar v. Kinowski*,¹⁸⁵ the court might find that the respondent “acquiesced in [appellant’s] delay until well after the appeal was taken” and thus excuse late perfection.

In the Second Department, the appellate process is relatively simple because appeals are made on the original record.¹⁸⁶ In the First Department, the practitioner who appeals on a fully reproduced record must first assemble the entire record, as described below, and serve it on the respondent. The appellant then gives the record, with proof of service, to the Civil Court appeals clerk for review. The clerk affixes the return to the record for appellant’s counsel’s filing with the Appellate Term, which will not accept the record or any briefs without the clerk’s return.

B. The Record

If the parties do not agree to a stipulated set of facts, called a CPLR 5527 statement—and they rarely do—the appellant must give the Appellate Term a record of what happened below. The record consists of an original record, a fully reproduced record, or an appendix. An original record is exactly that: the entire original court file, with transcripts. All appeals to the Appellate Term, Second Department, may be made on the original record, as may all poor-person appeals in the Appellate Term, First Department. To obtain an original record, the appellant need only ask. An appellant may subpoena the file from the Housing Court clerk’s office, but doing so might upset the clerks.

The record is important. The Appellate Term will not review a final judgment if the Housing judge failed to comply with CPLR 4213(b) specificity requirements. The Housing Court must set forth its rationale and articulate the facts essential to its determination in rendering judgment. Otherwise, the Appellate Term might remand for a new trial.¹⁸⁷

Likewise, the Appellate Term might decide that the record is so slender or limited that it prohibits intelligent appellate review of the trial court findings. In that case, the Appellate Term will remand for a new trial.¹⁸⁸ The Appellate Term might also remand if either documentary evidence was shown to the court of first instance but it was neither admitted into nor excluded from evidence,¹⁸⁹ or when the centerpiece document of the parties' appellate briefs is ambiguous and is "virtually ignored during the trial proceedings."¹⁹⁰

1. The Fully Reproduced Record

A fully reproduced record, which must be submitted to the Appellate Term, First Department, unless poor-person relief is granted, consists of the following under CPLR 5526: all the documents to which the judge referred in rendering the order or judgment, the order or judgment itself, the notice of appeal, a corrected transcript or a statement in lieu of a transcript under CPLR 5525(d) if a hearing was held, all motion papers other than memorandums of law, all exhibits, and any underlying documents.¹⁹¹

The transcripts, which must also be included in the record, must be prepared and settled according to Civil Court Act § 1704, not under CPLR 5525(b), (c), but the CPLR provides valuable precisions. Transcripts need not be prepared or settled if testimony was not taken:¹⁹² if the parties stipulate under CPLR 5525(b) that a portion of the record need not be transcribed, if the parties agree under CPLR 5525(d) on a statement in lieu of a stenographic transcript,

or if the parties agree to a CPLR 5527 statement instead of a record or an appendix.

To obtain a transcript, the practitioner should obtain the digital recording information (or, before the court used its current digital recorders, the pertinent tape and counter numbers) from counsel below, the judge, or the part clerk, who can find them on the court file, in the judge's trial book, in the minute book, or, best of all, though the court file's bar code indexing system as recorded on the courts' digital recorder, and then order the minutes from a transcription company. The minutes must be ready within 10 days after they are paid for. When the minutes are ready the clerk must notify counsel immediately. Quickly after the clerk notifies the appellant that the minutes are ready, the appellant should review them and propose amendments, and serve them on the respondent. Amendments are limited to typographical errors and omissions.¹⁹³

With an amendment to Civil Court Act § 1704(a), the way to settle a transcript for an appeal to the Appellate Terms in New York City has been changed. Effective November 1, 2000, for civil court actions and proceedings that begin on or after that date, an appellant must send the transcript, with proposed amendments, to the respondent within 15 days after receiving the transcript from the clerk. The respondent has 15 days, or 20 if served by mail, to propose objections or amendments. Unless the parties stipulate that the transcript is correct, the appellant "shall then procure the case to be settled on a written notice of at least four days [nine if by mail] to the clerk and to the . . . respondent . . . , returnable before the judge who tried the case." The clerk then prepares a clerk's return, and the judge has five days to indorse settlement on the return.¹⁹⁴

Previously, Civil Court Act § 1704 provided that on three days' notice (eight if served by mail), either side was entitled¹⁹⁵ to submit the

transcript and any changes to the Housing Court judge. The judge who heard the case had to indorse the court's settlement on the clerk's return within five days unless the parties stipulated that the transcript and the amendments were correct. This rule still applies to proceedings begun before November 1, 2000.¹⁹⁶

Civil Court Act § 1704(a) was amended to conform to the 15-day rule in CPLR 5525(c)(1). The legislative fix was thought necessary because under the old § 1704(a), the parties did not have enough time to settle a transcript before a brief had to be perfected. Conformity with CPLR 5525(c)(1) is a meritorious objective because under Civil Court Act § 1703, "[p]ractice and procedure on appeals shall be as provided in article 55 of the CPLR except insofar as [the Civil Court Act] or the rules of [the Civil Court] consistent with [the Civil Court Act] otherwise provide," and the old Civil Court Act § 1704(a) contained significant variants from CPLR 5525(c)(1).¹⁹⁷

But the new § 1704(a) provides an obstacle if the respondent is recalcitrant—and in that case the new § 1704(a) is different from CPLR 5525(c)(2). Thus, under § 1703, § 1704(a), not CPLR 5525, still controls in significant ways.

According to CPLR 5525(c)(2), if a respondent does not object to the transcript and the appellant's amendments within 15 days (20 if served by mail), the transcript and the amendments are deemed correct without any stipulation or judicial settlement. The transcript and the appellant's amendments are binding under CPLR 5525(c)(2) if the appellant affixes to the transcript and amendments a notice of service and certification under CPLR 5525(c)(3) that the appellant complied with the time limits and that the respondent offered no proposed amendments or objections. And here is the rub: Under the new § 1704(a), the appellant must serve on the respondent and the clerk a second notice, this one

a four-day notice (nine if by mail) for judicial settlement, not merely if the parties cannot agree on the transcript, but even if the respondent does not bother to answer the first notice.¹⁹⁸

In short, under CPLR 5525, if the appellant does not receive proposed amendments or objections from the respondent, the transcript is deemed settled without judicial involvement. Under § 1704(a), new and old, the appellant still needs a clerk's return. With the new § 1704(a), the appellant must serve a second notice to put the matter before a judge—when the respondent does not care, is happy with the transcript, or means to delay. Previously, the parties submitted the transcript to the clerk, and the clerk sent it to the judge. The new law offers many Housing Court practitioners and the unrepresented a new, extra layer of work and greater effort than for an appeal to the Appellate Division under the CPLR.

The collated record must be 8½ x 11 inches long and reproduced on plain white paper (recycled paper is not yet required in the Appellate Term) and bound on the left.¹⁹⁹ The subject matter of each page of the record must be stated at the top of each page. The record must also include, at the end of the record, an attorney statement under CPLR 2105 or stipulation under CPLR 5532 that affirms that the reproductions of the papers are exact duplicates of those contained in the original file. Many attorneys also include a certification as to no further opinion, although there is no statutory requirement to do so.

The front of the bound record must contain a statement pursuant to CPLR 5531(1-6) that provides the following information: (1) the index number below; (2) the full names of the parties and whether any party has changed; (3) the court and county in which the action was commenced; (4) the date the action began and the dates each pleading was served; (5) a brief description of the case; (6) whether the appeal is from a judg-

ment, an order, or both; the date each judgment or order appealed from was entered; and the name of the judge who made the order or directed the entry; and (7) whether the appeal is on the full record, printed or reproduced, or, if on the original record, whether the appendix method is used or whether the court or statute permitted the appeal on the original record.²⁰⁰

A copy of the CPLR 5531 statement must be filed with the Appellate Term Clerk's Office, whether in the First or the Second departments, when the record on appeal or appendix (First Department, where the statement should be in the record) or the brief (Second Department) is filed. In the Second Department the CPLR 5531 statement must be at the beginning of the appellant's opening, or main, brief.²⁰¹

If the record on appeal contains handwritten opinions or orders, the practitioner should type them up and type out at the top "Reproduced for the Court's Convenience."

The five sets of the record on appeal, which the appellant gives to the appeals clerk, with proof of service, should each contain the following consecutively numbered pages, in the following sequence: index (with first and last pages noted—e.g., Summary Judgment Motion . . . 13-16); CPLR 5531 statement; notice of appeal; judgment roll or order appealed from, including pleadings underlying the judgment or order; court's opinions; notice of petition and petition; answer; bill of particulars; any transcript of a proceeding at which testimony was taken (the original, signed transcript must be presented in a separate folder), broken down as to testimony by page of record—e.g., Jane Doe Direct 10, Cross 15, Redirect 20; exhibits (identifying the exhibit at the top of the page and where it was introduced into evidence) or stipulation that exhibits will be handed up when the briefs are filed; stipulation of settlement or notice of settlement of transcript; statement of no further opinion; attorney's CPLR 2105

certification or stipulation waiving certification; and the clerk's return on appeal form, which the Civil Court appeals clerk will insert.

2. The Appendix Method

The appendix method may be used in the Appellate Term, First Department, but the rules of the Appellate Term, Second Department, do not provide for that method. An appendix consists of the reproductions of what the attorneys consider to be the relevant papers supporting the issues being appealed and the original file.²⁰² Because practitioners often disagree over what an appendix should include, many believe that in a less complicated case it is easier to reproduce the entire record. Respondents may, however, file their own appendix. When the appendix method is used, the appellant must fill out numerous forms from the Civil Court appeals clerk to transfer to the Appellate Term the original record from the landlord-tenant clerk's office.²⁰³ The appendix method is rarely needed when an appeal is from a motion, although that method can be helpful when an appeal follows a hearing or a trial. The appendix method saves appellate printing costs by omitting testimony of witnesses not necessary to resolve appellate issues.

3. The Original Record

All landlord-tenant appeals in the Appellate Term, Second Department, may be prosecuted on the original record, with a clerk's return.²⁰⁴ In the First Department, an appeal is made on the original record only if the Appellate Term requests the original record or if a poor-person's application is granted. An appellant who proceeds on the original record must settle the minutes and go to the Civil Court appeals clerk to make certain that the papers are in order and to arrange for a clerk's return. The appeals clerk will then forward the original record directly to the Appellate Term. Once the Appellate Term receives the file, the appellant may file the briefs and the notice of argument or, in the Second Department, the note of issue.

4. Assuring an Accurate Record

It is impermissible to expand the record to include material not presented to the court below or to dilute the record by omitting documents.²⁰⁵ It is also imprudent to play fast and loose with the record on appeal. If an adversary includes new material or excludes existing material, a motion to strike the record or to dismiss the appeal under CPLR 5526 is appropriate.²⁰⁶ The court may admonish and affirm if a party intentionally fails to include motion papers and exhibits.²⁰⁷ And the court will not consider anything that is not,²⁰⁸ or which should not,²⁰⁹ be in the record. However, it is possible to add to the record by moving to enlarge the record on appeal.²¹⁰ If the motion is granted, the practitioner then files a supplemental record.

It is also a bad idea to play fast and loose with the record in the court below. For example, in 1999 an appellant committed shenanigans like asking a trial court to change a judgment issued by a then-deceased justice after appellate remedies were already being pursued. The Appellate Division, First Department, responded by imposing sanctions under 22 N.Y.C.R.R. Part 130-1.2.²¹¹

An appellate court's determination is based only on the record presented to the court of first instance.²¹² But Brandeis briefs are allowed: public records and incontrovertible official documents whose existence and accuracy are not disputed may be cited and considered for the first time on appeal.²¹³ Aside from evidence of that nature, counsel who obtain new information should bring a motion in the Housing Court to reargue or renew.

