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Key Differences Between Appeals in the Second Circuit and Connecticut's Appellate Courts

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I. INTRODUCTION

For Connecticut trial lawyers and appellate practitioners alike, understanding and keeping pace with the myriad variations between the federal and state appellate rules and procedures can be a daunting—but vital—task. How much time one has to appeal, when that time begins to run, and what is appealable, for example, differs depending on whether you are in state or federal court. The "Bible" for appeals in the United States Court of Appeals for the Second Circuit is the *Federal Rules of Appellate Procedure* ("FRAP"), as supplemented by the *Local Rules Supplementing Federal Rules of Appellate Procedure* ("Second Circuit Local Rules"). In Connecticut's appellate courts (the Supreme Court and the Appellate Court), it is the *Connecticut Rules of Appellate Procedure*, as found in the Connecticut Practice Book ("P.B."). Although many of the provisions in the FRAP and the Practice Book are similar—often even identical—the rules in both courts change regularly and contain a number of substantial differences that can serve as a trap for an unsuspecting lawyer.

This article discusses the significant differences, as well as similarities, in procedures that practitioners should be aware of when pursuing civil appeals in these courts.[1] By tracking the life cycle of an appeal, the article is organized in a manner that is intended to serve as a reference for analyzing issues that arise during various stages of an appeal. Section II addresses issues that arise before filing an appeal, such as post-judgment motions and perfecting the trial record for appellate review. Section III details the stages of an appeal, from filing the notice of appeal to briefing and oral argument. Section IV discusses issues that arise after disposition of the appeal, such as motions for reconsideration and petitions for a writ of *certiorari* to the United States Supreme Court.

[1] The article does not purport to address ***every*** difference between federal and state appeals. For example, there are significant differences regarding each court's caseload and docket. The Second Circuit has a larger docket than Connecticut's appellate courts. From October 1, 2005 through September 31, 2006, the Second Circuit entertained 3794 appeals on the merits. *See* Administrative Office of the United States Courts, 2006 Annual Report of the Director: Judicial Business of the United States Courts, Washington, D.C.: U.S. Government Printing Office, 2007. During the 2005-2006 court year, the Connecticut Supreme Court decided 134 appeals and the Connecticut Appellate Court resolved 496 appeals, for a total of 630 appeals in the state appellate system combined—less than one sixth the number of cases disposed of by the Second Circuit in the same time period. *See* Wesley W. Horton and Kenneth J. Bartschi, *2006 Connecticut Appellate Review*, 81 CONN. B. J. 8, 23 (2007) (hereinafter "Horton and Bartschi").

II. PRE-APPEAL ISSUES

A number of issues arise during the pre-appeal stages of a case that are critical to the success of any appeal. For example, whether the appellate court will review a particular issue and what standard of review the court will apply may be greatly affected by the adequacy of the record created at trial. Issues that are not properly preserved at trial may be unreviewable on appeal. Furthermore, post-judgment motions, which are filed with the trial court, can affect both the issues that can be raised on appeal as well as the timeliness of a subsequent appeal. As the following discussion details, there are a number of key similarities and differences during this pre-appeal stage between the practices in the Second Circuit and those in Connecticut's appellate courts.

A. Preserving Issues for Appeal

The Connecticut appellate courts and the Second Circuit have refused to entertain issues on appeal that were not properly raised in the trial court.[2] Therefore, a savvy trial attorney must consider the prospect of an appeal when preparing for trial and during the trial itself. The standards for determining whether an issue has been raised below—and, therefore, is properly preserved for appeal—are similar in the Connecticut appellate courts and the Second Circuit. For instance, in the Second Circuit (as in most federal appellate courts) the general rule is that an appellate court will not entertain a claim or issue on appeal unless it was "pressed or passed upon below."[3] This means that the parties and the court were made aware of the claim or issue, even if that claim or issue did not actually serve as the basis for the district court's determination.[4] The Connecticut appellate courts apply a similar general rule, addressing issues on appeal only if they were raised, even if not necessarily decided, in the trial court below.[5] Adding another layer to the preservation analysis, the Connecticut Supreme Court generally will not entertain issues on certification from the Appellate Court unless they were raised in the first instance in the Appellate Court.[6]

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[2] *See, e.g.*, Gurary v. Winehouse, 190 F.3d 37, 44 (2d Cir. 1999); Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp., 245 Conn. 1, 48-50, 717 A.2d 77 (1998).

[3] *E.g.*, United States v. Harrell, 268 F.3d 141, 146 (2d Cir. 2001); *see also* 19 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 2.05.05[1] (Matthew Bender 3d ed. 2002) (hereinafter "19 MOORE'S FEDERAL PRACTICE").

[4] *See, e.g.*, Booking v. Gen. Star Mgmt. Co., 254 F.3d 414, 418-19 & n.4 (2d Cir. 2001).

[5] *See* King v. Sultar, 253 Conn. 429, 448-49, 754 A.2d 782 (2000).

[6] *See* Ramos v. Comm'r of Corr., 248 Conn. 52, 60, 727 A.2d 213 (1999); *see also* P.B. § 84-11(a)-(b).

Nevertheless, both federal and state courts have fashioned certain exceptions to the prudential rule limiting appellate review to issues that were raised at trial. In *State v. Golding*,[7] the Connecticut Supreme Court held that a defendant can prevail on a claim of constitutional error not preserved at trial if ***all*** of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt.[8] The Second Circuit has taken a more expansive approach to its power to consider issues not raised below. That court has held that it may exercise its discretion to consider any issue that was not raised in the district court—whether of constitutional magnitude or not—where the parties have fully briefed the issue on appeal, the issue concerns a pure matter of law, and no party will be prejudiced by the appellate court's consideration of the issue.[9]

Both court systems also permit review of unpreserved claims under a plain error standard. In the Second Circuit, the court will address an unpreserved issue on appeal upon finding a "mistake that is clear and obvious, affected substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings."[10] In Connecticut state courts, the plain

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[7] 213 Conn. 233, 567 A.2d 823 (1989).

[8] *Id*. at 239-240. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." State v. Beltran, 246 Conn. 268, 275, 717 A.2d 168 (1998). The court has clarified that *Golding* is inapplicable where the error in question was induced by the party seeking review. *See* State v. Cruz, 269 Conn. 97, 106, 848 A.2d 445, 451 (2004) (claim that a jury instruction on self-defense was constitutionally infirm not reviewable where trial court included the exact language that the defendant had requested); *see also* State v. Fabricatore, 281 Conn. 469, 481-483, 915 A.2d 872, 879-880 (2007) (upholding Appellate Court decision dismissing defendant's appeal based on unpreserved, induced error).

[9] *See Booking*, 254 F.3d at 419 (considering unpreserved choice of law issue because it presented a purely legal question and because refusing to consider it would likely lead to a substantial injustice); Baker v. Dorfman, 239 F.3d 415, 420 (2d Cir. 2000) (reaching unpreserved issue that presented a pure matter of law). Commentators also have noted that federal courts generally will entertain unpreserved issues on appeal in "compelling circumstances," such as "a claim of illegal incarceration, a jurisdictional challenge, a claim of sovereign immunity, a serious issue of public policy, a change in the law, or for error that works manifest injustice." 19 MOORE'S FEDERAL PRACTICE, *supra* note 3, § 205.05[2], at 205-58. However, like the Connecticut state courts, the Second Circuit has expressed "disfavor" with respect to reviewing induced error. *See, e.g.*, Townsend v. Clairol Inc., 26 Fed. Appx. 75, 79 (2d Cir. 2002) (dismissing plaintiff's appeal and noting that the Second Circuit looks "with disfavor" on appeals raised over self-induced error).

[10] United States v. Sogomonian, 247 F.3d 348, 352 (2d Cir. 2001). Plain errors will not be reviewed if intentionally waived below. *See, e.g.*, United States v. Bedoya-Cano, 186 Fed.

error rule found in P.B. section 60-5 permits review of unpreserved issues if an error exists that is "so clear and so harmful that a failure to reverse the judgment would result in manifest injustice . . . [and] the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings."[11] Unlike *Golding* review of unpreserved issues, plain error review in state court is not limited to errors of constitutional magnitude.[12] In addition to *Golding* review and plain error review, state appellate courts may review a claim raised for the first time on review under certain exceptional circumstances.[13]

B. General Verdict Rule

An important difference between the federal and state appellate courts is the different presumptions each court will make upon finding error on appeal in one portion of a general verdict. In the Second Circuit, when there are two or more claims or defenses, the jury returns a general verdict, and the appellate court finds error in only one of the claims or defenses, the Second Circuit will reverse and remand the case because it is impossible for the court to know whether the jury based its verdict on the erroneous claim or the error-free claim.[14]

Appx. 56, 58 (2d Cir. 2006) (where defendant consciously and intentionally waived right in court below, even plain error review foreclosed); United States v. Yu-Leung, 51 F.3d 1116, 1121-22 (2d Cir. 1995) (distinguishing between when a party unintentionally forfeits an objection, and when a **"**party consciously refrains from objecting as a tactical matter"; and holding that the latter "constitutes a true 'waiver,' which will negate even plain error review").

[11] State v. Woods, 250 Conn. 807, 814, 740 A.2d 371 (1999).

[12] *See* State v. Velasco, 253 Conn. 210, 219 n.9, 751 A.2d 800 (2000) (reviewing unpreserved claim of statutory interpretation under plain error standard where the claim "presents a strictly legal question that requires no finding of facts" and "neither party is prejudiced by our decision to invoke the plain error doctrine under the circumstances of this case"); *see also* WESLEY W. HORTON AND KENNETH J. BARTSCHI, CONNECTICUT PRACTICE BOOK ANNOTATED: RULES OF APPELLATE PROCEDURE (2007 ed.) § 60-5 Author's Comments, at 36 (hereinafter "HORTON & BARTSCHI") (noting that "[t]he 'plain error' rule is applied in federal courts, so federal authority should be persuasive"). The Appellate Court has refused to review plain errors that are self-induced (just as it has restricted *Golding* review for induced error, *see supra* note 8). *See* State v. Caracoglia, 95 Conn. App. 95, 121, 895 A.2d 810, 829, *cert. denied*, 278 Conn. 922, 901 A.2d 1222 (2006).

[13] *See, e.g.*, Imperial Cas. & Indem. Co. v. State, 246 Conn. 313, 320, 714 A.2d 1230 (1998) ("[E]xceptional circumstances [for review of unpreserved claim] may occur where a new and unforeseen constitutional right has arisen between the time of trial and appeal or where the record supports a claim that a litigant has been deprived of a fundamental constitutional right and a fair trial.").

[14] *See, e.g.*, Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 759 (2d Cir. 1998).

In contrast, with certain exceptions, Connecticut appellate courts faced with the same scenario will usually affirm after finding error in one portion of a general verdict. Unlike the federal court, the state courts assume that the jury found all claims in favor of the prevailing party, and, therefore, the error was harmless.[15] There are a host of exceptions to that rule, however.[16] Because of these contrasting presumptions on appeal, a trial lawyer should assess the desirability of a general verdict differently, depending upon which court system is involved.

C. The Meaning of "Judgment"

Once a trial court renders a judgment in a case, appellate issues—and the myriad differences between state and federal appellate practice and procedure—become even more crucial to anyone expecting to file an appeal. Of great significance are the different ways in which the federal and state courts use the term "judgment."

Federal Rule of Civil Procedure ("FRCP") 58 provides that a judgment in federal court is not effective until it is set forth on a ***separate document*** and ***entered*** on the docket pursuant to FRCP 79(a). Thus, the date of the court's decision, and even the date on which the court filed its opinion with the clerk's office, are not controlling. All time periods relevant to the appeal process, including the time to file post-judgment motions and the time to file an appeal, begin to run when the clerk completes the mechanical tasks of creating a separate document and entering that separate "judgment" on the docket sheet. Rule 58 requires the separate document and entry

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[15] *See* Curry v. Burns, 225 Conn. 782, 786, 626 A.2d 719 (1993) ("[T]he so-called general verdict rule provides that, if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party."). The state rule therefore puts the onus on the parties to request interrogatories and clarify the jury's findings. *See* COLIN C. TAIT & ELIOT D. PRESCOTT, CONNECTICUT APPELLATE PRACTICE AND PROCEDURE (3d ed. 2000 & 2005 supplement) § 8.14 at 316 (hereinafter "TAIT & PRESCOTT").