C. The Brief

Arguments in the appellate brief—the brief scheduling is explained below in section X.C.—must be based solely on material contained in the record.²¹⁴ A party may argue on appeal only facts raised in the Housing Court or facts that can be ju-

diicially noticed.²¹⁵ A practitioner confronted with arguments unsupported by the record may move to strike the brief, although doing so is often a waste of time. The smarter practice is to comment on that fact in the responsive brief and at oral argument. Moreover, unless the practitioner gives the Appellate Term a strong reason to exercise its interest-of-justice discretion to consider unpreserved arguments, the practitioner should not address on appeal legal issues or theories not raised below.²¹⁶

All issues must be raised in the initial brief. Issues raised in the Housing Court but not raised in the appellant's brief are waived.²¹⁷ Arguments not raised are not considered and go unpreserved for further appeals. Issues raised for the first time in a reply brief will be stricken, or at least unread.²¹⁸

In the First Department, unless a justice permits lengthier papers, the opening, or main, and responsive briefs may not exceed 50 pages each. Reply briefs are limited to 20 pages.²¹⁹ There is no page limit in the Second Department. The Second Department simply refers the practitioner to CPLR 5528 and 5529 for the form, style, and content of the briefs.²²⁰ The First Department's rules provide nothing about the form, style, and content of briefs, except that nothing may be appended to a brief absent advance permission.²²¹ But the practitioner in the First Department cannot go wrong by adhering to CPLR 5528 and 5529, especially because appellants and respondents should adhere to the CPLR unless a specific rule to the contrary appears in the Civil Court Act or in an Appellate Term rule.²²²

The civil practice rules provide that the appellant's brief shall contain (1) a table of contents with point headings and the contents of an appendix, if not bound separately; (2) a concise statement, not exceeding two pages, of the questions involved, without names, dates, or particulars but sufficiently specific to appraise the court of the issues and with each

question numbered and answered immediately with how the court below ruled; (3) a concise statement of the case and facts; and (4) the argument, divided by point headings (and subheadings) distinctively printed. The rules do not require a conclusion with a prayer for relief, but practitioners should compose one. Practitioners would also be wise to have a separate statement of the case and statement of the facts. The statement of the case serves as a summary of the argument. The statement of the facts should include persuasively written facts and procedural history, but not law or opinion. Law and opinion are reserved for the argument section.

The respondent's answering brief has the same format as the appellant's brief but may include a counterstatement of the questions and facts of the case if the respondent disagrees with the appellant's version.²²³ Typically, respondents disagree with the appellant's version of the questions and facts. Note that the respondent's answering brief need not address issues in the same order the appellant presented them. Just as a smart appellant's attorney will begin with the appellant's strongest arguments, a smart respondent's attorney will answer with the respondent's strongest arguments first.

Reply briefs are allowed if they are not repetitious.²²⁴ Because, as explained above, case law prohibits attorneys from raising issues for the first time in reply, practitioners are advised to be complete, and to anticipate the respondent's arguments, in their main briefs. The rules do not contemplate sur-reply briefs, which presumably are forbidden, except on cross-appeals.

When writing a brief to the Appellate Term, the practitioner should concentrate on accurate citing and persuasive writing.

Cite the Sites. Citing poses a special problem before the Appellate Term. All citations should be

in official format, if available: Misc.3d, A.D.3d, and N.Y.3d.²²⁵ Citing to the West Group's unofficial reporter series (N.Y.S.2d, N.E.2d) is optional. The justices and the Appellate Terms' libraries have the unofficial reporter series (N.Y.S.2d, N.E.2d), but making the justices and their law clerks and court attorneys locate official parallel citations wastes their time—time they can devote to resolving your case. Additionally, practitioners who want to impress the justices will not use the Bluebook citation format. They will use the Official Style Manual, also known as the Tanbook, which the New York State court system devised for its official reports. The newest version of the Tanbook, updated effective October 2007, is available online at www.courts.state.ny.us/reporter/new_styman.htm [last visited March 14, 2008]. Practitioners interested in learning about the Tanbook and citing formats may read a few articles on the subject.²²⁶ All the citations in this article are in Bluebook format, not Tanbook format.

To cite facts from a reproduced record, practitioners should refer to the sequentially paginated record in a bracket or a parenthetical: [R. 22-23, 216-220]. To cite facts when appealing on the original record, practitioners should be as clear as possible. Testimony in a brief must always be accompanied by a reference to the page where the testimony appears.²²⁷ Practitioners who want to be entirely credible will also refer to the transcript's line numbers, although even the best appellate practitioners rarely do so.

Citing is made difficult because most Housing Court and Appellate Term opinions are either unreported or reported only in the *New York Law Journal* or the Housing Court Reporter. But practitioners should try to find official citations to officially reported cases. Many Appellate Term opinions have been lost to posterity. Most Appellate Term opinions are not reported officially or unofficially, and neither Westlaw nor LEXIS tracks Appellate Term opinions reported

only in the *New York Law Journal*, even when the Appellate Term affirms or reverses a published Housing Court decision, unless the Law Journal publishes the Appellate Term opinion as a "Decision of the Day," a relatively rare event.²²⁸ Effective late 2001, however, all Appellate Term opinions decided from that point forward are online on the New York State Law Reporting Bureau's Website: www.courts.state.ny.us/reporter/decisions.htm [last visited Mar. 14, 2008]. That Website is now required reading for landlord-tenant practitioners. The Reporting Bureau's Website contains officially published, soon-to-be officially published, and online (unpublished) decisions and motions from the Appellate Terms and from all other courts as well. The Website is updated every business day and has an impressive search function.

Helpful reading can also be found at tenant.net [last visited Mar. 14, 2008], which contains squibs of opinions published in the *New York Law Journal*. Appellate Term opinions are also available now on Westlaw in the NY-CS (published opinions) and NY-ORCSU (unpublished opinions) databases. Practitioners should therefore always use a combined database on Westlaw: "NYLJ, NY-CS, NY-ORCSU."²²⁹ Easily New York's best online resource for New York landlord-tenant case law, statutes, secondary authority, and a great deal more law is the Metropolitan Council on Housing's Housing Links, www.metcouncil.net/factsheets/links.htm [last visited Mar. 14, 2008], and its sibling site, www.hcc-nyc.org/legalservices/housinglinks.htm [last visited Mar. 14, 2008], maintained by Stuart W. Lawrence, Esq., of Manhattan's Housing Conservation Coordinators, Inc.

The moral: Take good care, despite the obstacles, to cite officially reported cases, not to cite reversed cases, and not to let your adversary's or a Housing Court judge's citation to reversed cases go unnoticed. Then tell the court that you shepardized, insta-

cited, or key-cited your authorities: Give the weight of authority in parentheticals (*per curiam*, memorandum, etc.) and the leave denied and appeal dismissed citations. Avoid blocked, lengthy, excessive, and inaccurate quotations. Always using pinpoint (jump) citations allows the reader to find your principle, proves that you really read your case, and assures accurate and complete citing and quoting. Provide explanatory parentheticals to authority when the reference is unclear. Cite key cases and do not string cite. In this context, citing well is not merely writing well. It is researching well, and persuasively.

Write It Right. Every Appellate Term, First Department, opinion is a "*per curiam*" opinion, but the court's opinions are in memorandum format, which allows the court to engage in a brief, often conclusory discussion of the facts and the law. For many years, Appellate Term, Second Department, landlord-tenant opinions have been memorandum opinions.²³⁰ In a memorandum opinion, no matter how it is labeled, the court gets right to the point, sometimes discarding nuance and always excising facts not critical to the result. So too should the practitioner discard nuance, irrelevancies, and invective.²³¹ Landlord-tenant appellate specialist Paul N. Gruber said, in a February 2001 e-mail to the author, "I've been receiving a few briefs lately that have been needlessly smug, laden with attitude and simply hostile. There's a difference between effective advocacy and professional wrestling. I have never met an appellate judge who appreciates a brief that attacks the opponent as opposed to the opponent's case." Neither will the court accept "an ad hominem attack against the motion court, conduct which itself could support an award of sanctions."²³²

Few other courts look for briefs to be so succinct and concise. Even point and subpoint headings should be succinct and concise. The First Department's rules allow for 50 pages for opening, or main, and responsive

briefs and 20 pages for reply briefs.²³³ The Second Department's rules have no page limit, although every appellate court has the power to sanction and impose costs against parties or their attorneys for submitting lengthy briefs.²³⁴ Because the Appellate Terms' rules provide nothing about spacing, margins, point size, or footnotes, practitioners might believe that lengthy briefs are not prohibited. They would be right. But a lengthy, wordy brief is not a winning brief, especially before the Appellate Term.

The best and most successful way to be succinct is to limit appellate issues to those two or three that might succeed. Overinclusiveness is cowardly and a potential way not to get the reader to read what is important. Issues should be organized effectively, first by threshold issues and then by the issues most likely to succeed. If these things are equal, organize by what will give the client the greatest relief. For example, dismissing the petition with prejudice if you represent the tenant in a nonpayment appeal should come before securing a small rent abatement.

Lengthy briefs are disfavored, but devoting space to rebutting the other side's arguments and potential arguments is essential. Pretend that an appellate court attorney from Appellate Term's court-attorney pool, called the Law Department, will draft the opinion. Pretend also that a court attorney from the pool, or perhaps the justice's personal law clerk, will draft any concurrence or dissent. (Current practice is that the Appellate Term, Second Department, court attorney who drafts the proposed majority opinion will draft the concurrence or dissent. Current practice in the Appellate Term, First Department, is for concurring or dissenting justices to author their own separate views.) Because the opinion is tentative, the preliminary drafter (the court attorney or law clerk)—as opposed to the ultimate and real decision makers (the justices)—might not have attended oral argument, stress law and fact in your brief. Do not wait

until the reply brief or, worse, oral argument to contradict the opposing side's positions.

Write in simple, concise prose, in plain English. The preceding eight words sound basic. Yet they articulate important advice—advice explained in the following principles of persuasive appellate writing.

1. Use roadmap thesis paragraphs to explain every point heading. Introduce issues with topic sentences. Conclude issues with thesis sentences.
2. Write to the Appellate Term, not to an adversary, a client, or yourself. Assume that your judicial reader knows nothing about your facts but a good deal about the law. Include harmful facts but mitigate them. Always include harmful authorities, and mitigate them as well. Then understate, never overstate. The key to persuasive appellate writing is to be subtle and dignified, not belligerent or extravagant. Avoid adverbial excesses such as "clearly" and "obviously." Do not use italics, underlining, bold, and capitals, or quotation marks for effect.
3. Eliminate legalisms, which are pretentious and add nothing. Forgo foreign words that have English equivalents.
4. Fix nominalizations, or turning verbs into adjectives and nouns. Thus, "He committed a violation of the rules" becomes "He violated the rules." Throw away throat-clearing introductory clauses and phrases like "it is submitted that. . . ." Cut cowardly writing ("generally," "typically," and the like).
5. Use the subject-verb-object formation as often as possible, and do not separate subject from verb or predicate. That will prune the single-passive voice. Thus, "The passive voice is avoided by good lawyers" becomes "Good lawyers avoid
- the passive voice." Blank passives are acceptable under some circumstances, such as when the actor is known or cannot be known. But judicial readers know that some lawyers use blank passives to deceive. Thus, "The passive voice is avoided" is a blank passive because the reader does not know who avoids the passive.
6. Move from old to new in large-scale organization and in sentences. Introduce before you explain. Give the exception before the rule. Do not give exceptions unless fairness requires you to do so, and then set out the exceptions. Write in the positive, not the negative. Thus, "Good lawyers do not write in the negative" becomes "Good lawyers write in the positive." Untangle complex conditionals. Lay out your facts, and apply the law to your facts. Stress well-formulated issues and arguments, not cases. Use cases only to support your propositions. Do not give the facts of a case unless you want to analogize or distinguish.
7. Short words, sentences, and paragraphs are better than long words, sentences, and paragraphs, but vary your sentence and paragraph length for readability.
8. The greatest emphasis is at the end of a sentence or paragraph; the second is at the beginning; the least is in the middle. Thus, "Appellant paid rent, but he paid rent late" is different from "Appellant paid rent late, but he paid rent." Start sentences and paragraphs with something important, but end them with a climax. Save the middle to bury something.
9. Focus on the context and your hoped-for remedy. All law and fact that do not advance your requested remedy is irrelevant detail.