[16] *See id*. at 315-16; *Curry*, 225 Conn. at 801 (limiting application of general verdict rule to the following circumstances: (1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded on one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded); *see also* Doe v. Yale Univ., 252 Conn. 641, 661 n.19, 748 A.2d 834 (2000) (holding general verdict rule inapplicable because plaintiff asserted only one legal theory of recovery); Richmond v. Ebinger, 65 Conn. App. 776, 782 n.2, 787 A.2d 552 (2001) (holding general verdict rule inapplicable where "jury was not making the factually and legally distinct judgment that Curry requires," and affirming that "[i]t is the distinctness of the defenses raised, and not the form of the pleading, that is the decisive test governing the applicability of the general verdict rule." (Citation omitted; internal quotation marks omitted.).

on the docket in an attempt to reduce confusion regarding when a district court judgment becomes final and appealable.[17] Because of the importance of having a clear date from which all appeal periods run, federal courts generally insist on strict compliance with Rule 58.[18]

By contrast, state court procedure does not require the entry of a separate "judgment" in the same manner as FRCP 58 requires in federal court. Therefore, the time to appeal or file post-judgment motions in state court is measured from the date the court gives notice of the judgment or decision.[19] In state court, the clerk eventually will create a "judgment file," but that is a clerical document of no significance in computing the appeal period. In fact, it is common for a judgment file not to be entered until an appeal is already filed.[20] Because the appeal period in state court starts when the parties receive notice of the judgment, it follows that the start date for the appeal period differs, depending upon the circumstances. Practice Book § 63-1 recognizes:

> If notice of the judgment or decision is given in open court, the appeal period shall begin on that day. If notice is given only by mail, the appeal period shall begin on the day that notice was mailed to counsel and pro se parties of record by the trial court clerk. The failure to give notice of judgment to a nonappearing party shall not affect the running of the appeal period. In criminal cases where the appeal is from a judgment of conviction, the appeal period shall begin when sentence is pronounced in open court. In civil jury cases, the appeal period shall begin when the verdict is accepted.

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[17] *See generally* 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d §§ 2781-82 (1995) (detailing purpose and history of Rule 58). The clerk is not required to give the parties notice of the entry of judgment, however, so it is prudent to check the docket regularly for the entry date.

[18] *E.g.*, United States v. Indrelunas, 411 U.S. 216, 221-22 (1973) (reversing dismissal of appeal as untimely because no Rule 58 document was entered, and, therefore, appeal period never started to run). However, FRAP 4(a)(7) was amended in 2002 to provide that the appeal period begins to run either when the clerk enters the separate judgment or when 150 days have run from entry of the judgment or order on the civil docket, whichever occurs earlier. The change resolved a circuit split regarding whether a party could appeal months and even years after a case had ended simply because the clerk never entered judgment on a separate document. *Compare* Fiore v. Washington County Cmty. Mental Health Ctr., 960 F.2d 229, 236 (1st Cir. 1992), *with* United States v. Haynes, 158 F.3d 1327, 1331 (D.C. Cir. 1998). The 2002 amendment clarified that FRCP 58 does not provide parties with a loophole through which their appeal period may never end.

[19] *See* P.B. § 63-1(b).

[20] *See* P.B. § 71-1; *see also* Lucisano v. Lucisano, 200 Conn. 202, 206-07, 510 A.2d 186 (1986).

This rule is rife with possibilities for confusion and ambiguity,[21] and it creates precisely the scenario that the federal courts tried to avoid in adopting FRCP 58.

D. Post-Judgment Motions

Another important pre-appeal issue is the impact that the timely filing of post-judgment motions can have on the appeal. Especially in federal court, where the timely and proper filing of an appeal is ***jurisdictional***, it is critical that prospective appellants review the FRCP and FRAP and proceed very carefully after entry of "judgment."

The time period for filing a post-judgment motion in federal court differs depending upon the type of motion being filed. Although some post-judgment motions may be filed within a "reasonable time" or at any time,[22] the majority of post-judgment motions must be filed within ten days after entry of judgment.[23] Many of these post-judgment motions will toll the time to appeal, which normally would start to run upon the entry of judgment, if, but only if, the post-judgment motion is ***timely filed***.[24] A federal district court has ***no*** authority under ***any*** circumstances to extend the ten-day deadline for filing timely post-judgment motions that toll the appeal period, even if an opponent consents to the extension and even if the district court enters

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[21] *See generally* HORTON & BARTSCHI, *supra* note 12, § 63.1 Author's Comments, at 126-28 (discussing various court decisions interpreting when the time to appeal begins to run under P.B. § 63-1).

[22] For example, a motion for relief from the final judgment based on (a) mistake, inadvertence, surprise or excusable neglect, (b) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial, or (c) fraud, misrepresentation, or other misconduct of an adverse party, may be made within a reasonable time after judgment, not to exceed one year. FRCP 60(b). A motion for relief from the final judgment based on the fact that the judgment is void, the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or any other reason justifying relief from the operation of the judgment, must be made within a reasonable time after judgment. *Id*. A motion to correct clerical mistakes in the judgment or order may be made at any time. FRCP 60(a).

[23] For example, a motion for judgment notwithstanding the verdict must be made within ten days of the entry of judgment. FRCP 50(b). In addition, a motion to amend the court's factual findings or to make additional findings and amend the judgment accordingly must be made within ten days of the entry of judgment. FRCP 52(b). A motion for a new trial or to alter or amend the judgment also must be made within ten days after the entry of judgment. FRCP 59. The ten days excludes weekends and holidays. FRCP 6(a). In state court, time periods always include weekends and holidays unless the last day of the period falls on a weekend or holiday. P.B. § 63-2.

[24] *See* FRAP 4(a)(4)(A).

an order granting the extension of time.[25] This is a bright-line rule that is essential for anyone taking a federal appeal to understand. The Second Circuit has not hesitated to issue harsh rulings against those who do not follow this rule carefully.[26]

Similar to federal practice, some post-judgment motions in state court toll the time for taking an appeal.[27] By comparison to federal courts, however, state trial courts have the authority to grant an extension of time for a party to file such motions.[28]

Another noteworthy difference between post-judgment motions practice in the Second Circuit and the state courts is the courts' respective powers to grant motions for additur or remittitur. Although state court rules specifically refer to a motion for additur as a possible post-judgment motion a party may file,[29] additur is impermissible in federal court.[30] Both federal and

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[25] *See* FRCP 6(b) (a district court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e) and 60(b)").

[26] *See generally* Mark R. Kravitz, *Deadlines*, NAT'L L. J., Jan. 22, 2001 at A14. Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397 (2d Cir. 2000), is a good example of the draconian results that can occur if an appellant violates this important rule. In *Lichtenberg*, defendant Besicorp, after receiving consent from both the plaintiff and the district court, filed its motion for reconsideration one week past the ten-day deadline. The district court denied the motion two months later. Besicorp filed its notice of appeal within 30 days of the district court's denial of the motion (but clearly not within 30 days from the entry of the original judgment). The Second Circuit dismissed the appeal as untimely, stating that "[s]ince Besicorp's motion was not timely filed under Rule 59(e), it did not have the effect of extending Besicorp's time to appeal." *Id*. at 401. The fact that the plaintiff and the district court had agreed to the extension of time was of little import to the Second Circuit's strict application of the rules of practice.

[27] See P.B. § 63-1(c), which provides in relevant part that, "[i]f a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective, either a new twenty-day period or applicable statutory time period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion." The provision goes on to list the motions that fall into this category, including many of the same motions that toll the appeal period in federal court.

[28] *See, e.g.*, P.B. § 16-35 (ten-day period for filing post-judgment motions may be extended by court for good cause); *see also* P.B. § 60-2 (6) (noting that the court "may also, for example, on its own motion or upon the motion of any other party, . . . order that a party for good cause shown may file a late appeal"); Connecticut Light & Power Co. v. Lighthouse Landings, Inc., 279 Conn. 90, 102-06, 900 A.2d 1242, 1249-51 (2006) (using § 60-2 supervisory powers to allow late appeal where exceptional circumstances, beyond party's control, gave rise to the lateness).

[29] *See* P.B. §§ 16-35, 63-1.

state courts permit motions for remittitur and a plaintiff cannot appeal from an accepted remittitur in either court system.[31]

E. Perfecting the Trial Court Record

Another important element of the post-judgment, pre-appeal stage of litigation is perfecting the trial court record. This aspect of the appellate process is especially important to a potential appellant in state court, because the Practice Book makes it the appellant's responsibility to provide an adequate record for review.[32] It is the appellant's duty to make sure the trial court complies with the Practice Book provisions requiring a written or oral memorandum of decision in certain situations[33] and to ensure that any oral decisions are transcribed and signed by the judge in the event of an appeal.[34] If a trial judge does not file a written memorandum of decision or sign a transcript of the oral decision, the appellant may file notice with the appellate clerk that the decision has not been filed[35] and/or may move in the appellate court with jurisdiction over the appeal for an order that the trial court issue a memorandum of decision within a specified time.[36] Connecticut appellate courts have not

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[30] *See* Dimick v. Schiedt, 293 U.S. 474 (1935) (additur violates the Seventh Amendment's prohibition on re-examining facts found by the jury). The Seventh Amendment, and hence the *Dimick* holding with respect to additur, is not applicable to the states. *See generally* Mark R. Kravitz, *Handling Remittuturs*, THE NAT'L L. J., Nov. 6, 2000 at A18.

[31] *See* Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977) ("a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed"); Cohen v. Yale-New Haven Hosp., 260 Conn. 747 (2002) (dismissing plaintiff's appeal for lack of subject matter jurisdiction where he accepted remitted judgment, holding that "the plaintiff was required to decline the remittitur and appeal from the trial court's order granting a new trial").

[32] *See* P.B. § 61-10.

[33] According to P.B. § 64-1(a), the trial court must render its decision orally or in writing under certain specified circumstances. P.B. § 64-2(a) specifically states that an oral or written decision is not required in any uncontested matter, in any pendente lite family relations matter whether contested or uncontested, or in any dismissal for lack of diligence.

[34] P.B. § 64-1(a) states that if the trial court issues an oral decision, the decision shall be recorded by a court reporter and, if there is an appeal, a transcript shall be ordered of that portion of the proceedings in which the court stated its oral decision.

[35] P.B. § 64-1(b).

[36] P.B. § 60-2 states that the appellate court with jurisdiction over an appeal has supervisory power over the appeal, which includes the ability to "(1) order a judge to take any action necessary to complete the trial court record for the proper presentation of the appeal." The Appellate Court has implied that moving for an order directing the trial court to complete a decision is a requirement for perfecting the record on appeal. In State v. Pressley, 59 Conn. App.

hesitated to affirm a decision and/or decline to review a particular claim of error on appeal because of appellant's failure to create an adequate record on appeal.[37]

Properly perfecting the record for appeal in state court also includes moving for articulation or clarification whenever the trial court's decision is unclear or fails to address a relevant issue.[38] The appellate clerk forwards the motion to the trial judge, who may hear arguments or receive evidence on the motion.[39] Within 20 days of a judge's articulation, any party may move for further articulation.[40] In addition, if the trial court refuses to articulate or issues an inadequate articulation, the appellant must then, within ten days, seek appellate review of the trial judge's ruling in a motion for review.[41]

By contrast, it is ***not*** the appellant's responsibility in federal court to urge the trial court to issue a memorandum of decision or to articulate the grounds for its decision.[42] Although an

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77, 80, 755 A.2d 929 (2000), the Appellate Court refused to entertain defendant's claim that he was harmed by the trial court's delay in issuing a memorandum of decision, where defendant simply notified the appellate clerk that the trial court had not issued a decision (pursuant to P.B. § 64-1(b)), but never followed up with a motion for the Appellate Court to exercise its supervisory powers and order the trial court to issue the memorandum in a timely fashion (pursuant to P.B. § 60-2). Thus, under *Pressley*, if the trial court does not comply after receiving an order from the appellate clerk, an appellant must move for an order from the court with appellate jurisdiction in order to perfect the trial court record.

[37] *See, e.g.*, Cadlerock Props. Joint Venture, L.P. v. Comm'r of Envtl. Prot., 253 Conn. 661, 674-75, 757 A.2d 1 (2000) (refusing to review evidentiary issues when trial court did not state a reason for its decision on each claim, and appellant failed to move for an articulation or rectification to perfect the record).

[38] *See e.g., Cadlerock*, 253 Conn. at 674-75, 757 A.2d at 10 (appellant's failure to seek articulation is fatal to claim on appeal).

[39] *Id*.

[40] *Id*.

[41] *See* P.B. § 66-7; *see also* Highgate Condo. Ass'n v. Watertown Fire Dist., 210 Conn. 6, 21 553 A.2d 1126 (1989) (refusing to consider claim of error in trial court's denial of motion for articulation because appellant did not move for review in the appellate court).

[42] One exception to this rule is if the district court grants an injunction that it is required to support with factual findings pursuant to FRCP 52(a). In such a situation, if the court failed to make the required factual findings, the beneficiary of the injunction must file a motion for additional findings with the district court pursuant to FRCP 52(b) within ten days of entry of judgment. If a party fails to do so, on appeal of the injunction, the court of appeals will vacate the injunction and remand for further findings by the district court. *E.g.*, Shain v. Ellison, 273 F.3d 56, 67 (2d Cir. 2001) (remanding for district court to make requisite findings).

appellant is required to order a transcript of the district court proceedings if one is not already on file,[43] the appellant does not have to move for clarification or articulation of a district court's decision in order to receive review of its claim. Instead, either party or the district court itself may correct any errors or omissions from the record as needed.[44] If the district court makes corrections to the record after an appeal is pending, it may do so only with leave of the court of appeals.[45] In fact, the court of appeals itself may rectify an error or omission in the record or remand the case to the district court for supplementation of the record.[46] The Second Circuit's informal practice is to require the appellant to stipulate to a dismissal of the appeal pending correction of the record in the trial court, without prejudice to renewal of the appeal once the trial court acts to correct the record.[47]

F. Appealability

Once a trial attorney has preserved an issue in the trial court and perfected the trial court record, the next question is whether the order or judgment at issue is an appealable final judgment. The standards for determining when an order is an appealable final judgment are very similar in the state and federal courts.[48] One important difference, however, is that a state court's order setting aside a verdict and ordering a new trial is immediately appealable by statute,[49] whereas a similar federal court order is reviewable on appeal only after the new trial results in a final judgment.[50]

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[43] *See* FRAP 10(b)(1)(A).