10. Start early, but edit until the deadline. Attend to detail in the final edits.²³⁵
11. Most important, learn the techniques of honest, ethical legal writing.²³⁶

X. Noticing, Dismissing, and Abandoning Appeals

A. Notice of Argument

After perfecting the appeal, the practitioner must notice the appeal for argument within the Appellate Term's time constraints; otherwise, the appeal might be dismissed. In the Appellate Term, First Department, appellants or respondents may notice appeals, and thus schedule argument for a particular term of the court, by serving and then filing with the Appellate Term's clerk's office an original notice of argument, with proof of service. In the Second Department, only the appellant may notice the argument; the appellant does so by serving and filing a form called a note of issue.

The contents of the notice of argument or note of issue, which like most forms the Appellate Term's clerk's office will provide, are in the Second Department's rules but not in the First Department's rules. The notice or note must contain the title of the appeal; the judgment or order appealed from, with dates and the county of the Housing Court; the name, address, and telephone number of the attorney and the name of the attorney who will orally argue; and the name of the party who is filing the notice or note.²³⁷ In the Second Department, but not in the First, the appellant must file with the court blank, stamped postcards addressed to all the parties.²³⁸ The court will use the postcards to notify the parties when and where oral argument will take place.

There are preargument conferences in the Appellate Division, First and Second departments, to settle cases and to narrow appellate issues. There are no preargument conferences in

the Appellate Term, although many practitioners would like the Appellate Term to assign a seasoned appellate court attorney to conduct them. Settling cases on appeal would save litigants time and money and reduce the court's backlog.

B. Dismissals

The Appellate Term automatically dismisses appeals that have not been brought for argument within the prescribed time limits.²³⁹ In the First Department, the appellant has 60 days from the date the return is filed to notice an appeal for argument.²⁴⁰ In other words, 60 days after the return is filed, the appeal is placed on an unpublished dismissal calendar, which is called, at least administratively, on the first argument day of each term. Because the First Department has only two argument days a term, an appeal not noticed for argument will be dismissed without warning on the first argument day of the third term following the filing of the return. A respondent noticing the appeal must file and serve the notice at least 68 days before the first day of the term.²⁴¹ In the Second Department, an appeal not noticed for argument will be dismissed if it has been on the general calendar for more than 90 days. The Second Department's dismissal calendar is published in the *New York Law Journal* five days before it is called.²⁴² Although the First Department's dismissal calendar is unpublished, the *New York Law Journal* publishes the list of filed clerk's returns 15 days before the first day of each term.²⁴³ That list serves as a warning to practitioners.

C. Briefing Schedules

The above deadlines are important because they set the date by which opening (main) briefs, answering briefs, and reply briefs, with proof of service, must be filed under 22 N.Y.C.R.R. 640.6(3). In the First Department, the appellant has 53 days before the first day of the term for which argument is noticed to file, with proof of service, the notice of

argument and five copies (including one signed original) of the opening brief and the record or appendix. The respondent must then file, with proof of service, four copies and one original of the answering brief, and any exhibits the appellant did not file, at least 31 days before the beginning of the term. That gives the respondent at least 22 days to write, serve and file an answering brief. The appellant who replies may then file four copies and one original of the reply brief, with proof of service, 24 days before the first day of the term. That gives the appellant at least a week to write, serve and file the reply.

A respondent who notices the argument in the First Department must file and serve the notice of argument at least 68 days before the first day of the term.²⁴⁴ The briefing schedule is the same when the appellant notices the argument for appeal. A respondent who prods an appeal can therefore force an appellant to perfect in 15 days,²⁴⁵ because the appellant must file the briefs and record or appendix at least 53 days before the first day of the term.

If the appeal is placed or is about to be placed on the dismissal calendar, the practitioner may apply to the court for more time.²⁴⁶ In the alternative, the appellant and the respondent may stipulate to obtain additional time. An appeal not briefed is deemed abandoned.²⁴⁷

In the Second Department, the appellant may file a note of issue, with a signed original with proof of service and three copies of the brief, on or before the last Friday of any month.²⁴⁸ The respondent's brief is due exactly 14 days after service on the respondent.²⁴⁹ A reply brief must be served and filed within seven days after the appellant receives the respondent's answering brief.²⁵⁰

Practitioners who are bad at math can get an appellate printing company's briefing schedule from the appellate clerks' offices, which will also have for distribution free copies of

briefs, records and forms that novices may use as models. For those who can afford them, appellate printing companies can also greatly assist the novice or busy practitioner to prepare the record quickly and to assure technical compliance with appellate rules. Nevertheless, no competent appellate attorney should rely on anything but the appellate rules themselves. For example, the courts' briefing schedules consider nothing out of the ordinary, such as the briefing schedule for cross-appeals, which is found at CPLR 5530(b), or the schedule if the respondent notices the argument.

D. Abandonment

Sometimes appellants leave appeals to die on the vine. The case may settle or the appellant may decide not to pursue the appeal, but abandonment is a poor way to leave things. The Court of Appeals, strongly advising practitioners not to abandon an appeal, has ruled that the Appellate Division may dismiss a second appeal that presents the same issue as an earlier abandoned appeal.²⁵¹ Although the Appellate Division has the discretion to entertain an appeal after an earlier appeal is dismissed for failure to prosecute, *Rubeo* holds that the Appellate Division need not exercise this discretion. Writing for the Court, Chief Judge Kaye advised the practitioner to avoid this situation by moving for an extension of time under 22 N.Y.C.R.R. 670.8(d)-(h) or by withdrawing the appeal. That way, the Chief Judge explained, the practitioner will be "sparing the Appellate Division the burden of carrying, monitoring and ultimately dismissing [the appeal]."²⁵²

Thus, instead of abandoning an appeal, withdraw it. That way, a practitioner who decides to appeal again in the future may still address issues raised in the first appeal.²⁵³

XI. Oral Argument

The Appellate Term, First Department, conducts 10 sessions a year—none in July or August. Oral argument is scheduled for the first

and second Monday of each month. The Appellate Term, Second Department, also conducts 10 sessions a year—none in July or August. For the Second and Eleventh Judicial District, oral argument is usually heard twice a month on Wednesdays. The court will send a postcard to the litigants two weeks in advance stating where, at 141 Livingston Street in Brooklyn, 88-11 Sutphin Boulevard in Queens, or 126 Stuyvesant Place in Staten Island, oral argument will take place. For the Ninth and Tenth Judicial Districts, oral argument is usually heard twice a month on Tuesdays in Central Islip, Goshen, Mineola, and White Plains. The clerk's office tries to group arguments at these locations and will notify the litigants by postcard. The calendar is called at 9:30 a.m.

In the Appellate Term, Second Department, a practitioner must request oral argument. Oral argument is requested by asking for it, and stating who will argue and for how long, at the upper right-hand corner of the brief's cover page.²⁵⁴ According to some counsel, the Second Department will allow oral argument whether or not a request for argument is noted on the brief. The First Department's rules about requesting oral argument are contradictory. Practitioners in the First Department are therefore urged to follow the Second Department's rules about requesting oral argument on the brief's cover page, lest they risk submitting the appeal without oral argument.²⁵⁵ If the appellant does not request oral argument, the respondent should also submit, lest defeat be snatched from the jaws of victory. Whether or not oral argument is assumed in the First Department, orals can be waived by stipulation, by writing "submitted" on the brief's cover page, or by not appearing on oral-argument day. If one side does not appear for a scheduled oral argument, the side that appears may argue anyway.

The calendar for oral argument in the First Department is printed in the *New York Law Journal* six days before

the first day before each term.²⁵⁶ The Second Department notifies litigants through publication in the *New York Law Journal* 12 days before the term begins and by postcard to be received at least five days before the term begins.²⁵⁷

A practitioner who cannot argue on a particular day may obtain a stipulation from opposing counsel or move for an adjournment. If the Appellate Term is given a reason, it "is usually liberal with the first adjournment."²⁵⁸

The Appellate Term is a hot bench. The justices are prepared for oral argument because they read the litigants' briefs in advance and receive bench briefs from their law clerks or the court-attorney pool. Practitioners should get to the point and be prepared for focused questions that will sidetrack a rehearsed presentation. Practitioners who worry that they made a more effective argument after they left the courthouse than while in the courthouse should not worry unduly. Unless the justices tell you, "We disagree, but we'll think about it"—a crushing prediction one hears from time to time in the Appellate Term—it often happens that the final opinion bears little resemblance to the oral argument. Nevertheless, no practitioner should miss the opportunity to argue. Briefs count for more than oral argument in most appeals, but close cases are won or lost at oral argument in the Appellate Term.

Cases are called according to the calendar, but it is wise to arrive at the beginning of the oral argument. That will enable the advocate to assess the court and, even more important, to avoid arriving late. The appellant is seated to the left of the podium, or to the right of the justices; the respondent is seated to the right of the podium, or to the left of the justices.

If you want the court to consider a case not in your brief—a *New York Law Journal* case decided after the briefs were filed, for example—give your adversary notice and make

enough copies for each justice. Before the calendar is called, ask the clerk to distribute the case to the justices.

Oral argument is limited to 15 minutes,²⁵⁹ although the Presiding Justice may (and often will) cut it short or allow more time. Rebuttals are rare; sur-rebuttals are almost unheard of.

A few pointers will aid the oral advocate.

1. After you introduce yourself quickly, give a quick roadmap of all the major points you plan to argue: "This case should be reversed for three reasons. First, . . ." That will assure your organization and the justices' comprehension. It will also focus the court to ask what it is concerned about and to allow a sidetracked speaker to mention something important at least once—at the beginning, when it counts most.
2. Discuss only important things in your few moments before the court. Do not raise in oral argument anything overly controversial, lest your argument excite opposition. Your brief speaks for itself on the details and on the less critical issues. Do not argue issues not in your brief or your adversary's brief.
3. Have a conversation with the court. Do not be stiff. Do not read. Especially do not read your brief or recite long quotations.
4. Answer all the questions when you get them, and try to begin your answer with a yes or no.
5. If you have a theme of your case, you will never get stuck. Develop a theme in advance. Then dwell on emotional themes without getting emotional.
6. Do not interrupt a justice who is speaking.
7. Do not interrupt your adversary or make faces or gestures while your adversary or a justice is speaking.

8. Turn your cell phone off when you enter the courtroom.
9. Appellate advocacy is different from trial advocacy. Be respectful. Do not try to clobber your adversary, the court below, or the justices. Be firm, not obsequious.

Once oral argument ends, the practitioner must wait from one to 12 months for a decision. A three-to-six month wait for a decision is the norm. Currently, the Appellate Term, Second Department, schedules oral argument later than the First Department will, but the First Department will take longer than the Second Department to decide the appeal. The net effect in both departments is that it sometimes takes longer than a year after the summary proceeding is decided for the court to decide the appeal of the summary proceeding.