[44] *See* FRAP 10(e)(2). The district court's power to correct or modify the record is limited to (1) differences about whether the record truly discloses what occurred in the district court; and (2) material omissions by error or accident. FRAP 10(e)(1) & (2).

[45] FRCP 60(a).

[46] *See* FRAP 10(e)(2)(C) & (3); *see also* Salinger v. Random House, Inc., 818 F.2d 252, 253 (2d Cir. 1987) (supplementing record on appeal).

[47] *E.g.*, Joseph Scott Co. v. Scott Swimming Pools, Inc., 764 F.2d 62, 66 n.3 (2d Cir. 1985).

[48] For example, the courts define "final judgment" in almost identical language. *E.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (final decision is one that "ends the litigation [of that claim] on the merits and leaves nothing for the court to do but execute the judgment"); Goodson v. State, 228 Conn. 106, 112, 635 A.2d 285 (1993) ("The test of a final judgment is if the rights of the parties are so concluded that further proceedings cannot affect them.").

[49] CONN. GEN. STAT. § 52-263.

[50] *See, e.g.*, Ortiz Del-Valle v. Nat'l Basketball Ass'n, 190 F.3d 598, 599 (2d Cir. 1999). The exception is when a district court grants a contingent new trial coupled with judgment as a matter of law. The latter is immediately appealable and, if reversed, allows the court of appeals to

Another important difference is the treatment of decisions that are final with respect to some claims but not final with respect to other claims in the same action. In federal court, a final decision on some but not all claims in a lawsuit is not appealable unless the district court makes an express determination that entry of judgment is appropriate and there is no reason to delay the appeal of those claims.[51] District courts may only make this determination and permit a party to appeal immediately if the final decision is "independent and inherently separable" from the remaining issues in the case.[52]

By contrast, a final decision in state court that disposes of all the claims in a complaint, counterclaim or cross-complaint—while leaving undecided the claims in a separate complaint, counterclaim or cross-complaint—is generally immediately appealable. The same rule applies if the court disposes of all claims by or against a particular party. A party may nonetheless seek to defer the appeal until the entire case is concluded by filing with the trial court a notice of intent to appeal within 20 days after issuance of the notice of a final decision.[53] However, if the trial court renders a final decision on one cause of action, without disposing of the entire complaint, counterclaim or cross-complaint, then the order is not an appealable final judgment unless "the trial court makes a written determination that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs."[54]

The state and federal courts use similar tests for determining whether to review certain interlocutory orders, with one important difference enunciated by the Connecticut Supreme Court. In federal court, pursuant to *Cohen v. Beneficial Indus. Loan Corp.*,[55] certain collateral orders may be appealed prior to a final judgment in the entire case, if the collateral order (a) conclusively determines the disputed question, (b) resolves an issue completely separate from the merits of the action, and (c) is effectively unreviewable on appeal from final judgment.[56] A party in federal court, however, may choose not to appeal a collateral order that is appealable under

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review the contingent new trial order as part of its pendent appellate jurisdiction. *E.g.*, Kirschner v. Office of Comptroller of City of New York, 973 F.2d 88, 95 (2d Cir. 1992).

[51] *See* FRCP 54(b).

[52] *See* Ginett v. Computer Task Group, Inc., 962 F.2d 1085, 1096 (2d Cir. 1992).

[53] *See* P.B. §§ 61-2, 61-3, 61-5.

[54] P.B. § 61-4.

[55] 337 U.S. 541 (1949).

[56] *See, e.g.*, Cuoco v. Moritsugu, 222 F.3d 99, 105-06 (2d Cir. 2000) (permitting collateral appeal of denial of motion for summary judgment on qualified immunity issue).

Cohen, without losing the ability to appeal the order after entry of final judgment on the entire case.[57]

Similarly, in state court, pursuant to S*tate v. Curcio*,[58] a party may appeal from a non-final judgment: "(1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them."[59] However, the Connecticut Supreme Court has held, in some circumstances, that a party who ***may*** file an appeal of an interlocutory order under *Curcio* ***must*** do so or else risk losing the right to appeal after a final judgment issues.[60] That approach is directly contrary to Second Circuit practice.

Moreover, both the Second Circuit and the state appellate courts may, in their discretion, hear an appeal of an interlocutory order if the order is central to the judgment in the case and prompt resolution of the dispute on appeal will aid the litigation. For example, in federal court, certain civil orders that are not otherwise appealable may be appealed if the district court makes a written determination that the order involves a controlling question of law as to which there is a substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation.[61] If the appellant then files a timely petition

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[57] *See, e.g.*, In re "Agent Orange" Prod. Liab. Litig. MDL No. 381, 818 F.2d 179, 181 (2d Cir. 1987) ("There is often little reason to deny review on appeal from a clearly final judgment on the theory . . . that an earlier order that did not terminate the entire proceeding was nonetheless so final as to have been appealable."); *see also* 15A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3909 at 305 n.38 (1976).

[58] 191 Conn. 27, 31-34, 463 A.2d 566 (1983).

[59] Genden v. Am. Airlines, 257 Conn. 520, 526, 778 A.2d 58 (2001); *see, e.g.*, Hartford Accident & Indem. Co. v. Ace Am. Reinsurance Co., 279 Conn. 220, 901 A.2d 1164 (2006) (holding that an interlocutory order denying plaintiff's demand that defendant post security constitutes a final judgment for the purposes of appeal when, *inter alia*, that order threatens the irrevocable loss of a right already secured and irreparable harm if an immediate appeal is not permitted).

[60] *See* In re Shamika F., 256 Conn. 383, 406, 773 A.2d 347 (2001) (an order of temporary custody is a *Curcio* final judgment, and any party with standing to challenge that order ***must*** do so at the time of the order; appeal at the end of the case is untimely); *see also* Thomas Scheffey, *Litigators Beware: Appeal Now or Pay Later, Waiting for Final Judgment may be Malpractice*, 27 CONN. L. TRIB. No. 25, at 6 (June 18, 2000) (discussing and criticizing the *Shamika* case). In In re Jeisean M., 270 Conn. 382, 404-05, 852 A.2d 643 (2004), the court upheld and applied the *Shamika F*. rule, affirming that an order of temporary custody is a *Curcio* final judgment, for which an appeal at the end of the case is an "impermissible collateral attack." Whether this rule has application beyond the realm of child protection services remains to be seen.

[61] S*ee* 28 U.S.C. § 1292(b).

for permission to appeal with the court of appeals, that court may grant the appellant permission to appeal. Parties in state court also may seek certification from the Chief Justice to appeal an interlocutory order that involves a matter of substantial public interest, if delay would work a substantial injustice.[62]

Similarly, the state appellate courts may entertain questions of law prior to final judgment upon certification or reservation by either state trial courts or federal district courts. For example, a federal district or appeals court may certify a question to the state Supreme Court, if the proceeding involves a question of Connecticut law that may be determinative of the cause and as to which it appears that there is no controlling precedent in the decisions of the Supreme Court of this state.[63] The Supreme Court may accept or reject the certification, or it may request the certifying court to provide further information on the facts of the case.[64] Similarly, a state trial court may order a reservation to a state appellate court if it determines that the question involved is reasonably certain to enter into the final determination of the case and that present determination by the court with appellate jurisdiction would be in the interest of simplicity, directness and economy in judicial action.[65] If the appellate court agrees with the trial court's determinations, the court may hear the appeal.[66]

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[62] *See* CONN. GEN. STAT. § 52-265a; P.B. § 83-1 through § 83-4. If the Chief Justice certifies the question, the appeal will be heard directly by the Supreme Court. *E.g.*, Babcock v. Bridgeport Hosp., 251 Conn. 790, 817-18, 742 A.2d 322 (1999).

[63] *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76-77 (1997) (urging federal courts of appeals to use certification to state courts in order to avoid deciding constitutional questions unnecessarily). For a lively discussion among three Second Circuit judges regarding the standards for certifying issues to the state court, see Tunick v. Safir, 209 F.3d 67 (2d Cir. 2000).

[64] *See* P.B. §§ 82-3 & 82-4.

[65] P.B. § 73-1.

[66] *See, e.g.*, Burke v. Fleet Nat'l Bank, 252 Conn.1, 8-9, 742 A.2d 293 (1999). Another procedure for immediate review of an interlocutory order in state court is found in P.B. § 77-1, which states that any person affected by a court order that prohibits the public or any person from attending any session of court, or any order that seals or limits the disclosure of files, affidavits, documents or the material on file with the court may seek review of such order by filing a petition for review with the Appellate Court within 72 hours after the issuance of the order. The Appellate Court must then have an expedited hearing on the petition for review. For recent examples of proceedings instituted pursuant to P.B. § 77-1, see State v. Kelly, 45 Conn. App. 142, 695 A.2d 1 (1997) (determining that trial court's decision to close the court to media during a retrial was unwarranted and unnecessary in order to preserve defendant's right to a fair trial), and Vargas v. Doe, 96 Conn. App. 399, 900 A.2d 525 (2006) (concerning orders that parties may appear anonymously).

Finally, there is one proviso that must be added with respect to the appealability of preliminary injunctions. In federal court, an order granting or denying a preliminary injunction is immediately appealable.[67] In state court, however, an order granting or denying a preliminary injunction is an unappealable interlocutory order,[68] with some statutory exceptions.[69]

III. THE APPEAL PROCESS

A number of important issues arise during the process of filing and arguing an appeal before the Second Circuit and the state appellate courts. For example, a threshold issue in both court systems is in what court one files the appeal. This is particularly crucial in the federal courts, where filing a timely notice of appeal is jurisdictional. Properly presenting the argument in a timely and properly formatted brief and appendix is also an important part of the appeal process in both systems. Finally, the procedures followed during the oral argument stage of an appeal are crucial, as oral argument can have a significant impact on the outcome of a case. Each of these important stages in the appeal process is highlighted in this next section.

A. To which Court do you Appeal?

The first step in filing any appeal in state or federal court is determining which court has jurisdiction over your appeal. This is particularly an issue in the state court system, which has two levels of appellate courts—the Appellate Court and the Supreme Court. With some limited exceptions, appeals in state court go directly to the Appellate Court in the first instance.[70] However, the Supreme Court may—and often does—*sua sponte* or upon motion by a party, transfer an appeal in the Appellate Court to itself.[71]

The issue of what court has jurisdiction over an appeal also arises in the federal system. Although appeals from a district court or bankruptcy court within the Second Circuit generally are heard by the Court of Appeals for the Second Circuit, there are some limited exceptions to this rule. For example, some final judgments are directly appealable to the United States Supreme Court.[72] Moreover, all patent and plant variety protection actions must be heard by the

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[67] *See* 28 U.S.C. § 1292(a); *see also* Cuomo v. Barr, 7 F.3d 17, 19-20 (2d Cir. 1993).

[68] *See, e.g.*, City of Stamford v. Kovac, 228 Conn. 95, 99-100, 634 A.2d 897 (1993).

[69] For example, by statute, the grant or denial of a preliminary injunction in labor cases is appealable within 14 days. *See* CONN. GEN. STAT. § 31-118.

[70] CONN. GEN. STAT. § 51-199(b) lists the matters that are heard directly by the Supreme Court, including any matter in which a trial court declared a state statute unconstitutional and any appeal involving a conviction for a capital felony.

[71] *See* CONN. GEN. STAT. § 51-199(c); P.B. § 65-1 through § 65-4.

[72] *See* 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or

Court of Appeals for the Federal Circuit.[73] In some instances, an appellant may have a choice between bringing the appeal in the Second Circuit or the Court of Appeals for the D.C. Circuit.[74] Thus, in either court system, it is important to consider carefully which court(s) may hear your appeal in order to strategize about where you would like to or must file the appeal.[75]

B. Time to Appeal

Filing the appeal on time is critical, especially in federal court, because the U.S. Supreme Court has held that a timely notice of appeal is jurisdictional.[76] Thus, federal courts of appeals lack the authority to entertain an untimely appeal.[77] Unlike their federal counterparts, the appellate courts of Connecticut do have the discretion to entertain an untimely appeal in some circumstances.[78] However, they exercise that discretion only in exceptional cases.[79] The

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permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.").

[73] *See* 28 U.S.C. § 1295(a)(4) & (a)(8). *See generally* The Holmes Group v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002).