The Appellate Term will not read postargument briefs.

XII. Frivolous Appeals, Attorney Fees, and Costs

A. Frivolous Appeals

Litigants sometimes abuse their appellate remedies by filing frivolous appeals. An appeal is frivolous if it is "completely without law or merit," if "it is undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another," or if "it asserts material factual statements that are false."²⁶⁰ A party may move the Appellate Term under CPLR 2214 or 2215 to request that the court award costs sanctions for frivolous litigation.²⁶¹ The Appellate Term may also impose costs or sanctions on its own.²⁶²

B. Pleading Attorney Fees

Practitioners should request attorney fees in the petition, or as a counterclaim in the respondent's answer, if the Housing Court has any basis to award attorney fees in a landlord-tenant proceeding. But at least in consolidated cases in which one petition requests attorney fees, a postjudgment request for attorney

fees is permitted unless the moving party intentionally relinquishes its claim.²⁶³

In *A.D. 1619*, a prevailing landlord moved after the proceedings ended to amend two petitions to include attorney fees. The first petition included a claim for attorney fees; in the second case, "[a] claim for attorney fees was interposed for the first time in landlord's postjudgment and postappeal motion approximately nine months after our order."²⁶⁴ After the court denied the motion to amend, the Appellate Term held that a party should give notice of a claim for attorney fees near the start of a case to avoid surprise and prejudice.²⁶⁵ Thus, the Appellate Term affirmed the trial court's denial of the motion to amend the petition to include a late claim for attorney fees.²⁶⁶

On appeal, the Appellate Division answered that the tenant could not claim surprise "since respondent was aware of Article 19 of the lease providing for the landlord's recovery of attorneys' fees if the landlord prevailed in litigation over nonpayment of rent, and indeed, since the landlord's petition in the second of the two consolidated nonpayment proceedings expressly demanded such fees."²⁶⁷ Despite *A.D. 1619*, the practitioner is still advised to claim attorney fees early, even though the Housing Court will not address attorney fees until a case is over.²⁶⁸

A.D. 1619 raises another interesting question: May a party who has not claimed attorney fees before the trial court amend its petition after winning an appeal? Perhaps. Depending on how much time has passed, laches may apply and a plenary action may be required. But notions of fair play may make it possible for an indigent litigant to claim attorney fees after an appeal if an attorney did not represent the indigent at trial, and thus did not claim attorney fees below, if the indigent won the appeal while represented by counsel.²⁶⁹

C. Appealing Amounts of Legal Fees and Prevailing-Party Status

Appellate issues arise over whether the Housing Court should have awarded attorney fees and over the amount awarded. If the Appellate Term finds that the Housing Court wrongly awarded an amount or that a different party prevailed, the Appellate Term will remand the case to the Housing Court to determine the amount of legal fees.²⁷⁰

D. Determining Fees

The Appellate Term may award a fee-on-a fee for pursuing an appeal over legal fees.²⁷¹ A fee-on-a-fee is justified for time an attorney spends to recover a legal fee. But the Housing Court retains jurisdiction over attorney fees arising out of a proceeding held before it.²⁷² As a result, the Housing Court may, following an appeal, award attorney fees and disbursements incurred to handle a motion to vacate a judgment, to appeal, and to prosecute or defend appellate and postappellate motions.²⁷³

E. Appellate Costs

A prevailing party in the Appellate Term is entitled to costs on appeal,²⁷⁴ although costs are modest and appellate courts have the discretion to award costs to the losing side.²⁷⁵ As explained above, costs may also be awarded for frivolous litigation under 22 N.Y.C.R.R. 130.1-1(d).

XIII. Conclusion

Appeals to the Appellate Term, at least in the First Department, where appeals on the fully reproduced record are the norm, are tedious and complex. On the first go-around, the practitioner might spend as much time complying with the rules as preparing the legal issues on appeal. But that thicket of complexity is more illusory than real. Although the rules are stultifying and time-consuming to follow, they are easy to learn with a little practice. A practitioner who completes but one appeal will know

most of the rules by heart. Then the practitioner can get down to the serious business of winning residential landlord-tenant appeals.

Endnotes

1. N.Y.C. Civ. Ct. Act § 1702(a) (McKinney 1989); N.Y. CPLR 5515(1), 5703(a) (McKinney 1995).
2. Sanford F. Young, *Appeals from Intermediate Courts Require Careful Adherence to Applicable Statutes and Rules*, 71 N.Y. St. B.J. 8, 14 (Mar. 1999).
3. N.Y. Const. art. VI, § 8 (McKinney 2006); N.Y.C. Civ. Ct. Act § 1701 (McKinney 1989).
4. Uniform City Ct. Act § 1701 (appeals from City Ct.); Uniform Just. Ct. Act § 1701 (appeals from Justice Ct.). County Court appellate practice and procedure is provided for in CPLR Art. 55. The rules governing appealability to County Court are similar to those in the Appellate Division. See N.Y. CPLR 5701 (McKinney 1995).
5. N.Y. CPLR 5703(b) (McKinney 1995).
6. 22 N.Y.C.R.R. 640.1 (2007).
7. *Id.* 730.1(a)(1), (f).
8. Oral argument will be heard in 2008 at 126 Stuyvesant Place on November 12.
9. N.Y. Const. art. VI, § 8(a) (McKinney 2006); 22 N.Y.C.R.R. tit 22, ch. I, § 1.1(f), 730.1(c)(2).
10. N.Y. Const. art. VI, § 8(c) (McKinney 2006).
11. N.Y. CPLR 5703(a) (McKinney).
12. *Id.*
13. 22 N.Y.C.R.R. 640.9(a)(1) (First Department), 731.11(a), 732.11(a) (Second Department) (2007).
14. N.Y. CPLR 5513(b), 5703(a), 5516 (McKinney 1989); 22 N.Y.C.R.R. tit. 22, ch. IV, §§ 640.9(b) 731.11, 732.11.
15. N.Y. CPLR 5601(b) (McKinney).
16. *Id.* 5601(a).
17. *Id.* 5602(5)(b).
18. *Id.* 5602(a).
19. *Id.* 5601(a).
20. For two brief and helpful articles on appellate jurisdiction, see Craig Peterson, *Appellate Jurisdiction and Scope of Review* 17 in New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007) [hereinafter "Appellate Jurisdiction"]; James E. Pelzer, *The Basics of Appellate Jurisdiction: The Concepts of Aggravement, Appealability & Reviewability in New York Civil Appellate Practice* 29 in New York Appellate Practice (unpublished article, N.Y. St. Bar Ass'n CLE 2007).
21. See, e.g., *In re Judicial Settlement of Account of Proceedings of McGinty*, 129 Misc. 2d 56, 59, 492 N.Y.S.2d 349, 352 (Surr. Ct. Queens Co. 1985).
22. N.Y.C. Civ. Ct. Act § 1702(a)(1)-(3) (McKinney 1989).
23. N.Y. CPLR 5501(a)(1) (McKinney 1995).
24. *Id.* 5501(d).
25. N.Y.C. Civ. Ct. Act § 1702(d) (McKinney 1989).
26. N.Y. CPLR 5501(c) (McKinney 1995). New York and the federal courts both use the "judicial notice" doctrine. New York also uses the federal appellate *de novo* standard to review questions of law and, for intermediate courts of appellate jurisdiction like the Appellate Term and the Appellate Division, the federal "clearly erroneous" appellate standard to review questions of fact. New York and federal appellate courts review discretionary determinations under the same abuse-of-discretion standard, but New York does not follow the federal "plain error" doctrine as part of a "harmless error" review. For the differences between the New York and federal appellate standards, see Gerald Lebovits, *The Legal Writer, Technique: A Legal Method to the Madness—Part I*, 75 N.Y. St. B.J. 64 (June 2003); Gerald Lebovits, *The Legal Writer, Technique: A Legal Method to the Madness—Part II*, 75 N.Y. St. B.J. 64 (July/Aug. 2003).
27. N.Y.C. Civ. Ct. Act § 1702(a)(1) (McKinney 1989).
28. N.Y. CPLR 5501(a)(2-4) (McKinney 1995).
29. *Id.* 5501(a).
30. David D. Siegel, *New York Practice* § 530, at 910 (4th ed. 2005).
31. N.Y.C. Civ. Ct. Act § 1702 (McKinney 1989); N.Y. CPLR 550 (McKinney 1995); *Nivens v. N.Y.C. Hous. Auth.*, 246 A.D.2d 520, 521, 667 N.Y.S.2d 415, 417 (2d Dep't 1998) (mem.), *lv. denied*, 92 N.Y.2d 805, 700 N.E.2d 319, 677 N.Y.S.2d 780 (1998); *Essex v. Newman*, 237 A.D.2d 486, 486, 655 N.Y.S.2d 595, 596 (2d Dep't 1997) (mem.).
32. N.Y. CPLR 5501(a)(1) (McKinney 1995); *Wolf v. Rand*, 258 A.D.2d 401, 404, 685 N.Y.S.2d 708, 711 (1st Dep't 1999) (mem.); *Charchan v. Wilkins*, 231 A.D.2d 668, 669, 647 N.Y.S.2d 550, 551 (2d Dep't 1996) (mem.); *McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135, 136 (1st Dep't 1995) (mem.).
33. *In re Aho*, 39 N.Y.2d 241, 248, 347 N.E.2d 647, 651, 383 N.Y.S.2d 285, 289 (1976).
34. N.Y. CPLR 5519 (McKinney 1995).
35. *Id.* at 5501(a); *Smith v. Maya*, 27 H.C.R. 415B, 416-17, N.Y.L.J., July 23, 1999, at 30, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

36. *Eighty-First Assocs. v. Morell*, 27 H.C.R. 350A, N.Y.L.J., June 23, 1999, at 26, col. 1 (App. Term 1st Dep't) (*per curiam*).
37. *Rochdale Vil., Inc. v. Goode*, 16 Misc. 3d 49, 50, 842 N.Y.S.2d 142, 143 (App. Term 2d Dep't 2d & 11th Jud. Dists. June 14, 2007) (mem.).
38. N.Y. CPLR 5511 (McKinney 1995).
39. *E.g., Advanced Distribution Sys., Inc., v. Frontier Warehousing, Inc.*, 27 A.D.3d 1151, 1152, 811 N.Y.S.2d 840, 841 (4th Dep't 2006) (mem.).
40. *In re Luckenbach's Will*, 303 NY 491, 104 N.E.2d 870, 303 N.Y. 491 (1952).
41. *Parochial Bus Sys., Inc. v. Bd. of Educ. of N.Y.C.*, 60 N.Y.2d 539, 544, 458 N.E.2d 1241, 1243, 470 N.Y.S.2d 564, 566 (1983).
42. *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 472-73, 502 N.E.2d 982, 986, 510 N.Y.S.2d 67, 71 (1986).
43. N.Y. CPLR 5512(a) (McKinney 1995).
44. See Appellate Jurisdiction, *supra* note 20, at 22-24.
45. *Johnson v. Hunte*, 8 Misc. 3d 133(A), 2005 N.Y. Slip Op. 51160(U), *1, 2005 W.L. 1713319, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. July 21, 2005) (mem.); *Roberson v. Morris*, 22 H.C.R. 292C, N.Y.L.J., May 18, 1994, at 23, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
46. *E.g., 130 W. 57 Co. v. Farley*, 27 H.C.R. 82A, N.Y.L.J., Feb. 16, 1999, at 29, col. 1 (App. Term 1st Dep't) (*per curiam*).
47. *E.g., Merwest Realty Corp. v. Prager*, 264 A.D.2d 313, 313-14, 694 N.Y.S.2d 38, 39 (1st Dep't 1999) (mem.); *Knickerbocker Village v. Doe*, N.Y.L.J., Jan. 5, 1994, at 21, col. 2 (App. Term 1st Dep't) (*per curiam*).
48. N.Y. CPLR 5511 (McKinney 1995); *Abboud v. Abuhegazy*, 243 A.D.2d 519, 519, 663 N.Y.S.2d 96, 97 (2d Dep't 1997) (mem.); *In re Spedicato v. Div. Hous. Comm. Renewal*, 241 A.D.2d 343, 344, 660 N.Y.S.2d 970, 970 (1st Dep't 1997) (mem.); *Blackman v. Powell*, 19 H.C.R. 698B, N.Y.L.J., Dec. 3, 1991, at 30, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
49. *Everett D. Jennings Apts. L.P. v. Hinds*, 12 Misc. 3d 139(A), 2006 N.Y. Slip Op. 51335(U), *1 2006 W.L. 1892280, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 18, 2006) (mem.).
50. *Simon v. Whitfield*, 2008 N.Y. Slip Op. 50515(U), *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 7, 2008) (mem.) ("Since landlord failed to submit opposition to said cross motion, the order granting the relief requested was entered on default, and no appeal lies therefrom by the defaulting party.") (citing N.Y. CPLR 5511; *Coneys v. Johnson Controls, Inc.*, 11 A.D.3d 576, 577, 782 N.Y.S.2d 669, 670 (2d Dep't 2004)); 301 *Oriental Blvd. LLC v. Rovner*, 5 Misc. 3d 134(A), 799 N.Y.S.2d 162, 2004 N.Y. Slip Op. 51480(U), *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Nov. 30, 2004) (mem.). Under 22 N.Y.C.R.R. tit. 22, ch. II, § 208.11(b)(3), Housing Court may preclude oral argument from a landlord who does not submit papers opposing a tenant's motion. 4117 15th Ave. Realty Corp. v. Huredo, 184 Misc. 2d 986, 987, 712 N.Y.S.2d 304, 305 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000) (mem.). But oral opposition is insufficient in any event; oral argument is not part of the appellate record and is of no evidentiary value because it is unsworn. *Fox v. T.B.S.D. Inc.*, 278 A.D.2d 612, 613-14, 719 N.Y.S.2d 150, 151 (3d Dep't 2000), *lv. denied*, 96 N.Y.2d 716, 754 N.E.2d 1114, 730 N.Y.S.2d 31 (2001). Thus, it is irrelevant for appellate purposes that Housing Court heard oral argument; it is an unappealable default nonetheless. *Brown v. Chase*, 3 Misc. 3d 129(A), 787 N.Y.S.2d 676, 2004 N.Y. Slip Op. 50371(U), *1, 2004 W.L. 1049221, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Apr. 29, 2004) (mem.) ("Failure to interpose written opposition to a motion renders the resulting order or judgment equivalent to an order or judgment entered upon consent or at least acquiescence, by which the appellant is not aggrieved, and decisions have likened such an appeal to one taken from an order or judgment entered on default, from which no appeal lies. This is true even when, as in this matter, the appealing party appears on the motion return date and orally opposes the motion. . . .") (citations omitted). For a discussion of this issue, see Jaya K. Madhavan, *Core Differences Between the First and Second Departments in Residential Landlord-Tenant Law* 2 (unpublished article, N.Y. St. Jud. Inst. MCJE 2007).
51. *Barasch v. Micucci*, 49 N.Y.2d 594, 599, 404 N.E.2d 1275, 1277, 427 N.Y.S.2d 732, 734 (1980); *Berlin v. New Hope Holiness Church of God, Inc.*, 93 A.D.2d 798, 798, 460 N.Y.S.2d 961, 962 (2d Dep't 1983) (mem.).
52. *Bd. of Mgrs. of Greentree at Murray Hill v. Golub*, 17 Misc. 3d 128(A), 2007 N.Y. Slip Op. 51910(U), *1, 2007 W.L. 2937118, at *1 (App. Term 1st Dep't Oct. 5, 2007) (*per curiam*) (citing N.Y. CPLR 5511).
53. *Id.* (citing *Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, LLP v. Mazzella*, 262 A.D.2d 15, 690 N.Y.S.2d 561 (1st Dep't 1999) (mem.)).
54. N.Y. CPLR 5015 (McKinney 1995).
55. *Id.* 5501(a)(1).
56. *Campion v. Alter Coach Lines, Inc.*, 137 A.D.2d 647, 647, 524 N.Y.S.2d 738, 738 (2d Dep't 1988) (mem.); *Manhattan Mansions v. Gonclaves*, 2003 N.Y. Slip Op. 51445(U), *1, 2003 W.L. 22849767, at *1 (Hous. Part Civ. Ct. N.Y. County May 7, 2003) (Gerald Lebovits, J.).
57. *Deshler v. East West Renovators, Inc.*, 259 A.D.2d 351, 351, 687 N.Y.S.2d 65, 66 (1st Dep't 1999) (mem.); *Bossio v. Fiorillo*, 222 A.D.2d 476, 477, 635 N.Y.S.2d 59, 60 (2d Dep't 1995) (mem.); *N.Y.C. Prop. Mgmt. v. Santos*, 18 Misc. 3d 5, 6, ___ N.Y.S.2d ___ (App. Term 1st Dep't 2007) (*per curiam*); 615 Co. v. Axelrod, 24 H.C.R. 32A, N.Y.L.J., Jan. 17, 1996, at 29, col. 2 (App. Term 1st Dep't) (*per curiam*).
58. David D. Siegel, Practice Commentaries, N.Y. CPLR 5517, 2007 (McKinney 1995).
59. *Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 197-98, 669 N.Y.S.2d 585, 588 (1st Dep't 1998) (mem.); *cf.* N.Y. CPLR 2221, 5701(a)(2)(viii) (Appellate Division McKinney 1995).
60. *Roberts v. Narcissus Boutique, Ltd.*, 72 A.D.2d 808, 808, 421 N.Y.S.2d 917, 918 (2d Dep't 1979) (mem.).
61. *Venetucci v. Venetucci*, 151 A.D.2d 472, 472, 542 N.Y.S.2d 663, 663 (2d Dep't 1979) (mem.).
62. *W. 141 St. HDfC v. Jones*, 18 Misc. 3d 135(A), 2008 N.Y. Slip Op. 50183(U), *1, 2008 W.L. 269096, at *1 (App. Term 1st Dep't Jan. 31, 2008) (*per curiam*).
63. *Spedicato v. Div. Hous. Comm. Renewal*, 241 A.D.2d at 344, 660 N.Y.S.2d at 970; *Violante v. Berkowitz*, 90 A.D.2d 837, 837, 456 N.Y.S.2d 78, 79 (2d Dep't 1982) (mem.).
64. *McGraw v. Wack*, 220 A.D.2d at 292, 632 N.Y.S.2d at 136.
65. *Edwards v. Chavanes*, 15 Misc. 3d 139(A), 841 N.Y.S.2d 819, 2007 N.Y. Slip Op. 50993(U), *2, 2007 W.L. 1438704, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. May 14, 2007) (mem.); *Paolini v. Thurston*, 25 H.C.R. 424A, N.Y.L.J., Aug. 7, 1997, at 25, col. 1 (App. Term 1st Dep't) (*per curiam*).
66. *Kennedy Plaza, LLC v. Powell*, 11 Misc. 3d 132(A), 2006 N.Y. Slip Op. 50355(U), *2, 2006 W.L. 623696, at *3 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 9, 2006) (mem.).
67. *E.g., Perez v. Perez*, 100 A.D.2d 962, 963, 474 N.Y.S.2d 989, 990 (2d Dep't 1984) (mem.).
68. *Lefkowitz v. Weis*, 261 A.D.2d 448, 448, 687 N.Y.S.2d 296, 296 (2d Dep't 1999); *Eighty-First Assocs.*, 25 H.C.R. 179A, N.Y.L.J., Mar. 27, 1997, at 27, col. 4.
69. *Fergusson v. Dumbacher*, 16 Misc. 3d 131(A), 2007 N.Y. Slip Op. 51430(U), *1, 2007 W.L. 2141615, at *1 (Appellate Term 1st Dep't July 26, 2007) (*per curiam*).
70. *Lebron v. Hendrickson*, 10 Misc. 3d 133(A), 2005 N.Y. Slip Op. 52086(U), *1, 2005 W.L. 3488278, at *1 (App. Term 2d Dep't 9th & 10th Jud. Dists. Dec. 12, 2005) (mem.).
71. 341 E. 19th St. Realty v. Sylvester, 8 Misc. 3d 138A, 2005 N.Y. Slip Op. 51311(U), *1, 2005 W.L. 1981546, at *1 (App. Term 2d