[74] For example, Tax Court decisions may be appealed either to the court of appeals where the parties are located or, under certain circumstances, to the Court of Appeals for the D.C. Circuit. *See* 26 U.S.C. § 7482(b)(1). Similarly, many administrative statutes provide for review of an agency decision in the Court of Appeals for the D.C. Circuit or the court of appeals that has personal jurisdiction over the parties. *See* 29 U.S.C. § 160(e) & (f) (governing appeals from a decision of the NLRB). In Connecticut, review of an agency decision is generally initiated with a petition to the trial court (Superior Court) in New Britain. CONN. GEN. STAT. § 4-183(f).

[75] Although federal notices of appeal are filed in the district court, the notice must specify the correct court of appeals or the appeal will be dismissed as jurisdictionally defective. FRAP 3(c)(1)(C). Taking a state court appeal to the wrong appellate court (Appellate Court or Supreme Court) is not a jurisdictional defect. *See* TAIT & PRESCOTT, *supra* note 15, § 4.31 at 182-83.

[76] *See* United States v. Robinson, 361 U.S. 220, 229 (1960). Despite this jurisdictional element, the district court may extend the time for filing a notice of appeal with certain limitations. See discussion on extensions of time, *infra* at notes 89-91 and surrounding text.

[77] *E.g.*, Cohen v. Empire Blue Cross & Blue Shield, 142 F.3d 116, 118 (2d Cir. 1998).

[78] Where the time period is set by statute and intended to be jurisdictional, however, an untimely appeal must be dismissed. *See* TAIT & PRESCOTT, *supra* note 15, § 4.14 at 159.

[79] *E.g.*, Ramos v. Comm'r of Corr., 248 Conn. 52, 61, 727 A.2d 213 (1999) ("[A]ppellate tribunals must exercise their discretion to determine whether a late appeal should be permitted to be heard. . . . In the exercise of that discretion, the Appellate Court has adopted a policy that, in other than exceptional cases, the need to address cases that were filed timely outweighs the need to permit appeals that are in fact late."); *see also* Alliance Partners, Inc. v. Voltarc

bottom line is that, in either court system, filing a timely appeal is a necessary prerequisite to any appeal, and counsel should take extra care to ensure that the appeal is timely.

The time periods for filing an appeal differ in state and federal courts. In federal court, with certain exceptions,[80] an appeal in a civil case must be filed within 30 days after the entry of the judgment.[81] However, if one party files a timely notice of appeal, any other party may file a notice of appeal within 14 days of the first notice of appeal, even if the 14 days exceeds the original 30-day appeal period.[82] In state court, an appeal must be filed within 20 days from the date notice of judgment or decision is given,[83] although as in federal court there are some exceptions to this general rule.[84] An appellee aggrieved by the decision below (not "any other party," as in federal court) may file a cross-appeal within ten days from the filing of an appeal,[85] presumably even if the ten days exceeds the original 20-day appeal period.

Technologies, Inc., 263 Conn. 204, 213-15 (2003) (affirming Appellate Court's broad discretion to deny permission to file a late appeal).

[80] For example, if the United States or its officer or agency is a party to an action, any party may file a notice of appeal within 60 days after the judgment or order appealed from is entered. FRAP 4(a)(1)(B). Furthermore, a notice of appeal from a decision of the United States Tax Court must be filed within 90 days after the entry of the Tax Court's decision. FRAP 13(a)(1). The time to appeal in criminal cases differs for the defendant and the government—while a defendant's notice of appeal must be filed within ten days of the later of either the judgment or the order being appealed or the filing of the government's notice of appeal, the government has 30 days to appeal from the later of the entry of the order being appealed or the filing of a notice of appeal by the defendant. FRAP 4(b)(1). Writs of error *coram nobis* are governed by the civil 30-day appeal period, not the appeal period for criminal cases. *See* FRAP 4(a)(1)(C).

[81] FRAP 4(a)(1)(A). An appellant may file an appeal prior to the formal entry of judgment. *See* Bankers Trust Co. v. Mallis, 435 U.S. 381, 387 (1978); Selletti v. Carey, 173 F.3d 104, 109-10 (2d Cir. 1999); *see also* FRAP 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document when required by Federal Rules of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.").

[82] FRAP 4(a)(3).

[83] P.B. § 63-1(a) & (b).

[84] For example, a decision on a mechanic's lien must be appealed within seven days of "the order." *See* CONN. GEN. STAT. § 49-35c. CONN. GEN. STAT. § 47a-35 provides only five days (excluding Sundays and legal holidays) to appeal in any summary process case. The grant or denial of any temporary injunction in a labor case must be appealed within 14 days of the order. *See* CONN. GEN. STAT. § 31-118.

[85] P.B. § 61-8.

Both the federal district courts and state trial courts have a limited authority to extend the appeal periods upon motion by a party. In federal court, the district court may extend the period to take an appeal no more than 30 days after the 30-day appeal period expires, upon a showing of excusable neglect or good cause.[86] The federal rules do not require a motion for extension of time be filed before the expiration of the appeal period. Instead, the rule provides that a motion filed before the expiration of the original appeal period may be made *ex parte*, while a motion filed after the expiration of the prescribed time to appeal must be certified to all parties.[87] No extension may exceed 30 days after the expiration of the original appeal period, or, in the event a motion for extension of time is made near the end of the permitted 30 days after the expiration of the original appeal period, the extension may be for ten days after the order granting the motion for extension of time is entered.[88] For example, if a party seeks an extension of time 40 days after judgment, the district court can grant the extension, permitting the appeal to be filed within the next 20 days. If the party seeks an extension of time 55 days after judgment, however, the court can grant a ten-day extension of time to file the appeal, even though the total time period in those circumstances would exceed 60 days. The district court may not grant extensions beyond those permitted in the rule.[89] Moreover, the court of appeals may not extend the time for filing a notice of appeal, under any circumstances.[90] Thus, if the district court does not grant a timely extension of time or a motion to reopen the judgment,[91] an appellant in federal court seeking to file an appeal more than 30 days after judgment enters is completely out of options.

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[86] FRAP 4(a)(5). A party filing a motion for extension of time before the appeal period expires or within the 30 days after the appeal period expired may show ***either*** excusable neglect ***or*** good cause to receive an extension of time. *See* FRAP 4(a)(5)(A)(ii).

[87] FRAP 4(a)(5)(B).

[88] FRAP 4(a)(5)(C).

[89] *See* Endicott Johnson Corp. v. Liberty Mut. Ins. Co., 116 F.3d 53, 56 (2d Cir. 1997) (district court improperly granted multiple extensions of time to file the appeal, and court of appeals thereafter had no jurisdiction to hear the appeal).

[90] FRAP 26(b)(1). *See generally*, M. Kravitz, *Deadlines*, *supra* note 26.

[91] In addition to granting a motion for extension of time to file an appeal, the district court may reopen the time to file an appeal for a period of 14 days if ***all*** of the following conditions are satisfied: (a) the court finds that the moving party did not receive notice under FRCP 77(d) of the entry of judgment or order sought to be appealed within 21 days after its entry; (b) the motion to reopen is filed within 180 days after the judgment or order is entered or within seven days after the moving party received notice under FRCP 77(d) of the entry, whichever is earlier; and (c) the court finds that no party would be prejudiced. *See* FRAP 4(a)(6). In *Bowles v. Russell*, 127 S. Ct. 2360 (2007), the Supreme Court held that the time limit of 14 days for reopening an appeal pursuant to FRAP 4(a)(6) is jurisdictional and mandatory. *See* 28 U.S.C. § 2107(c). *Bowles* overrules *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (*per*

Unlike in federal court, the state trial judge may not grant a motion for extension of time that is filed after the original appeal period has expired.[92] The judge who tried the case may, for good cause shown, extend the time limit for filing an appeal for an additional 20 days beyond the original appeal period.[93] However, a motion for extension of time in state court must be filed at least ten days before the expiration of the original time period unless cause for such extension arises within the remaining ten days.[94] If an appellant fails to move for an extension of time prior to the expiration of the appeal period, the state appellate courts may grant a motion for extension of time, pursuant to their supervisory powers.[95] This is vastly different from the rule in the federal system, where courts of appeal have no power to entertain untimely appeals.[96] The state appellate courts rarely grant extensions of time, however, and relying on this procedure makes an appeal susceptible to a motion to dismiss.[97]

As mentioned earlier, certain post-judgment motions will toll the appeal period in both federal and state courts, serving as an unofficial extension of time. In federal court, a number of

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curiam), and *Thompson v. INS*, 375 U.S. 384 (1964) (*per curiam*), to the extent that they purported to authorize an exception to the jurisdictional rule under the "unique circumstances" rule.

[92] *See* In re Karen R., 45 Conn. Supp. 255, 257, 717 A.2d 856 (1998).

[93] P.B. § 66-1. The trial judge may not extend the appeal period, however, for any of the statutory exceptions to the 20-day appeal period if the legislature intended the statutory time period to serve as a limit on the appellate court's subject matter jurisdiction. *See, e.g.*, Ambroise v. William Raveis Real Estate, 226 Conn. 757, 760-762, 628 A.2d 1303 (1993) (seven-day appeal period for pre-judgment remedies is mandatory and jurisdictional). *But see* Iovieno v. Comm'r of Corr., 242 Conn. 689, 694-700, 699 A.2d 1003 (1997) (ten-day period for filing a petition for certification to appeal from a habeas corpus judgment can be extended).

[94] P.B. § 66-1(c)(4). Also, "[w]here a motion for extension of the period of time within which to appeal has been filed at least ten days before expiration of the time limit sought to be extended, the party seeking to appeal shall have no less than ten days from issuance of notice of denial of the motion to file the appeal." *Id*. § 66-1(a).

[95] P.B. § 60-2(6); *see also* State v. Stead, 186 Conn. 222, 227-28, 440 A.2d 299 (1982).

[96] *Compare Cohen*, 142 F.3d at 118, *with Stead*, 186 Conn. at 227-29, 440 A.2d at 301-02.

[97] *E.g.*, Teguis v. Reber, 235 Conn. 471, 473, 667 A.2d 551 (1995). Of note, a motion to dismiss an appeal as untimely must be filed within ten days of the appeal or the untimeliness is waived. P.B. § 66-8; *see also* Bio-Polymers, Inc. v. D'Arrigo, 23 Conn. App. 107, 109 n.2, 579 A.2d 12 (1990). This is in stark contrast to the rule in federal court, where a timely appeal is jurisdictional and untimeliness can be raised at any time or by the court *sua sponte*.

post-judgment motions[98] will toll the appeal period, if they are timely filed, until the entry of the order disposing of the last such remaining motion.[99] In addition, when a district court grants a motion for remittitur, the time for taking an appeal does not begin to run until the plaintiff accepts the remittitur or the time for acting on it expires.[100] An ***untimely*** post-judgment motion will ***not*** toll the appeal period in federal court, even if the district court grants an extension of time to file the motion.[101] Because of this rule, a potential appellant unsure about the timeliness of its post-judgment motions or whether a particular post-judgment motion will serve to toll the appeal period is well-advised to file the notice of appeal within 30 days after the entry of judgment, even if the post-judgment motions are pending.[102] An appellant does not lose the right to appeal by filing a premature appeal. In fact, FRAP 4(a)(4)(B)(ii) specifically provides for the filing of an amended notice of appeal if the district court rules on post-judgment motions after a notice of appeal has been filed. Thus, whenever there is doubt regarding the timeliness of an appeal, the best practice is to file the notice of appeal, because a premature notice is not harmful but an untimely notice is fatal.

In state court, the 20-day period starts anew if a motion is filed within the appeal period that, if granted, would render the judgment, decision or acceptance of the verdict ineffective.[103]

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[98] Specifically, motions for judgment under FRCP 50(b), motions to amend or make additional factual findings under FRCP 52(b), motions for attorney's fees under Rule 54 if the district court extends the time to appeal under FRCP 58, motions to alter or amend the judgment under FRCP 59, motions for a new trial under FRCP 59, or motions for relief under FRCP 60 if the motion is filed no later than 10 days after the judgment is entered. *See* FRAP 4(a)(4).

[99] A separate judgment is not necessary after a court rules on post-judgment motions. FRAP 4(a)(7).

[100] *See* Ortiz Del-Valle v. Nat'l Basketball Ass'n, 190 F.3d 598, 600 (2d Cir. 1999); *see also* M. Kravitz, *Handling Remittuturs, supra* note 30.

[101] FRAP 4(a)(4); *see also* Lichtenberg v. Besicorp Group Inc., 204 F.3d 397 (2d Cir. 2000), discussed *supra* note 26.

[102] FRAP 4(a)(4)(B) provides that "[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered."

[103] Such motions include: motions to open or set aside the judgment, set aside the verdict, for a new trial, judgment notwithstanding the verdict, reargument of the judgment or decision, collateral source reduction, additur, and remittitur. Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision, a written or transcribed statement of the trial court's decision, or reargument of any motion listed above that does toll the appeal period. *See* P.B. § 63-1(c).