- Dep't 2d & 11th Jud. Dists. Aug. 17, 2005) (mem.).
72. *Pandya v. Korolev*, 9 Misc. 3d 127(A), 2005 N.Y. Slip Op. 51469(U), *1, 2005 W.L. 2276670, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Sept. 16, 2005) (mem.).
 73. *Tower W. Assocs. v. Presley*, 13 Misc. 3d 133(A), 2006 N.Y. Slip Op. 51894(U), *1, 2006 W.L. 284422, at *1 (App. Term 1st Dep't Oct. 5, 2006) (*per curiam*).
 74. *In re Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 715, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980).
 75. *15th Assocs. v. Pamblanco*, 15 Misc. 3d 127(A), 2007 N.Y. Slip Op. 50546(U), 2007 W.L. 852508, at *1 (App. Term 1st Dep't Mar. 21, 2007) (*per curiam*).
 76. *Park City LLC v. Benami*, 5 Misc. 3d 129(A), 2004 N.Y. Slip Op. 51266(U), *2, 2004 W.L. 2399139, at *2 (App. Term 2d Dep't 2d & 11th Jud. Dists. Oct. 25, 2004) (mem.).
 77. N.Y. CPLR 5512(a) (McKinney 1995); *Oppenheim & Co., P.C. v. Bernstein*, 198 A.D.2d 163, 164, 604 N.Y.S.2d 62, 63 (1st Dep't 1993) (mem.); *Schicchi v. J.A. Green Constr. Corp.*, 100 A.D.2d 509, 510, 472 N.Y.S.2d 718, 719 (2d Dep't 1984) (mem.); *Jessamy v. Waltonstead*, 13 Misc. 3d 128 (A), 2006 N.Y. Slip Op. 51742 (U), *1 (App. Term 2d Dep't 9th & 10th Jud. Dists. Sept. 14, 2006) (mem.).
 78. *In re Shulz v. Galgano*, 88 N.Y.2d 1015, 1015, 671 N.E.2d 1272, 1272, 648 N.Y.S.2d 875, 875 (1996) (mem.).
 79. *Peron Restaurant, Inc. v. Young & Rubicam, Inc.*, 179 A.D.2d 469, 470, 578 N.Y.S.2d 194, 195 (1st Dep't 1992) (mem.).
 80. N.Y. CPLR 2219(b), 5512(a); *In re Commitment of Juan Alejandro R. II*, 221 A.D.2d 183, 83, 633 N.Y.S.2d 159, 159 (1st Dep't 1995) (mem.); *Blaine v. Meyer*, 126 A.D.2d 508, 508, 510 N.Y.S.2d 628, 628 (2d Dep't 1987) (mem.).
 81. *Wilson v. Schindler Haughton Elevator Corp.*, 118 A.D.2d 777, 777, 500 N.Y.S.2d 310, 310 (2d Dep't 1986) (mem.).
 82. N.Y. CPLR 5512 (McKinney 1995); 225 *Holding Co. v. Beal*, 12 Misc. 3d 136(A), 2006 N.Y. Slip Op. 51269(U), *3, 2006 W.L. 1843973, at *3 (App. Term 2d Dep't 9th & 10th Jud. Dists. June 28, 2006) (mem.).
 83. *Martinez v. Jacobson*, 253 A.D.2d 521, 522, 677 N.Y.S.2d 161, 162 (2d Dep't 1998) (mem.) (noting that stipulations need not be "so ordered"), *lv. denied*, 93 N.Y.2d 818, 719 N.E.2d 927, 697 N.Y.S.2d 566 (1999).
 84. *Zaccaro v. Freidenbergs*, 10 Misc. 3d 143(A), 2006 N.Y. Slip Op. 50096(U), *2, 2006 W.L. 211717, at *2 (App. Term 1st Dep't Jan. 27, 2006) (*per curiam*).
 85. *Negron v. Goldman*, 4 Misc. 3d 140(A), 2004 N.Y. Slip Op. 50958(U), *2, 2004 W.L. 1944983, at *2 (App. Term 1st Dep't Aug. 20, 2004) (*per curiam*).
 86. *1223 Bushwick, LLC v. Williams*, 2008 N.Y. Slip Op. 50512(U), *1, 2008 W.L. 711713 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 5, 2008) ("No appeal as of right lies from an order which decides a motion that was not made on notice . . . [a]lthough under appropriate circumstances leave to appeal may be granted.") (citing N.Y.C. Civ. Ct. Act § 1702(a)(2); CPLR 2211; N.Y.C. Civ. Ct. Act § 1702(c)); *Benben v. DiMartini*, 4 Misc. 3d 135(A), 2004 N.Y. Slip Op. 50778(U), *1, 2004 W.L. 1620872, at *1 (App. Term 2d Dep't 9th & 10th Jud. Dists. July 7, 2004) (mem.).
 87. *HPS Holdings Co. v. AL & Assocs.*, 10 Misc. 3d 135(A), 2005 N.Y. Slip Op. 52103(U), *1, 2005 W.L. 3488430, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Dec. 5, 2005) (mem.).
 88. *See, e.g., Jacobs v. Rosenberg*, 20 H.C.R. 754A, N.Y.L.J., Dec. 21, 1992, at 23, col. 2 (App. Term 1st Dep't) (*per curiam*).
 89. *See, e.g., Charles J. Hecht, P.C. v. Clowes*, 224 A.D.2d 312, 312, 638 N.Y.S.2d 42, 43 (1st Dep't 1996) (mem.); *D'Amico v. Allstate Ins. Co.*, 194 A.D.2d 761, 761, 599 N.Y.S.2d 296, 296 (2d Dep't 1993) (mem.). For the state appellate standard reviewing facts, *see Thorsen v. Penthouse Int'l*, 80 N.Y.2d 490, 495, 606 N.E.2d 1369, 1370, 591 N.Y.S.2d 976, 979 (1992).
 90. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 173, 436 N.E.2d 1260, 1264, 451 N.Y.S.2d 658, 662 (1982) (internal quotations omitted).
 91. *Claridge Gardens, Inc. v. Menotti*, 160 A.D.2d 544, 545, 554 N.Y.S.2d 193, 194 (1st Dep't 1990) (mem.); *accord Minick v. Park*, 27 H.C.R. 103A, N.Y.L.J., Feb. 25, 1999, at 29, col. 2 (App. Term 1st Dep't) (*per curiam*).
 92. *A Real Good Plumber, Inc. v. Kelleher*, 191 Misc. 2d 94, 96, 740 N.Y.S.2d 745, 747 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2002) (mem.); *accord Nederpelt v. Ben Hur Moving & Stor.*, 18 Misc. 3d 138(A), 2008 N.Y. Slip Op. 50314(U), *1, 2008 W.L. 480036, at *1 (App. Term 1st Dep't Feb. 22, 2008) (*per curiam*).
 93. *Northern Westchester Prof. Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499, 458 N.E.2d 809, 812, 470 N.Y.S.2d 350, 354 (1983).
 94. *Alliance Prop. Mgmt. & Develop., Inc. v. Andrews Ave. Equities, Inc.*, 70 N.Y.2d 831, 833, 517 N.E.2d 1327, 1328, 523 N.Y.S.2d 441, 442 (1987) (mem.) (reviewing CPLR 5015 motion to vacate default).
 95. *Bouton v. De Almo*, 12 Misc. 3d 132 (A), 2006 N.Y. Slip Op. 51166 (U), *1, 2006 W.L. 1747493, at *1 (App. Term 1st Dep't June 26, 2006) (*per curiam*).
 96. *360 W. 55th St. L.T.v. Anvar*, 13 Misc. 3d 7, 9, 822 N.Y.S. 2d 353, 354 (App. Term 1st Dep't Aug. 3, 2006) (*per curiam*).
 97. N.Y.C. Civ. Ct. Act § 1702(d).
 98. *See, e.g., Blunt v. Northern Oneida County Landfill*, 145 A.D.2d 913, 913-14, 536 N.Y.S.2d 295, 296 (4th Dep't 1988) (mem.).
 99. *E.g., Rentways, Inc. v. O'Neill Milk & Cream Co., Inc.*, 308 N.Y. 342, 349, 126 N.E.2d 271, 274 (1955); *Nelson v. Times Square Stores Corp.*, 110 A.D.2d 691, 691, 487 N.Y.S.2d 814, 815 (2d Dep't 1985) (mem.).
 100. *Libeson v. Copy Realty Corp.*, 167 A.D.2d 376, 377, 561 N.Y.S.2d 604, 605 (2d Dep't 1990) (mem.); *accord Infante v. Bisnauthsing*, 16 Misc. 3d 127(A), 2007 N.Y. Slip Op. 51231(U), *1, 2007 W.L. 1774917, at *1 (App. Term 1st Dep't June 20, 2007) (*per curiam*).
 101. *See, e.g., Notre Dame Leasing, L.L.C. v. Rosario*, ___ H.C.R. ___ N.Y.L.J., July 18, 2001, at 21, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (quoting *Morris Plan Co. of New York v. Globe Indemnity Co.*, 253 N.Y. 496, 497, 171 N.E. 756, 756 (1930) (*per curiam*) ("Our duty does not require us to reject a contention sound in its ultimate conclusion because the path that we follow is different from the one marked out for us in the argument of counsel."), *reconsidering* 188 Misc. 2d 291, 727 N.Y.S.2d 271 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2001) (mem.), *aff'd*, 308 A.D.2d 164, 761 N.Y.S.2d 292 (2d Dep't 2003), *aff'd*, 2 N.Y.3d 459, 812 N.E.2d 291, 779 N.Y.S.2d 801 (2004).
 102. N.Y. CPLR 5520, 5514 (McKinney 1995).
 103. *Green v. Crosby*, 11 Misc. 3d 132(A), 2006 N.Y. Slip Op. 50353(U), *1, 2006 W.L. 623678, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Mar. 9, 2006) (mem.).
 104. N.Y. CPLR 5513(a) (McKinney 1989).
 105. *Id.* 2103(b)(2); *Messner v. Messner*, 42 A.D.2d 889, 890, 347 N.Y.S.2d 589, 589 (1st Dep't 1973) (*per curiam*).
 106. N.Y. CPLR 5513(d) (McKinney 1989).
 107. *Id.* 5513, 5514, 5520; *Haverstraw Park, Inc. v. Runcible Properties Corp.*, 33 N.Y.2d 637, 637, 301 N.E.2d 553, 553, 347 N.Y.S.2d 585, 585 (1973) (mem.); *Reinfeld v. 325 W End Corp.*, 43 A.D.2d 671, 671, 350 N.Y.S.2d 140, 141 (1st Dep't 1973) (*per curiam*) (waiver).
 108. *Cohen v. Grossman*, 185 A.D.2d 719, 720, N.Y.S.2d 893, 893 (4th Dep't 1992) (mem.); *Maddox v. New York*, 104 A.D.2d 430, 431, 478 N.Y.S.2d 923, 924 (2d Dep't 1984) (mem.); *Nagin v. Long Island Sav. Bank*, 94 A.D.2d 710, 710, 462 N.Y.S.2d 69, 70 (2d Dep't 1983) (mem.).
 109. *Dobess Realty Corp. v. City of N.Y.*, 79 A.D.2d 348, 350, 436 N.Y.S.2d 296, 299 (1st Dep't) (*per curiam*), *appeal dismissed*, 53 N.Y.2d 1054, 425 N.E.2d 888, 442 N.Y.S.2d 500 (1981).
 110. N.Y. CPLR 1022 (McKinney 1997).
 111. N.Y. CPLR 5514(a) (McKinney 1995).

112. *Id.* 5514(b).
113. *Id.* 5520(a).
114. 11 U.S.C. § 362.
115. N.Y. CPLR 2219(a) (McKinney 1991); *Corteguera v. City of N.Y.*, 179 A.D.2d 362, 363, 577 N.Y.S.2d 837, 838 (1st Dep't 1992) (mem.).
116. *Masters, Inc. v. White House Discounts, Inc.*, 119 A.D.2d 639, 640, 500 N.Y.S.2d 790, 791 (2d Dep't 1986) (mem.).
117. WSC 72nd St. Owners L.L.C. v. Bondy, 9 Misc. 3d 126(A), 806 N.Y.S.2d 449, 2005 N.Y. Slip Op. 51432(U), *2, 2005 W.L. 2216948, at *2 (App. Term 1st Dep't Sept. 9, 2005) (*per curiam*).
118. N.Y. CPLR 5515(1) (McKinney 1995).
119. 22 N.Y.C.R.R. 731.1(a), 732.1(a).
120. N.Y. CPLR 2103 (McKinney 1997).
121. *Id.* at 2103(b)(2).
122. 22 N.Y.C.R.R. 600.17(a).
123. *Id.* at 670.3(a).
124. N.Y. CPLR 5515(1) (McKinney 1995).
125. See, e.g., *Dingle v. Pergament Home Centers, Inc.*, 141 A.D.2d 798, 798, 530 N.Y.S.2d 25, 25 (2d Dep't 1988) (mem.).
126. See *City of Mt. Vernon v. Mt. Vernon Hous. Auth.*, 235 A.D.2d 516, 517, 652 N.Y.S.2d 771, 772 (2d Dep't 1997) (mem.) (prohibiting appellant from amending notice because appellant appealed from order that denied motion to amend complaint but not from order that granted dismissal against appellant).
127. N.Y. CPLR 5515 (McKinney 1995).
128. See, e.g., *Stanley v. Hawkins*, 180 Misc. 2d 302, 302, 688 N.Y.S.2d 379, 379 (App. Term 1st Dep't 1999) (*per curiam*).
129. *Brooklyn Props., LLC v. Shade*, N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
130. Robert W. Kanter, (Former Chief Clerk), App. Term, 1st Dept, Lecture before N.Y. County Law. Ass'n Civ. Ct. Prac. Sect., Feb. 13, 2003, minutes at 1.
131. Jeffrey R. Metz & Paul N. Gruber, Motion Practice in the Appellate Term 41 (unpublished article, N.Y. St. B. Ass'n CLE 1994) [hereinafter "Motion Practice"].
132. *Sherman Nagle Realty Corp. v. Cruz*, 5 Misc. 3d 140(A), 799 N.Y.S.2d 164, 2004 N.Y. Slip Op. 51664(U), *1, 2004 W.L. 2963998, at *1 (App. Term 1st Dep't Dec. 20, 2004) (*per curiam*).
133. James Briscoe West, *Landlord-Tenant Appeals* 17 n.7 (unpublished article, N.Y. COUNTY LAW ASS'N. CLE 1999) [hereinafter "Landlord-Tenant Appeals"].
134. *Motion Practice*, *supra* note 131, at 47 (emphasis in original).
135. *Id.* at 48.
136. *Id.* at 47.
137. *Id.* at 48.
138. 22 N.Y.C.R.R. 640.8(c), 731.7, 732.7; see generally CPLR Art. 22 (motions).
139. *Brooklyn Props.*, N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (noting that landlord's counsel received tenant's papers only from marshal but answered on merits and thus waived jurisdictional defect).
140. See N.Y. CPLR Article 25 (undertakings).
141. N.Y. CPLR 5519(a)(6) (McKinney 1995).
142. See Eric A. Portugese, CLS Commentaries to CPLR 5519.
143. See, e.g., *Horowitz v. Safeco Ins. Co. of Am.*, 50 A.D.2d 1042, 1042, 377 N.Y.S.2d 750, 751 (3d Dep't 1975) (mem.); *In re Eleven Eleven Book Ctr., Inc. v. Ribaud*, 86 Misc. 2d 17, 19-20, 381 N.Y.S.2d 643, 644-45 (Sup. Ct. N.Y. County 1976) (dismissing Article 78 petition to stay warrant and fix undertaking, but only because petitioner did not appeal judgment of eviction); *Oleck v. Pearlman*, 49 Misc. 2d 202 *passim*, 267 N.Y.S.2d 76 *passim* (Sup. Ct. Kings County 1966); *Mountbatten Equities v. Tabard Press Corp.*, 87 Misc. 2d 861, 864-65, 386 N.Y.S.2d 785, 788 (Civ. Ct. N.Y. County 1976), modified on other grounds, 88 Misc. 2d 831, 390 N.Y.S.2d 513 (App. Term 1st Dep't) (*per curiam*); *Moskowitz v. Rassbach*, N.Y.L.J., Apr. 2, 1997, at 29, col. 2 (Hous. Part Civ. Ct. N.Y. County). One court even found that automatic stays apply to landlords. See *Brown v. 99 Sutton LLC*, 2002 N.Y. Slip Op. 40223(U), *2, 2002 W.L. 1275171, at *2 (Hous. Part Civ. Ct. Kings County May 22, 2002) (setting undertaking for landlord that wanted to appeal ruling favoring tenant in illegal-lockout proceeding).
144. Andrew A. Scherer, Residential-Tenant Landlord Law in New York § 18:27, at 988 (2007–2008 ed.).
145. N.Y. CPLR 5519(a)(6) (McKinney 1995); *Pisano v. County of Nassau*, 41 Misc. 2d 844, 845-46, 246 N.Y.S.2d 733, 736 (Sup. Ct. Nassau County 1963), *aff'd*, 21 A.D.2d 754, 252 N.Y.S.2d 22 (2d Dep't) (mem.) *lv. denied*, 14 N.Y.2d 489, 202 N.E.2d 158, 253 N.Y.S.2d 1027 (1964).
146. *Landlord-Tenant Appeals*, *supra* note 133, at 16.
147. N.Y. CPLR 5519(c) (McKinney 1995); *Hunt v. Grinker*, 169 A.D.2d 477, 478, 564 N.Y.S.2d 350, 351 (1st Dep't 1991) (mem.).
148. Eric A. Portugese, CLS Commentaries to CPLR 5519.
149. N.Y. CPLR 5519(e) (McKinney 1995).
150. New York Official Reports, *Decisions*, available at www.courts.state.ny.us/reporter/decisions.htm (last visited Mar. 14, 2008).
151. See 22 N.Y.C.R.R. 640.9(c) (providing for stay applications pending motion for reargument or leave to appeal before Appellate Term, First Department).
152. Compare CPLR 5519(e)(ii) with 5519(e)(i).
153. *Motion Practice*, *supra* note 131, at 70.
154. N.Y. CPLR 2221(a)(2) (McKinney 1995).
155. *Greenhaus v. Milano*, 242 A.D.2d 383, 384, 661 N.Y.S.2d 664, 665 (2d Dep't 1997) (mem.).
156. For a discussion of that option, see Gerald Lebovits, *Post-Eviction Motions to Restore*, 33 N.Y. Real Prop. L.J. 84 (Spring 2005) (updated and reprinted in two parts at 5 Landlord-Tenant Monthly 1 (June 2007) and 5 Landlord-Tenant Monthly 1 (July 2007)).
157. Scherer, *supra* note 144, at § 18:32, at 989–90 (Fern Fisher, View from the Bench).
158. See *Brooklyn Props., LLC v. Shade*, N.Y.L.J., Feb. 11, 2003, at 23, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.); accord *Wilmaud Realty Corp. v. Burnett*, ___ H.C.R. ___, N.Y.L.J., Aug. 22, 2003, at 21, col. 4 (App. Term 2d & 11th Jud. Dists.) (mem.).
159. See generally *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1272, 536 N.Y.S.2d 44, 44 (1988) (*per curiam*).
160. *Thoda v. Arcoleo*, 179 A.D.2d 508, 509, 579 N.Y.S.2d 30, 31 (1st Dep't 1992) (mem.); *Creative Cabinet Corp. of Am., Inc. v. Future Visions Comp. Store*, 140 A.D.2d 483, 484, 528 N.Y.S.2d 596, 597 (2d Dep't 1988) (mem.).
161. N.Y. CPLR 5511 (McKinney 1995); *Parochial Bus Sys. Inc. v. Bd. of Educ. Of the City of N.Y.*, 60 N.Y.2d 539, 544-45, 458 N.E.2d 1241, 1243, 470 N.Y.S.2d 564, 566; *Arvic Realty Corp. v. RST Assocs., L.P.*, 9 Misc. 3d 137(A), 2005 N.Y. Slip Op. 51723(U), *1-2, 2005 W.L. 2764265, at *1-2 (App. Term 1st Dep't Oct. 25, 2005) (*per curiam*) (“[W]e have no occasion to address those portions of the final judgment as may be deemed to have been adverse to petitioner.”).
162. N.Y. CPLR 5501 (McKinney 1995).
163. See *87th St. Owners Corp. v. Olnick Org.*, 21 H.C.R. 8A, N.Y.L.J., Jan. 7, 1993, at 21, col. 2 (App. Term 1st Dep't) (*per curiam*) (holding that respondent may not get additional attorney fees from court below absent cross-appeal).
164. N.Y. CPLR 5513(c) (McKinney 1989).
165. *In re Sudarsky v. Div. Hous. Comm. Renewal*, 285 A.D.2d 704, 706, 685 N.Y.S.2d 704, 707 (1st Dep't 1999) (mem.).
166. *D'Onofrio Bros. Const. Corp. v. Bd. of Educ.*, 72 A.D.2d 760, 760, 421 N.Y.S.2d 377, 378 (2d Dep't 1979) (mem.).
167. *Cross Westchester Develop. Corp. v. Sleepy Hollow Motor Ct., Inc.*, 222 A.D.2d 644, 644-45, 636 N.Y.S.2d 372, 373 (2d Dep't 1995) (mem.), *lv. denied*, 88 N.Y.2d 802, 667 N.E.2d 338, 644 N.Y.S.2d 688 (1996).