In the event of such motions, the appeal period begins on the day that notice of the ruling on the last outstanding motion is given, except that with respect to motions for additur and remittitur, the appeal period begins from the date of (a) acceptance of the additur or remittitur, or (b) the expiration of the time for acceptance, whichever comes first.[104]

C. Filing an Appeal as of Right

In both state and federal appellate courts, certain appeals are guaranteed as of right, while other appeals are permitted at the discretion of the court. The procedures for filing an appeal differ depending upon whether it is an appeal as of right or discretionary. Furthermore, with respect to appeals as of right, the Second Circuit and the state appellate courts have different procedures for filing the notice of appeal, the amount of the filing fee, and the necessity of additional paperwork to perfect the appeal.

First, a party appealing as of right in federal court must file the original notice of appeal with the district court,[105] including enough copies to enable the district court clerk to serve a copy on each counsel of record and to the clerk of the court of appeals.[106] It is very important in federal court to include the names of each and every appellant in the notice of appeal.[107] The timely filing of the notice of appeal transfers jurisdiction over the case from the district court to the court of appeals immediately and automatically.[108] The transfer of jurisdiction is complete and the district court thereafter lacks the authority to issue any orders touching on the substance

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[104] P.B. § 63-1(c).

[105] If a party accidentally files the notice with the court of appeals, the clerk of that court will indicate on the notice the date when it was received and send it to the district court clerk. The notice is then considered filed in the district court on the date indicated by the court of appeals clerk. FRAP 4(d).

[106] FRAP 3(a) & (d).

[107] *See* FRAP 3(c)(1)(A). Although this rule at one time was very harsh, *see, e.g.*, Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) (dismissing appeal because appellant was not specifically named in notice of appeal; use of "et al." after first appellant's name insufficient), the 1993 amendments to FRAP 3 relaxed the rule a little. *See* 16A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3d (hereinafter "16A WRIGHT, MILLER & COOPER") § 3949.4 at 77-82 (1999). FRAP 3(c)(1)(A) now states that "an attorney representing more than one party may describe those parties in such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al." or "all defendants except X." Furthermore, FRAP 3(c)(4) provides that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice."

[108] *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.1 at 39-40.

of the matter on appeal,[109] with some exceptions.[110] Once the notice of appeal is filed, the district court clerk must send the notice of appeal to the appeals court clerk, who is responsible for docketing the appeal in the court of appeals.[111] A federal appeal is perfected once the notice of appeal is filed with the district court.[112]

In state court, the appellant also must file the original appeal form in the trial court, not the appellate court.[113] However, as opposed to federal court, where the trial court clerk sends the appeal form directly to the appellate court for docketing, a state trial court clerk will send or give the endorsed appeal form back to the appellant, together with a DS1 docket sheet listing the counsel for all parties.[114] The appellant is then responsible for filing the endorsed appeal form, the DS1 docket sheet and the additional required papers, discussed *infra*, with the appellate clerk's office in order to perfect its appeal.[115] This is an important distinction. A federal appeal is perfected when the notice is filed with the district court, whereas a state appeal is not perfected until the appeal papers are filed with the appellate court.

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[109] *E.g.*, Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 107-08 (2d Cir. 1981); *see also* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.1 at 41-53.

[110] Notably, the filing of a notice of appeal does not prevent the district court from ruling on pending post-judgment motions. *See* FRAP 4(a)(4)(B). Similarly, the district court retains jurisdiction to perform certain ministerial tasks that help preserve the status quo or aid in the progress of the appeal. *E.g.*, Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 564-65 (2d Cir. 1991); *see also* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.1 at 41-53.

[111] FRAP 3(d); FRAP 12(a).

[112] *See* FRAP 3(a)(2); *see also* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.1 at 39. Where more than one notice of appeal is filed in a case, the party that files the notice of appeal first is the appellant. If the notices are filed on the same day, the plaintiff in the proceeding below is the appellant. *See* FRAP 28.1(b).

[113] Unlike in federal court, the state appellate rules do not specify the contents of the notice of appeal, and there is no state precedent to the effect that failing to name an appellant in the notice is fatal to that appellant's claims. However, the notice of appeal form for civil matters used in state court does state "Where there are multiple parties, specify the name of the individual party(ies) filing this appeal." *See* Appeal - Civil Form, available at http://www.jud2.ct.gov/webforms/forms/sc028.pdf .

[114] P.B. § 63-3.

[115] *See, e.g.*, TAIT & PRESCOTT, *supra* note 15, § 5.1 at 199. The additional papers must be filed "forthwith," P.B. § 63-3, with no particular time limit after the appeal is filed in the trial court.

Second, the filing fees for an appeal as of right in state and federal court differ. In federal court, an appellant must pay a total of $255, which consists of a $5 fee to the district court and a $250 court of appeal docketing fee.[116] Similarly, an appellant must pay a $250 filing fee for an appeal to either the Connecticut Appellate Court or the Supreme Court.[117] In both state and federal appeals courts, the fee must be paid to the trial court with the notice of appeal.[118] However, in federal court, failure to pay the required fees with the notice of appeal is not a jurisdictional defect, and the district court clerk cannot refuse to file the notice of appeal because the fee has not been paid.[119] By contrast, a state trial court clerk must endorse on the original appeal form the receipt, or waiver, of fees.[120] Thus, payment of the fee is an important prerequisite to filing a timely appeal in state court.

Neither the federal nor the state systems currently requires an automatic bond for costs on appeal,[121] although a federal district court or the state appellate court having jurisdiction over the appeal may order a cost bond at any time.[122] In federal court, any party unable to pay the filing

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[116] 28 U.S.C. § 1917 provides for a $5 fee to be paid to the clerk of the district court; 28 U.S.C. § 1913 provides that "[t]he fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits," with the most recent being a $250 fee. Pursuant to FRAP 3(e), both fees are paid to the district court clerk, who accepts the appellate docket fee on behalf of the court of appeals.

[117] *See* CONN. GEN. STAT. § 52-259.

[118] FRAP 15(e); P.B. § 63-5.

[119] *See* Parissi v. Telechron, Inc., 349 U.S. 46, 47 (1955) (*per curiam*) (holding "that the Clerk's receipt of the notice of appeal within the 30-day period satisfied the requirements of § 2107, and that untimely payment of the § 1917 fee did not vitiate the validity of petitioner's notice of appeal"); *see also* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.3 at 56-57.

[120] *See* P.B. § 63-3.

[121] Both the federal and state appellate courts at one time required an automatic bond for costs on appeal. In the state court, the required bond was $400, but this requirement was eliminated in 1996. *See* P.B. § 63-5, and official commentary to the 1996 amendments. In the federal court, the required bond of $250 was eliminated in 1979. *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3953 at 291-92.

[122] FRAP 7 provides that the district court may order a bonds for costs "in any form and amount necessary to ensure payment of costs on appeal." It is entirely within the district court's discretion whether to require a bond and, if so, to set the amount of the bond. *See generally* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3953 at 291-93. In contrast, P.B. § 63-5 states that "security may at any time, on motion and notice to the appellant, be ordered by the court." The official commentary to the 1996 amendments to this section clarify that the "court" is the

fee or costs on appeal may move in the district court to proceed *in forma pauperis*.[123] In state court, an indigent party may seek a waiver of the fee by filing an application for waiver of fees with the trial court within the time period permitted for filing the appeal.[124]

Third, the additional papers required to perfect the appeal differ slightly in state and federal court. In federal court, the appeal is deemed "perfected" as soon as the notice of appeal is filed in the district court.[125] However, the federal courts of appeals do require the appellant to file a few additional papers after filing the notice of appeal. In the Second Circuit, an appellant must file the following papers with the appellate court clerk within ten days of filing the notice of appeal with the district court clerk: (1) a statement by the attorney who filed the appeal, naming the parties that the attorney represents on appeal;[126] (2) an original and one copy of a pre-argument statement (Form C or Form C-A), detailing information such as the case name, whether the appeal is as of right or mandatory, a brief description of the action and result below, the issue proposed to be raised on appeal, the relief sought, and whether any cases presenting similar issues are currently pending or soon to be brought before the Second Circuit;[127] (3) the appeal transcript information form (Form D), which requires the appellant to indicate whether a transcript has been ordered and, if not, the reasons why a transcript has not been ordered;[128] and

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court having appellate jurisdiction over the case. Note this difference between federal and state procedure—in federal court, the ***trial court*** may order a bond for costs; in state court, such an order must be made by the ***appellate court***.

[123] *See* FRAP 24.

[124] *See* P.B. §§ 63-6 & 63-7. Section 63-6 applies not only to the indigent, but also to those with either a statutory or constitutional right to court appointed counsel; or, a statutory right to appeal without payment of fees, costs and expenses. P.B. § 63-6 has been revised as of 2006, in accordance with In re Jeisean M., 74 Conn. App. 233, 812 A.2d 80 (2002), aff'd, 270 Conn. 382, 852 A.2d 643 (2004), which held that a trial court may not consider the merits of a proposed appeal in considering an application for waiver of fees, but may consider the proposed issues on appeal in determining the ***extent*** to which fees or costs should be waived. The revised § 63-6 now provides that the judge's permission is required for each expense, including court transcripts, in excess of $100.

[125] *See* FRAP 3(a)(2); *see also* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.1 at 39.

[126] FRAP 12(b).

[127] *See* Second Circuit Local Rules, Appendix Part C, ¶ 3(a).

[128] FRAP 10(b); Second Circuit Local Rules, Appendix Part C, ¶ 3(b). If a transcript of the proceedings below is unavailable, an appellant may file a statement of the evidence or proceedings from its own recollection. FRAP 10(c). The appellant must serve its statement of the proceedings on the appellee, which may object or propose amendments to the statement

(4) a copy of each order, judgment, or decision of a district court or agency, whether written or transcribed from an oral proceeding, from which review is sought.[129] Furthermore, FRAP 44 requires any party that questions the constitutionality of an Act of Congress in a proceeding in which the United States is not a party to give written notice to the circuit clerk immediately, so that the clerk can notify the Attorney General.[130]

A state court appellant must file a number of additional papers with the appellate clerk's office ***at the same time*** it files the original endorsed appeal form and the docket sheet, in order to perfect the appeal:[131] (1) a preliminary statement of the issues, which must list all issues to be raised on appeal (if an issue in the appeal is not listed in the preliminary statement, to the prejudice of an opposing party, the court may refuse to entertain the issue);[132] (2) a preliminary designation of the specific pleadings in the trial court case file that the appellant deems necessary to include in the appellate "record," including their dates of filing with the trial court and, if applicable, their number as listed on the docket sheet;[133] (3) a copy of the transcript order acknowledgement form filed with the court reporter,[134] or a certificate stating that no transcript is necessary;[135] (4) a docketing statement containing information regarding the parties on appeal,

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within ten days after being served. The district court then resolves any objections or proposed amendments to the statement of proceedings.

[129] Second Circuit Local Rules, Appendix Part C, ¶ 3(e). In the Second Circuit, failure to file a Form C or C-A (appeal information) and a Form D (transcript information) within ten days of the appeal will lead to dismissal of the appeal. *See* Second Circuit Clerk's Office, *2d Circuit Handbook* (hereinafter "*2d Circuit Handbook*") at 19. This "treatise" on practice in the Second Circuit is published by the Clerk's Office and available at http://www.ca2.uscourts.gov/.

[130] In addition, a party challenging the constitutionality of a ***state*** statute, where the state is not a party to the action, must notify the clerk immediately, so that the clerk may notify the Attorney General of that state. *See* FRAP 44(b).

[131] *See generally* TAIT & PRESCOTT, *supra* note 15, §§ 4.16-4.25 at 162-74.

[132] P.B. § 63-4(a)(1). The preliminary statement of issues may be amended as of right until the appellant files its brief.

[133] P.B. § 63-4(a)(2). This preliminary designation of the pleadings may be amended as of right until the appellant files its brief.

[134] P.B. § 63-4 and P.B. § 63-8 require the appellant to order an ***electronic version*** of the transcript at the time the appeal is filed even if a hard copy of the transcript has been previously delivered.

[135] P.B. § 63-4(a)(3). Once the transcript form is filed, an appellant may amend it only with leave of the court. Upon receipt of a certificate of completion from the court reporter, counsel who ordered the transcript must forward the certificate to the appellate clerk, with a certification

all persons having legal interest in the appeal, all pending appeals that arise from substantially the same controversy as the cause on appeal, whether there were exhibits in the trial court, and, in criminal cases, whether or not the defendant is incarcerated as a result of the proceedings from which appeal is taken;[136] (5) a pre-argument conference statement, which includes information on the possibility of settlement and resolution of the appeal;[137] and (6) a draft judgment form, prepared pursuant to P.B. section 6-2.[138] In addition, any party in a non-criminal matter who challenges the constitutionality of a state statute must file a notice with the clerk identifying the statute, the name and address of the party challenging it, and whether the statute's constitutionality was upheld by the trial court.[139] It follows from the above descriptions that filing an appeal in state court is somewhat more paper-intensive than filing an appeal in the Second Circuit.

Fourth, both the federal and state courts permit joint and consolidated appeals, although the Practice Book provides far greater guidance than the federal rules regarding the handling of such appeals. FRAP 3(b) provides that two or more parties may file a joint notice of appeal when they each are entitled to appeal and their interests make joinder practicable.[140] Parties filing a joint notice of appeal in the district court need only pay one filing fee and are treated as a single appellant for briefing and other purposes.[141] Furthermore, when two or more parties have filed separate timely notices of appeal, the Second Circuit may join or consolidate the appeals on motion or *sua sponte*.[142] Other than providing for joint and consolidated appeals, the federal rules do not provide guidance on the procedures applicable to such appeals.[143]

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that a copy of the transcript has been sent to all counsel of record. The appellant then must file the transcript with the appellate clerk on or before filing its brief.

[136] P.B. § 63-4(a)(4). Amendments to the docketing statement may be filed at any time.

[137] P.B. § 63-4(a)(5). Amendments to the pre-argument conference statement can be made orally at the conference, if one is held.

[138] P.B. § 63-4(a)(6).

[139] *See* P.B. § 63-4(a)(7).

[140] FRAP 3(b)(1).

[141] *See* Second Circuit Rules Relating to the Organization of the Court (hereinafter "Second Circuit Organization Rules") 0.17; United States v. Suarez, 880 F.2d 626, 629 (2d Cir. 1989) (where "issues posed on . . . appeal have general application," joint notice of appeal, put forward under the authority of counsel for one of the appellants, is proper).

[142] FRAP 3(b)(2).

[143] *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.2 at 55 (citing United States v. Tippett, 975 F.2d 713, 716 (10th Cir. 1992), for the proposition that "there is a dearth of guidance about the effects of consolidation in the federal appeals court"). Some have suggested

The state appellate rules, by contrast, devote a lengthy section of the Practice Book to joint and consolidated appeals.[144] Under that section, two or more plaintiffs or defendants in the same case may appeal jointly or severally. Furthermore, separate cases heard together and involving at least one common party may as of right be appealed jointly. Upon motion or *sua sponte*, a trial court may order that a joint appeal be filed at any time prior to the filing of an appeal. When parties file a joint appeal, only one entry fee is required. Furthermore, either the Appellate Court or Supreme Court may, on motion or *sua sponte*, order that two or more cases pending before it be consolidated, and the Supreme Court may even transfer a case pending before the Appellate Court to itself in order to consolidate that case with a case pending before the Supreme Court. Fees already paid cannot be refunded when appeals are consolidated. Whenever appeals are filed jointly or consolidated, a single "record" is created. All appellants must file a single consolidated brief and all appellees must file a single consolidated brief, unless the Chief Judge or Chief Justice, upon a written request from the parties, grants permission to file a separate brief.[145]

Fifth, as with joint and consolidated appeals, the state appellate rules also provide greater guidance than the federal rules on the subject of amended appeals. One possible reason for this is that, unlike the federal district courts, the state trial courts appear to retain greater authority to issue orders within their jurisdiction while an appeal is pending.[146] Thus, P.B. section 61-9 provides that if the trial court makes a decision that the appellant wishes to have reviewed after the appellant has filed its notice of appeal, the appellant may file an amended appeal within 20 days of the issuance of notice of the decision. The amended appeal must comply with the requisites for the original appeal, discussed above, except that no new fee is required. If the amended appeal is filed after briefing has occurred, a party that already has filed its brief may move for leave to file a supplemental brief. The rules state that if an appellant files a second appeal in the same case, instead of following the procedures for an amended appeal, the court shall treat the papers as an amended appeal without refunding any of the fees paid for the second appeal.[147]

There is no similar provision in the federal appellate rules, perhaps because the district courts for the most part have no authority to issue orders once an appeal is pending. The one

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that FRCP 42(a) may be relevant and analogous in interpreting FRAP 3(b). *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.2 at 55.

[144] *See* P.B. § 61-7.

[145] *Id*.

[146] *See* Ahneman v. Ahneman, 243 Conn. 471, 482-83, 706 A.2d 960 (1998). In contrast, the federal district courts for the most part lose jurisdiction over a case in which an appeal is pending. *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3949.1 at 39-53.

[147] P.B. § 61-9.

exception to this rule is where a party files a notice of appeal before the district court has ruled on outstanding post-judgment motions; in that case, the district court may rule on the post-judgment motions and the appellant may file an amended notice of appeal within 30 days after disposition of the post-judgment motions without paying an additional fee.[148] Furthermore, the courts of appeals will permit an appellant to amend a notice of appeal to correct technical defects or substantive matters within the original appeal period.[149] Some courts will permit technical defects in the notice to be corrected beyond the original 30-day appeal period, but no court of appeals permits substantive amendments to a notice of appeal beyond the prescribed time to appeal.[150]

D. Filing a Discretionary Appeal

In federal court, the procedure for filing a discretionary appeal is very different from the procedure for filing an appeal as of right. As noted above, certain civil orders that are not otherwise appealable may be appealed if the district court makes a written determination that the order involves a controlling question of law as to which there is a substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation.[151] In such circumstances, the appellant must file a petition for permission to appeal within ten days after the entry of the order.[152] The ten-day filing period is jurisdictional, although the district court may amend or recertify its order to restart the ten-day period.[153] The petition may not exceed 20 pages without the court's permission and must include the following: (1) the facts necessary to understand the question presented; (2) the question itself; (3) the relief sought; (4) the reasons why the appeal should be allowed and is authorized by a statute or rule; (5) an attached copy of the order, decree or judgment complained of; and (6) any order stating the district court's permission to appeal or finding that the necessary conditions are met.[154] The original petition and three copies must be filed with the clerk of the court of

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[148] FRAP 4(a)(4)(B)(ii) & (iii).

[149] *See* 20 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 303.21[4] at pp. 303-57 through 303-58 (Matthew Bender 3d ed. 2002).

[150] *Id*. at 303-58.

[151] S*ee* 28 U.S.C. § 1292(b).

[152] *Id*.; *see also* FRAP 5.

[153] *E.g.*, Marisol by Forbes v. Giuliani, 104 F.3d 524, 528 (2d Cir. 1998). As with the appeal period for appeals as of right, however, the court of appeals may not extend the time for filing the petition for permission to appeal. *See* FRAP 26(b)(1).

[154] FRAP 5(b) & (c).

appeals.[155] Within ten days of the order granting permission to appeal, the appellant must pay the district clerk all required fees and file a cost bond if required under FRAP 7.[156] If the petition for permission to appeal is granted, the appeal proceeds as normal, except that the appellant does not need to file a notice of appeal (however, in appeals as of right, a notice of appeal is jurisdictional and mandatory).

In state court, however, the discretionary appeal process does not differ substantially from the procedure followed for appeals as of right. A party seeking a reservation from the trial court must provide that court with a stipulation stating the question at issue and designating the specific pleadings in the trial court file that are necessary for a determination of the question.[157] Counsel also must file a joint docketing statement at the same time. If the trial court orders a reservation to an appellate court, the trial court clerk sends notice of the reservation to the appellate court clerk, along with the stipulation, the joint docketing statement and the DS1 docketing sheet.[158] From that point on, the appeal proceeds as normal,[159] except that no filing fees are required from either party[160] and that the appellate court can decline to exercise jurisdiction at any point during the reservation.

E. Extraordinary Writs

Both the state and federal appellate courts provide prospective appellants with the option of filing an extraordinary writ, if a direct appeal is not an option. In federal court, a writ of mandamus or prohibition may be filed as an independent action for an order mandating or prohibiting a district court judge from acting or ruling in a certain way.[161] An extraordinary writ may issue from a non-final judgment in federal court. A petition for an extraordinary writ must be titled "In re [name of petitioner]," and must state (a) the relief sought, (b) the issues presented, (c) the facts necessary to understand the issue presented by the petition, and (d) the reasons why

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[155] FRAP 5(c). A significant difference between appeals as of right and discretionary appeals in federal court is that the petition for permission to appeal is filed in the court of appeals whereas a notice of appeal is filed in the district court.

[156] FRAP 5(d).

[157] P.B. § 73-1(c).

[158] P.B. § 73-1(d).

[159] *See* HORTON & BARTSCHI, *supra* note 12 at 268 ("once the trial court approves the reservation, it can be filed like any other appeal").

[160] P.B. § 73-1(d).

[161] The All Writs Act, 28 U.S.C. § 1651(a), permits the federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

the writ should issue.[162] In the Second Circuit, the petitioner must file an original and four copies of the writ with the appellate clerk.[163] The Court may deny the petition without an answer; otherwise it may order that the respondent file an answer within a fixed time.[164] The Second Circuit has held that a writ of mandamus will issue under the following circumstances: (1) a novel and significant issue of law, (2) inadequacy of other remedies, and (3) presence of a legal issue that will aid in the administration of justice.[165] The federal courts' power to issue writs is very rarely exercised and is usually reserved for complex cases with novel issues of constitutional import.[166]

State litigants have the option of bringing a writ of error in cases where the legislature has not provided for an appeal by statute.[167] However, in contrast to writs in federal court, a writ of error in state court may be brought only from a final judgment of the superior court, in the following cases: (1) in a decision binding on a non-party, (2) summary decision of criminal contempt, (3) a denial of transfer of a small claims action to the regular docket, and (4) as otherwise necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.[168] Because the right to appeal is a remedy provided by statute, the writ of error is viable where judgment is final but the legislature has not provided for an appeal. For example, the writ of error is the only means of review of summary criminal contempt judgments.[169] A person seeking a writ of error must, within 20 days after notice of the judgment complained of, present the writ to the trial court clerk, who must sign it even if it is not presented in a timely

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[162] FRAP 21(a)(2). FRAP 21(d) provides that such petitions shall not exceed 30 pages, except with permission from the Court.

[163] *See* Second Circuit Local Rule 21(b). Note that FRAP 21 requires only an original and three copies.

[164] FRAP 21(b).

[165] *See* In re United States, 903 F.2d 88, 89 (2d Cir. 1990). In addition, mandamus is the accepted method for reviewing an order denying a claimed right of trial by jury. *See* Maldonado v. Flynn, 671 F.2d 729, 732 (2d Cir. 1982). For a discussion of the standards for mandamus, see In re Austrian and German Holocaust Litig., 250 F.3d 156 (2d Cir. 2001).

[166] *See generally* MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE (3d ed. 1999) § 3.04-3.11 at 194-220 (hereinafter "TIGAR & TIGAR").

[167] *See* P.B. § 72-1; CONN. GEN. STAT. § 51-199(d). *See generally* TAIT & PRESCOTT, *supra* note 15, §§ 9.1-9.8 at 342-354.

[168] P.B. § 72-1(a); CONN. GEN. STAT. § 51-199(d); *see also* TAIT & PRESCOTT, *supra* note 15, § 9.2 at 344.

[169] *E.g.*, Martin v. Flanagan, 259 Conn. 487, 494, 789 A.2d 979, 983-983 (2002); In re Dodson, 214 Conn. 344, 346, 572 A.2d 328, *cert. denied*, 498 U.S. 896 (1990).

manner.[170] The petitioner then must serve the writ at least 10 days before the return day and return it to the appellate court clerk at least one day before the return day.[171] Within 20 days after returning the writ to the appellate clerk, the petitioner (a.k.a. the plaintiff-in-error) must file two copies of whatever documents are necessary to present the claims of error in the writ. The respondent (a.k.a. the defendant-in-error) then has ten days in which to file two copies of any additional documents that are necessary to defend the action.[172] Although rare, the Supreme Court does occasionally entertain writs of error.[173]

F. Stays Pending Appeal

Federal and state appellate courts take opposite approaches to stays of execution pending appeal. Although a federal court appellant must take affirmative action to ensure that the execution of the district court's judgment will be stayed pending appeal, an appellant in state court generally receives an automatic stay of execution pending appeal.

In federal court, there usually is a brief automatic stay for a period of ten days.[174] In its discretion, the district court may stay proceedings to enforce a judgment until after it rules on post-judgment motions.[175] To extend the stay pending an appeal, however, a party must move for a longer stay and generally post a bond as collateral. The motion for stay generally must be filed in the district court; however, if moving in the district court would be impracticable or the district court denies the motion, the party may move in the court of appeals for a stay.[176] An appellant in federal court usually must secure its stay by giving a supersedeas bond to the district court. The stay is effective when the district court approves the bond.[177] The amount of the bond is determined on a case-by-case basis, and courts have the discretion to waive the bond

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[170] P.B. § 72-3(a); *see* Morrison v. Parker, 261 Conn. 545, 804 A.2d 777 (2002) (signing is mandatory).

[171] P.B. § 72-3(b).

[172] P.B. § 72-3(e) & (g).

[173] For cases involving writs of error, see State v. Perez, 276 Conn. 285, 288 n.2, 885 A.2d 178, 181 n.2 (2005); Seymour v. Seymour, 262 Conn. 107, 809 A.2d 1114 (2002); In re Jonathan S., 260 Conn. 494, 798 A.2d 963 (2002); and Thalheim v. Town of Greenwich, 256 Conn. 628, 775 A.2d 947 (2001).