168. N.Y.L.J., Mar. 7, 2003, at 20, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).
169. N.Y.L.J., Apr. 16, 2001, at 34, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).
170. *Hegeman Asset L.L.C. v. Smith*, 5 Misc. 3d 8, 11, 783 N.Y.S.2d 192, 195 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).
171. *Id.* at 13, 783 N.Y.S.2d at 196.
172. N.Y. CPLR 5521(a) (McKinney 1995).
173. 22 N.Y.C.R.R. 731.5, 732.5.
174. *Id.* 640.2(a).
175. *See id.* 640.2(c).
176. *Id.* 731.1(a), 732.1(a).
177. *Id.* 731.1(c), 732.1(c).
178. N.Y.C. Civ. Ct. Act § 1704.
179. *Id.*
180. 22 N.Y.C.R.R. 640.6(a)(1).
181. N.Y. 1st Dep't R. 600.11(a)(3).
182. *Zetlin v. Hanson Holdings, Inc.*, 63 A.D.2d 878, 878, 405 N.Y.S.2d 472, 473 (1st Dep't 1978) (mem.).
183. *Tonkonogy v. Jaffin*, 21 A.D.2d 264, 249 N.Y.S.2d 934 (1st Dep't 1964) (*per curiam*).
184. *Manhattan Mansions*, 2003 N.Y. Slip Op. 51445(U), *1 (quoting *Zetlin*, 63 A.D.2d at 878, 405 N.Y.S.2d at 473).
185. *Cetnar v. Kinowski*, 245 A.D.2d 974, 975, 667 N.Y.S.2d 107, 109 (3d Dep't 1997).
186. 22 N.Y.C.R.R. 731.1(a), 732.1(a).
187. *Nederpelt*, 18 Misc. 3d 138(A), 2008 N.Y. Slip Op. 50314(U), *1, 2008 W.L. 480036, at *1.
188. *See generally Joseph v. Trust*, 7 Misc. 3d 75, 795 N.Y.S. 2d 813 (App. Term 1st Dep't 2005) (*per curiam*).
189. *Driscoll v. AV Polo Run Assocs.*, 17 Misc. 3d 128 (A), 851 N.Y.S.2d 63, 2007 N.Y. Slip Op. 51932(U), *1, 2007 W.L. 2962738, at *1 (App. Term 1st Dep't Oct. 11, 2007) (*per curiam*).
190. *Joseph*, 7 Misc. 3d at 77, 795 N.Y.S.2d at 814.
191. N.Y. CPLR 5526 (McKinney 1995).
192. N.Y.C. Civ. Ct. Act § 1704(b).
193. *Ayton v. Bean*, 29 A.D.2d 577, 578, 459 N.Y.S.2d 460, 461 (2d Dep't), *appeal dismissed*, 60 N.Y.2d 770, 457 N.E.2d 804, 469 N.Y.S.2d 697 (1983).
194. N.Y.C. Civ. Ct. Act § 1704(a).
195. *Id.* § 1703.
196. *See id.*
197. *Id.*
198. N.Y. CPLR 5526 (McKinney 1995).
199. *Id.*
200. N.Y. CPLR 5531 (McKinney 1995).
201. 22 N.Y.C.R.R. 731.2(b), 732.2(b).
202. N.Y. CPLR 5528(a)(5), 5529 (McKinney 1995).
203. 22 N.Y.C.R.R. 640.2(a).
204. *Id.* 731.1(a), 732.1(a).
205. *Becker v. City of N.Y.*, 249 A.D.2d 96, 97, 671 N.Y.S.2d 88, 90 (1st Dep't 1998) (mem.).
206. *See Mount Lucas Assocs., Inc. v. MG Ref. & Mktg., Inc.*, 699 N.Y.S.2d 666, 666 (1st Dep't 1998) (mem.); *Bennett Excavators Corp. v. Lasker-Goldman Corp.*, 11 A.D.2d 734, 734, 204 N.Y.S.2d 706, 707 (2d Dep't 1960) (mem.).
207. *2001 Real Estate v. Campeau Corp. (U.S.)*, Inc., 148 A.D.2d 315, 316, 538 N.Y.S.2d 531, 531-32 (1st Dep't 1989) (mem.).
208. *O'Connor v. Papertisian*, 309 N.Y. 465, 469, 131 N.E.2d 883, 885 (1956).
209. *In re Hayes' Will*, 263 N.Y. 219, 221, 188 N.E. 716, 717 (1934).
210. N.Y. CPLR 5526 (McKinney 1995); *Mount Lucas Assocs., Inc. v. MG Ref. & Mktg., Inc.*, 250 A.D.2d 245, 254, 682 N.Y.S.2d 14, 21 (1st Dep't 1998).
211. *See Levy v. Carol Mgmt. Corp.*, 206 A.D.2d 27 *passim*, 698 N.Y.S.2d 226 *passim* (1st Dep't 1999) (*per curiam*).
212. *Schenck v. Hill, Lent & Troesch*, 130 A.D.2d 734, 735, 516 N.Y.S.2d 37, 38 (2d Dep't 1987) (mem.).
213. *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177, 178 (2d Dep't 1989) (mem.). Named after Supreme Court Justice Louis D. Brandeis, a "Brandeis brief" contains legal argument along with reliable economic and social surveys and studies not presented in first instance.
214. *Mount Lucas Assocs.*, 250 A.D.2d at 254, 682 N.Y.S.2d at 21.
215. *E.g., Buley v. Beacon Tex-Print, Ltd.*, 118 A.D.2d 630, 631, 499 N.Y.S.2d 782, 784 (2d Dep't 1986) (mem.).
216. *E.g., Fresh Pond Rd. Assocs. v. Estate of Schacht*, 120 A.D.2d 561, 561, 502 N.Y.S.2d 55, 56 (2d Dep't 1986) (mem.), *lv. denied*, 68 N.Y.2d 802, 498 N.E.2d 429, 506 N.Y.S.2d 865 (1986); *Buckingham v. Donarry Realty Corp.*, 25 A.D.2d 722, 723, 268 N.Y.S.2d 775, 777 (1st Dep't 1966) (*per curiam*).
217. *See VDR Realty Corp. v. Mintz*, 167 A.D.2d 986, 987, 562 N.Y.S.2d 7, 8 (4th Dep't 1991) (mem.).
218. *Minichiello v. Supper Club*, 251 A.D.2d 182, 183, 674 N.Y.S.2d 369, 371 (1st Dep't 1998) (mem.).
219. 22 N.Y.C.R.R. 640.5(d).
220. *See id.* 731.1(a), 732.1(a).
221. *See id.* 640.5(e).
222. N.Y.C. Civ. Ct. Act § 1703.
223. N.Y. CPLR 5528(c) (McKinney 1995).
224. *Id.* 5528(b).
225. *See id.* 5529(e). For a discussion of the Official Reports, see Gerald Lebovits, *A Review: The Third Series*, 77 N.Y. St. B.J. 30 (Mar./Apr. 2005).
226. *See Gerald Lebovits, New Edition of State's "Tanbook" Implements Extensive Revisions in Quest for Greater Clarity*, 74 N.Y. St. B.J. 8 (Mar./Apr. 2002); Gerald Lebovits, *The Legal Writer, Tanbook, Bluebook, and ALWD Citations: A 2007 Update*, 79 N.Y. St. B.J. 52 (Oct. 2007); Gerald Lebovits, *The Legal Writer, Write the Cites Right—Part I*, 76 N.Y. St. B.J. 64 (Oct. 2004); Gerald Lebovits, *The Legal Writer, Write the Cites Right—Part II*, 76 N.Y. St. B.J. 64 (Nov./Dec. 2004).
227. 22 N.Y.C.R.R. 640.5(c).
228. *See Editor's Note*, 1 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 8 (Feb. 2000) ("You can't always rely on the official reporters or those expensive on-line research services to tell you whether a particular lower court case has been affirmed or reversed on appeal.").
229. For an article about conducting online landlord-tenant legal research, see Gerald Lebovits & Daniel J. Curtin, Jr., *Legal Research, Riding the Landlord-Tenant Super-Highway*, 2 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 1 (Sept. 2001).
230. For the differences between "*per curiam*" and "memorandum" opinions, and for explanations of appellate concepts like concurrences and dissents, see Gerald Lebovits, *The Legal Writer, Technique: A Legal Method to the Madness—Part I*, 75 N.Y. St. B.J. 64 (June 2003); Gerald Lebovits, *The Legal Writer, Technique: A Legal Method to the Madness—Part II*, 75 N.Y. St. B.J. 64 (July/Aug. 2003).
231. For an explanation why invective is not merely unprofessional and uncivil but also unsuccessful, flawed advocacy, see Gerald Lebovits, *Professionalism in the Legal Profession*, 5 Richmond County B. Ass'n J. 8 (Summer 2006).
232. *Rector, Church Wardens & Vestrymen of Trinity Church in City of N.Y. v. Video Editions, Inc.*, 4 Misc. 3d 43, 44, 780 N.Y.S. 2d 837, 838 (App. Term 1st Dep't 2004) (*per curiam*).
233. 22 N.Y.C.R.R. 640.5(d).
234. *See Slater v. Gallman*, 38 N.Y.2d 1, 4-5, 339 N.E.2d 863, 864-65, 377 N.Y.S.2d 448, 450-51 (1975).
235. For more advice on how to write briefs in landlord-tenant cases, see Gerald Lebovits, *What Readers of Legal Briefs Hate: The Top 30 Sins*, 1 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 12 (Aug. 2000), and Gerald Lebovits, *What Readers of Legal Writing Like: The Top 29 Selections*,

- 2 Finkelstein & Ferrara's Landlord-Tenant Prac. Rep. 5 (July 2001).
236. For some articles on ethical writing, see Gerald Lebovits, *The Legal Writer, Legal-Writing Ethics—Part I*, 77 N.Y. St. B.J. 64 (Oct. 2005); Gerald Lebovits, *The Legal Writer, Legal-Writing Ethics—Part II*, 77 N.Y. St. B.J. 64 (Nov./Dec. 2005); JoAnn M. Wahl, *Ethics in Appellate Practice* 631 in *New York Appellate Practice* (unpublished article, N.Y. St. Bar Ass'n CLE 2007); David O. Boehm, *Ethical Considerations for Appellate Counsel* 639 in *New York Appellate Practice* (unpublished article, N.Y. St. Bar Ass'n CLE 2007); Robin M. Heaney, *Brief Writing and Oral Argument, Including Ethics Considerations for Appellate Counsel* 765 in *New York Appellate Practice* (unpublished article, N.Y. St. Bar Ass'n CLE 2007).
237. 22 N.Y.C.R.R. 731.4(b), 732.4(b).
238. *Id.*
239. *Id.* 640.6(a)(3)(iii), 731.8(a) 732.8(a).
240. *Id.* 640.6(a)(3)(1).
241. *Id.* 640.6(a)(3)(ii).
242. *Id.* 731.8(c), 732.8(c).
243. *Id.* 640.6(2).
244. *Id.* 640(a)(3)(ii).
245. *Id.* 640.6(a)(3)(ii).
246. *Id.* 640.6(a)(3)(iii), 731.8(a), 732.8(a).
247. 2246 *Holding Corp. v. Nolasco*, 15 Misc. 3d 142(A), 841 N.Y.S.2d 824, 2007 N.Y. Slip Op. 51099(U), *1, 2007 W.L. 1558619, at *1 (App. Term 1st Dep't May 30, 2007) (*per curiam*).
248. 22 N.Y.C.R.R. 731.4(c), 732.4(c).
249. *Id.*
250. *Id.*
251. See *Rubeo v. Nat'l Grange Mutual Ins. Co.*, 93 N.Y.2d 750, 720 N.E.2d 86, 697 N.Y.S.2d 866 (1999).
252. *Id.* at 755, 720 N.E.2d at 88, 697 N.Y.S.2d at 868.
253. Cf. *N.Y.C. Hous. Auth. v. Quinones*, 23 H.C.R. 58B, N.Y.L.J., Jan. 31, 1995, at 25, col. 4 (App. Term 1st Dep't) (*per curiam*) (declining to consider in second appeal issues dismissed in first appeal for failure to prosecute).
254. 22 N.Y.C.R.R. 731.2(a)(2), 732.2(a)(2).
255. Compare *id.* 640.5(a) with *id.* 640.7(c).
256. *Id.* 640.7(b).
257. *Id.* 731.4(d), 732.4(d).
258. Kanter, *supra* note 130, at minutes at 3.
259. 22 N.Y.C.R.R. 640.8(d), 731.6(a), 732.6(a).
260. *Id.* 130-1.1(c)(1-3).
261. *Id.* 130-1.1(d).
262. *Id.*
263. *A.D. 1619 Co. v. VB Mgmt., Inc.*, 259 A.D.2d 382, 382, 687 N.Y.S.2d 127, 128 (1st Dep't 1999) (mem.), *appeal dismissed*, 93 N.Y.2d 1030, 719 N.E.2d 912, 697 N.Y.S.2d 552 (1999).
264. *A.D. 1619 Co. v. VB Mgmt., Inc.*, 175 Misc. 2d 1021, 1022, 672 N.Y.S.2d 985, 986 (App. Term 1st Dep't 1998) (*per curiam*).
265. *Id.*, 672 N.Y.S.2d at 986.
266. *Id.*, 672 N.Y.S.2d at 986.
267. 259 A.D.2d at 382, 687 N.Y.S.2d at 128.
268. See *Solow v. Wellner*, 86 N.Y.2d 582, 589, 658 N.E.2d 1005, 1008, 635 N.Y.S.2d 132, 135 (1995).
269. See Laurie L. Lau, *A Further Consideration of Attorneys' Fees in the Housing Court From One Judge's Perspective* 15 (2007) (unpublished article, N.Y. St. Bar Ass'n Cttee. on Landlord-Tenant Proceedings CLE) ("[A] tenant may request attorney's fees at any time. . .") (citing *Frank v. Park Summit Realty Corp.*, N.Y.L.J., Oct. 4, 1989, at 22, col. 2 (Sup. Ct. NY County), *aff'd & modified on other grounds*, 175 A.D.2d 33, 573 N.Y.S.2d 655 (1st Dep't 1991) (mem.), *aff'd & modified*, 79 N.Y.2d 789, 587 N.E.2d 287, 579 N.Y.S.2d 649 (1991) (mem.)).
270. See, e.g., *Duell v. Condon*, 200 A.D.2d 549, 549-50, 606 N.Y.S.2d 690, 691 (1st Dep't 1994) (mem.), *aff'd*, 84 N.Y.2d 773, 647 N.E.2d 96, 622 N.Y.S.2d 891 (1995); 390 W. End Assocs. v. Steppacher, 23 H.C.R. 191A, N.Y.L.J., Apr. 12, 1995, at 25, col. 3 (App. Term 1st Dep't) (*per curiam*).
271. E.g., *Kumble v. Windsor Plaza Co.*, 161 A.D.2d 259, 260, 555 N.Y.S.2d 290, 291 (1st Dep't) (mem.), *appeal dismissed*, 76 N.Y.2d 843, 559 N.E.2d 1285, 560 N.Y.S.2d 126 (1990); *Perkins v. Town of Huntington*, 117 A.D.2d 726, 726-27, 498 N.Y.S.2d 451, 453 (2d Dep't 1986) (mem.).
272. *Masbel Realty Corp. v. Birnbaum*, 26 H.C.R. 360A, N.Y.L.J., June 16, 1998 (App. Term 1st Dep't) (*per curiam*).
273. See *Duell*, 84 N.Y.2d at 784 n.2, 647 N.E.2d at 101 n.2, 622 N.Y.S.2d at 896 n.2.
274. N.Y. CPLR 8107, 8203 (in fine) (McKinney 1981).
275. See *Camarella v. E. Irondequoit Cent. Sch. Bd.*, 34 N.Y.2d 139, 141-42, 313 N.E.2d 29, 29, 356 N.Y.S.2d 553, 554 (1974) (mem.).

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