[174] FRCP 62(a). There are a number of exceptions to this automatic stay rule, however. For example, there is no automatic stay for an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent.

[175] FRCP 62(b).

[176] FRAP 8(a).

[177] FRCP 62(d).

requirement in its entirety or lower the amount required in exceptional or unusual circumstances.[178] As a practical matter, the bond should be posted within ten days after the entry of judgment, in order to avoid any gap between the automatic stay and the bond-instituted stay.[179]

By contrast, Connecticut appellate courts generally provide an automatic stay pending appeal that can be lifted only in certain circumstances.[180] No bond is required to secure the stay. A party seeking to terminate the stay and execute the judgment prior to the resolution of an appeal must move before the judge who decided the case to terminate the stay, either before or after an appeal is filed.[181] The judge may grant the motion if she is of the opinion that (a) the appeal is sought only for delay, or (b) the due administration of justice so requires.[182]

There are a number of exceptions to the automatic stay rule in state court.[183] In cases in which the automatic stay does not apply, a party may move before the judge who decided the case for a stay of the judgment pending appeal.[184] The judge also may order a stay *sua sponte*. Any party may move for a continuance of a temporary injunction pending appeal, or for a stay of any judgment ordering a permanent injunction, pursuant to CONN. GEN. STAT. sections 52-476 and 52-477.[185] If a Superior Court denies a discretionary stay, a party may seek review of that

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[178] *See* Dillon v. City of Chicago, 866 F.2d 902, 904-05 (7th Cir. 1988).

[179] *See generally* Mark R. Kravitz, *Stays Pending Appeal*, NAT'L L. J., Apr. 2, 2001 at A10.

[180] P.B. § 61-11 ("Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to take an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause."). The filing of a writ of error also generally effects a stay of execution. *See* Geddes v. Sibley, 116 Conn. 22, 25, 163 A. 596 (1932).

[181] *See* P.B. § 61-11(d).

[182] *See* P.B. § 61-11(c).

[183] P.B. § 61-11(b). For example, actions concerning attorneys brought pursuant to P.B. § 2-1 through § 2-81, juvenile matters brought pursuant to P.B. § 26-1 through § 35-5, certain administrative appeals, orders of relief from physical abuse pursuant to General Statutes § 46b-15, and orders of periodic alimony, support, custody or visitation in domestic relations matters brought pursuant to P.B. § 25-1 through § 25-69 are not automatically stayed pending appeal.

[184] *See* P.B. § 61-12.

[185] Generally, mandatory and prohibitory injunctions remain in effect pending an appeal unless the enjoined party moves for a stay from the trial court. *E.g.,* Tomasso Bros., Inc. v. October Twenty-Four, Inc., 230 Conn. 641, 652-58, 646 A.2d 133 (1994).

decision by the Appellate or Supreme Court by filing a motion for review within ten days after the clerk sends the party notice that the stay has been denied.[186]

G. Appellee's Responsibilities after Appeal is Filed

The federal and state appellate courts also differ with respect to what is expected of an appellee once the appellant has filed an appeal.[187] In federal court, the appellee has very few responsibilities, whereas the state appellate courts require an appellee to provide the court with a number of pleadings in order to preserve its rights to raise certain issues in the appeal.[188]

For example, an appellee in state court must file a preliminary statement of the issues within 20 days of the appellant's filing of its preliminary statement of issues if the appellee wishes to: (a) present for review an alternative ground upon which the judgment may be affirmed; (b) present for review adverse rulings or decisions of the court that should be considered on appeal in the event the appellant is awarded a new trial; or (c) claim that a new trial rather than a directed judgment should be ordered.[189] Moreover, within 20 days of the appellant's filing of the preliminary designation of the pleadings, the appellee may object to the inclusion of any pleadings so designated, or file its own designation to add to the pleadings indicated by the appellant.[190] The rules also require that, if additional information is or becomes known to the appellee, the appellee must file a docketing statement supplementing the information appellant is required to provide.[191] Furthermore, if the appellee disagrees with the draft judgment file submitted by the appellant, the appellee can file either a statement specifying the disagreement or a separate draft judgment file within 20 days of the filing of the appellant's draft.[192] The appellate clerk then transmits the appellant's draft and any disagreement or draft

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[186] *See* P.B. § 66-6.

[187] An important difference between the appellee's responsibilities after an appeal is filed is that a state court appellee must file a motion to dismiss an appeal as untimely within ten days of the filing of the appeal. *See* P.B. § 66-8. In contrast, the timeliness of an appeal is a jurisdictional issue in federal court that can be raised at any time.

[188] *See generally* TAIT & PRESCOTT, *supra* note 15, §§ 4.16-4.25 at 162-75.

[189] P.B. § 63-4(a)(1). The appellee may amend the preliminary statement as of right until its brief is filed, but only if it filed such a statement within the 20 days. An appellee who fails to file a preliminary statement of the issues within the 20 days may not later do so without leave of the court to file it out of time.

[190] P.B. § 63-4(a)(2).

[191] P.B. § 63-4.

[192] P.B. § 63-4(a)(6).

from the appellee to the trial court clerk who, within 20 days of receipt of the documents, files the original judgment file and sends copies to the appellate clerk.[193]

In the event that an appellant orders less than the entire transcript for the appellate record, both the federal and state appellate courts provide a mechanism for the appellee to have additional portions of the transcript ordered. In federal court, an appellee that considers it necessary to have a transcript of other parts of the proceedings must, within ten days after the appellant serves appellee with a partial transcript order (which must include a statement of issues), file and serve on the appellant a designation of additional transcript parts to be ordered.[194] The appellant must then order those additional parts within ten days. If the appellant fails to do so, appellee may, within the following ten days, either order the necessary portions or move in the district court for an order requiring appellant to do so.[195] In state court, the appellee must order any additional transcript portions itself, and cannot force the appellant to order them as can a federal appellee. Within 20 days of the filing of appellant's papers, an appellee must file with the appellate clerk a copy of any additional order form that the appellee has placed.[196]

Furthermore, the federal and state appellate rules differ with respect to their treatment of cross appeals. The Federal Rules do not mention the filing of cross appeals specifically. They do provide, however, that, after a party has filed a notice of appeal, any other party has 14 days during which to file a notice of appeal.[197] It is not necessary to designate on the notice of appeal or on the other appeal papers that it is a cross appeal.[198] In state court, an appellee aggrieved by the judgment or decision below may file a cross appeal within ten days from the filing of the appeal.[199] The filing and form of the cross appeal is the same as if the cross appeal were an original appeal, except that no filing fee is required.[200]

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[193] *Id*.

[194] FRAP 10(b)(3).

[195] FRAP 10(b)(3)(C).

[196] P.B. § 63-4(a)(3).

[197] *See* FRAP 4(a)(3).

[198] In order to determine which party is the appellant when both parties have filed notices of appeal, the rules state that the party that filed the appeal first is the appellant, or, if the notices of appeal were filed on the same day, the plaintiff in the proceeding below is the appellant. FRAP 28.1(b).

[199] P.B. § 61-8.

[200] There is no waiver of the filing fee in federal court, and a party filing a notice of appeal when another party in that case already has filed a notice of appeal presumably must pay the $255 filing fee.

H. Designating the Record on Appeal

The state and federal appellate courts have different views of what constitutes the "record" on appeal. In federal court, the entire trial court file, including the original papers and exhibits[201] filed with the district court and the transcript of proceedings,[202] automatically becomes the record on appeal.[203] As a practical matter, in most cases the record stays in the district court until the appellate court asks for it.[204] Thus, the parties must be certain that all relevant materials from the record that they wish the appellate court to consider are included in the joint appendix, as discussed *infra*.[205]

In state appellate courts, there is a distinction between the case file (which is similar to the record on appeal in federal court) and the appellate court "record," which the appellate clerk creates after reviewing the appellant's brief. With respect to the case file, the trial court clerk prepares and forwards to the appellate clerk two complete copies of the case file within ten days after the appeal is filed. Unlike the record on appeal in federal court, transcripts are not part of

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[201] FRAP 10(a). In the Second Circuit, the parties are encouraged to agree with respect to which exhibits are necessary for the determination of the appeal. Second Circuit Local Rule 11(b). In the absence of agreement, the appellant shall, not later than 15 days after filing the notice of appeal, serve the appellee with a designation of the exhibits the appellant deems necessary for the appeal. The appellee may file a cross-designation in order to add exhibits to the list. According to Second Circuit Local Rule 11(c), the district clerk then forwards all the designated exhibits to the clerk of the court of appeals as part of the record, although, this rarely happens in practice.

[202] If no transcript exists, the parties' statement of the evidence and proceedings, as settled and approved by the district court, must be included in the record on appeal. *See* FRAP 10(c).

[203] As an alternative to filing the original papers, exhibits and transcripts with the court of appeals, the parties may prepare, sign and submit to the district court a statement of the case showing how the issues presented on appeal arose and were decided by the district court. If the district court approves it, the statement may be certified to the court of appeals as the record on appeal. FRAP 10(d).

[204] Although the FRAP contains a procedure for the district court clerk to transfer the record to the appellate court, *see* FRAP 11(b)(2), this rarely happens in practice. Predominantly, the record stays in the district court so that the parties have easy access to it during the preparation of the appeal. *See 2d Circuit Handbook*, *supra* note 129, at 10.

[205] In the event that any motion for an immediate order, such as a motion to dismiss, is filed in the court of appeals before the briefs and appendix are filed, the district clerk must forward those parts of the record designated by any party in the motion. FRAP 11(g).

the trial court case file in state court. For a court to consider evidence on appeal, the transcripts must be filed with the appellate clerk at the time the brief is filed.[206]

The record on appeal in state court is created by the appellate clerk after the appellant files its main brief in the case. The appellate clerk reviews the appellant's brief and the parties' designations of the record filed in the early stages of the appeal and determines what parts of the trial court case file to include in the formal "record."[207] The clerk then prepares and certifies the record and sends it to the appellant for photocopying.[208] Within 20 days of the clerk's certification of the record, the appellant must file the "record" (with a yellow cover) and a certification that a copy has been sent to each counsel of record and the trial court judge.[209] If a motion for rectification or articulation leads to changes in the transcript or memorandum of decision after the official "record" has been prepared, the appellate clerk may prepare a supplemental record, to be distributed in the same manner as the original record.[210] In practice, the appellate clerk often does not distribute the record until after the parties' briefs are filed. The "record," not to be confused with the case file, is just a snapshot of relevant docket entries, pleadings, motions, judgment and the appeal form for the convenience of the appellate judges.

I. Clerk's Office Staff; Preargument Conference

Once an appeal is docketed, both the federal courts of appeals and the state appellate courts assign a case manager to the appeal. The case manager is a particular individual in the clerk's office who is responsible for that case on appeal. In both court systems, the case managers are great resources of information about your case or appellate practice and procedure.

Both court systems also provide for pre-argument conferences in certain cases. A federal court of appeals may direct the attorneys, and, when appropriate, the parties, to participate in one or more settlement conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement.[211] In the Second

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[206] P.B. § 68-9. The appellant and appellee must each file the transcripts they respectively ordered at the time their respective briefs are due.

[207] P.B. § 68-3. The contents of the record in an administrative appeal are set forth expressly in P.B. § 68-10.

[208] P.B. § 68-2.

[209] P.B. §§ 68-4, 68-7.

[210] P.B. § 66-5.

[211] FRAP 33; *see also* Second Circuit Local Rules, Appendix Part C, § 5, & Appendix Part D ("Guidelines for Conduct of Pre-argument Conference under the Civil Appeals Management Plan").

Circuit, the staff counsel conducts these conferences, most of which are conducted telephonically.[212]

In the state appellate court, the Chief Justice or Chief Judge or a designee may, in cases deemed appropriate, direct the appellate clerk to schedule conferences of the parties. Usually, the clerk will postpone briefing until 45 days after the conference is held. A judge trial referee or senior judge presides at the conference, which is intended to focus on the possibility of settlement, simplification of issues, amendments to the preliminary statement of issues, transfer to the Supreme Court, timetables for filing briefs, *en banc* review, and any other matters that the conference judge may consider appropriate.[213]

J. Motions Practice

An important difference between filing a motion in the Second Circuit and filing a motion in state appellate courts is that the federal court generally permits oral argument on substantive motions, [214] whereas the state courts usually do not hear oral argument on motions.[215]

In addition, the procedure for filing a motion in federal court is substantially more paper-intensive than the procedure in state appellate courts. For example, when filing a motion in the Second Circuit, the moving party must also submit: (1) a Motion Information Statement (Form T-1080) as the first page of the motion; (2) an affidavit (often by counsel, but not necessarily so) containing factual information only; (3) the body of the motion, setting forth the information and legal argument necessary to support the motion, not exceeding 20 pages; (4) a copy of the lower court opinion or agency decision from which appeal is taken; and (5) any exhibits necessary for the determination of the motion.[216] Furthermore, if a non-governmental corporate party files a motion before filing its principal brief, the motion must be accompanied by a corporate disclosure statement, identifying all the party's parent corporations and listing any publicly held company that owns 10 percent or more of the party's stock.[217] In the Second Circuit, the movant

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[212] Even where the notice of preargument conference specifies that it will be conducted in person, it is possible to have it changed through the case manager to a telephonic conference.

[213] P.B. § 63-10.

[214] Second Circuit Local Rule 27(b). Certain motions, such as petitions for permission to appeal, are submitted without oral argument. Second Circuit Local Rule 27(e).

[215] P.B. § 66-4; *see also* State v. Lopez, 235 Conn. 487, 497, 668 A.2d 360 (1995) (no violation of due process to permit oral argument on motions only in exceptional circumstances).

[216] *See* Second Circuit Local Rule 27(a). Although a cover to the motion is not required, if a cover is used, it must be white. *See* FRAP 27(d)(1)(B).

[217] FRAP 26.1(b). Because all parties must file a corporate disclosure statement with their briefs, the movant need not file another corporate disclosure statement if a motion is filed after the brief. It is important to follow carefully the requirements of FRAP 26.1, as the corporate disclosure

must file the original of all these papers plus four copies with the appellate court clerk.[218] Any party may file a memorandum of law in opposition to the motion, not to exceed 20 pages, within eight days after service of the motion. The movant may then file a reply brief, not to exceed ten pages, within five days after service of the response.[219]

Unlike the federal practice, a movant in state court need only file the motion itself, without an accompanying memorandum of law, affidavits or other forms. The motion must set forth in separate paragraphs, appropriately captioned: (1) a brief history of the case, (2) the specific facts upon which the moving party relies, and (3) the legal grounds upon which the moving party relies.[220] Except with special permission from the appellate clerk, the motion taken together with any memorandum of law shall not exceed ten pages in length.[221] Generally, the movant must file the original motion and 15 copies with the appellate clerk.[222] Any party who opposes a motion may file, within ten days of the filing of the motion, an opposition to the motion, not to exceed ten pages in length.[223] Reply briefs are not permitted.

The state and federal appellate courts use different procedures for deciding appellate motions. In the Second Circuit, substantive motions are ordinarily submitted to a panel of three judges for oral argument, generally on a Tuesday.[224] Procedural motions may be decided by a

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statement is intended to give judges and the court information they need regarding disqualification and recusal. FRAP 26.1 clarifies even further what types of holdings corporate parties must disclose. *See* FRAP 26.1, as amended affective December 1, 2002.

[218] *See* Second Circuit Local Rule 27(a)(1)(C)(vii). FRAP 27(d)(3) only requires an original and three copies.

[219] FRAP 27(a)(3), (4) & 27(d)(2).

[220] P.B. § 66-2(a).

[221] P.B. § 66-2(b). The rules provide that a party may file a separate memorandum of law if so desired. However, the motion and the memorandum together may not exceed ten pages, which is a difficult page limit to meet in two documents. Most parties therefore include all argument in the motion itself and do not file a separate memorandum of law.

[222] P.B. § 66-3. There are exceptions to this rule, however. For example, a party moving for an extension of time need file the original motion only, though the movant must indicate that a copy of the motion has been mailed to each of the movant's clients who are parties to the appeal. *See* P.B. § 66-1(c)(1). A motion for rectification or articulation must be filed as an original with three copies, unless the trial court was a three-judge court, in which case an original and five copies of the motion must be filed. *See* P.B. § 66-5.

[223] P.B. § 66-2(a). An opposition to an extension of time is due within five days. *See* P.B. § 66-1(c)(3).

[224] *See 2d Circuit Handbook, supra* note 129, at 13.

single judge or, if they are unopposed, by the appellate clerk.[225] The presiding judge on the panel schedules emergency motions, such as those seeking a stay, injunctive relief, bail, or mandamus.[226] If immediate action is required, the judge may act as an emergency applications judge and provide an interim ruling pending full panel consideration.[227] In state court, substantive motions are submitted to the entire court at conference, without any oral argument.[228] Procedural motions may be acted upon by one justice alone[229] or in some instances by the appellate clerk. The Appellate Court will occasionally schedule oral argument on its own (where no motion is filed) if it determines that an appeal should be dismissed, to give parties an opportunity to address why the appeal should not be dismissed.

K. Briefs

There are a number of differences in the requirements for briefs in the state and federal court systems. Most significantly, the page limits, required contents, formats, and time for filing each brief differ drastically between the two court systems.

First, the federal appellate courts have very specific requirements for brief content. An appellant's brief to the Second Circuit must contain, in the following order: (a) a corporate disclosure statement;[230] (b) a table of contents, with page references; (c) a table of authorities with references to the pages of the brief where they are cited; (d) a jurisdictional statement, establishing the district court's and the court of appeals' jurisdiction; (e) a statement of the issues presented for review; (f) a statement of the case briefly indicating the nature of the case, course of proceedings and the disposition below; (g) a statement of the facts relevant to the issues submitted for review with appropriate references; (h) a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings; (i) the argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of

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[225] *Id*. at 15. A circuit judge may act alone on any motion, but may not dismiss or otherwise finally determine an appeal alone. *See* FRAP 27(c); Second Circuit Local Rule 27(f).

[226] *See 2d Circuit Handbook*, *supra* note 129, at 14.

[227] *Id*.

[228] The court may schedule oral argument on a motion, but does so only in exceptional circumstances. *See* TAIT & PRESCOTT, *supra* note 15, § 6.4 at 231.

[229] In state court, one or more members of an appellate court may rule on a motion that is not dispositive of the appeal, subject to review by a full panel upon a motion for reconsideration. P.B. § 66-2(d).

[230] *See* FRAP 26.1. Even if the corporate disclosure statement already has been filed with a motion, as discussed *supra*, the principal brief ***must*** include the statement before the table of contents.

the record on which the appellant relies, and, for each issue, a concise statement of the applicable standard of review; (j) a short conclusion stating the precise relief sought; (k) a certificate of compliance, if required by FRAP 32(a)(7); (l) a certificate of service; and (m) the text of any pertinent statutes, rules or regulations, which must be set out in the brief itself or in an addendum at the end.[231]

In the Second Circuit, an appellant's brief also must include, as a preliminary statement, the name of the judge or agency member who rendered the decision from which the appeal is taken and, if the judge's decision is reported, the citation thereof.[232] The appellee's brief must include all of the above components, except that an appellee need not file a jurisdictional statement, statement of the issues, statement of the case, statement of the facts, and statement of the standard of review, unless the appellee is not satisfied with the appellant's statements.[233] The Second Circuit interprets the failure to brief an issue as abandonment of the issue.[234]

In state appellate court, the required contents of a brief are not as numerous though somewhat similar as in federal court. Most notably, the state courts do not require a corporate disclosure statement or statement of jurisdiction. The state courts do require an appellant's brief to include the following, in order: (a) a table of contents; (b) a statement of the issues; (c) a table of authorities;[235] (d) a statement of proceedings and facts, which must be in narrative form and must be supported by appropriate references to the page or pages of the transcript or to the document upon which the party relies; (e) the argument, which must be divided into appropriate headings for each point to be presented and must include a separate, brief statement of the standard of review;[236] (f) the conclusion and statement of relief requested; (g) a certification of service; (h) a certification of form;[237] and (i) the text of pertinent portions of any constitutional

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[231] *See generally* FRAP 28(a).

[232] Second Circuit Local Rule 28(2).

[233] FRAP 28(b).

[234] *See* LoSacco v. City of Middletown, 71 F.3d 88, 92 (2d Cir. 1995).

[235] See P.B. § 67-11 for the required format for the table of authorities.

[236] P.B. § 67-4(d)(1) through (5) detail specific requirements for a brief that makes certain types of claims on appeal. For example, when an appellant claims error in the trial court's refusal to charge the jury as requested, the party claiming such error must include in its brief or appendix a verbatim statement of the charge as requested and as given by the court and any relevant exceptions to the charge as given.

[237] P.B. § 67-2 requires a certificate to be attached to the signed, original brief indicating that the brief complies with all the provisions of P.B. § 67-2, relating to format. The state certificate of compliance is substantially different from the certificate of compliance required in federal court, which relates only to the length of the brief, and not all the format requirements for briefs. *See* FRAP 28(a)(11) & 32(a)(7).

provision, statute, ordinance or regulation upon which appellant relies.[238] The appellee's brief must contain the same components.[239]

Second, the time requirements for filing briefs differ greatly in the state and federal appeals systems, with the state courts generally providing more time for filing a brief. According to the federal rules, the appellant's brief must be filed within 40 days after the filing of the record, the appellee's brief is due within 30 days after the service of the appellant's brief, and the appellant's reply brief must be filed within 14 days after the service of the appellee's brief, but at least three days before argument.[240] However, shortly after an appeal is filed, the Second Circuit issues scheduling orders with the due dates for each brief, and these deadlines often provide the parties with less time than the federal rules.[241] Although a party that needs more time to file its brief may move for an extension of time pursuant to FRAP 26(b),[242] the Second Circuit has indicated its reluctance to grant such extensions of time.[243]

In state court, an appellant's brief is due within 45 days after the delivery date of the transcript ordered by the appellant, or, if no transcript is required, within 45 days after the filing of the appeal.[244] Appellee's brief must be filed within 30 days after the filing of the appellant's brief or the delivery date of the portions of the transcript ordered only by that appellee,

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[238] *See generally* P.B. § 67-4 for contents of appellant's brief. Notably, the state rules provide that, whenever possible, the plaintiff and the defendant shall be referred to as such, rather than as appellee and appellant. *See* P.B. § 67-1.

[239] *See generally* P.B. § 67-5. Where the appellee is also a cross appellant, the rule requires the brief to be clearly labeled to indicate which sections of the brief respond to the first appellant's appeal and which sections present the cross appeal. P.B. § 67-5(g).

[240] FRAP 31(a)(1). Pursuant to FRAP 26(c), an additional three days may be added to the time for filing the brief of the appellee or the reply brief of the appellant in certain circumstances.

[241] *See* Second Circuit Local Rules, Appendix Part D, § 7 ("In the interest of obtaining prompt resolution of appeals, most scheduling orders in the Second Circuit are somewhat tighter than the schedules provided for in the Federal Rules of Appellate Procedure. *See* FRAP 31(a).").

[242] A motion for an extension of time to file a brief must be filed within two weeks before the brief is due or the argument is scheduled unless exceptional circumstances exist. Second Circuit Local Rules, Appendix Part C, § 7. The motion for more time also must be accompanied by a supporting affidavit. *Id.*

[243] *See* United States v. Delia, 925 F.2d 574, 575 (2d Cir. 1991).

[244] P.B. § 67-3. In some cases, where a pre-argument conference is held before the briefing obligations begin, the time for filing the appellant's brief may be extended, via letter from the appellate clerk's office, to 45 days after the pre-argument conference occurs.

whichever is later.[245] Appellant's reply brief is due within 20 days after the filing of appellee's brief, except that if appellee files a cross appeal, appellant's reply brief may be filed within 30 days after the filing of the appellee's brief.[246] The cross appellant/appellee may then file, within 20 days after the filing of the appellant/cross appellee's reply brief, a cross appellant's reply brief.[247] Any party may file a motion to extend the time for filing its brief.[248] Moreover, if a party files any motion in the trial court that would render the judgment, decision or acceptance of the verdict ineffective after appeal has been taken, any party may move for a stay of the briefing requirements pending the outcome of the motion in the trial court.[249] The appellate clerk may grant a stay for up to 60 days; beyond that time period, the court having jurisdiction over the appeal must rule on the motion for stay. Within ten days of the last post-judgment motion being resolved, the appellant must file with the appellate clerk a statement that the motions have been decided, together with a copy of the decision on the motions. The filing of this statement reinstates the appeal, and the date of notice on the ruling of the motion is treated as the date of the filing of the appeal for purposes of briefing.[250]

Third, the page limits differ in state and federal appellate courts, and the state courts generally provide for lengthier briefs. In federal court, a principal brief may not exceed the greater of (a) 30 pages, (b) 14,000 words, or (c) 1,300 lines of text with monospaced text.[251] A reply brief may not exceed the greater of (a) 15 pages, (b) 7,000 words, or (c) 650 lines of

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[245] *Id*.

[246] *Id*. By contrast, when a cross-appeal is filed in federal court, the appellant does not receive an extension of time in which to file its reply brief, which is due 14 days after the appellee's brief is served.

[247] *Id*. Federal rules do not provide for a reply brief by a cross appellant.

[248] A motion for an extension of time to file a brief must be filed at least ten days prior to the expiration of the deadline, or, if the cause for the extension arises within the ten-day period, as soon as reasonably possible. P.B. § 66-1(c)(4). A motion for extension of time to file a brief must specify the current status of the brief, the estimated dated of completion, and, in criminal cases, whether the defendant is incarcerated as a result of the proceeding in which the appeal has been taken. P.B. § 66-1(c)(1).

[249] *See* P.B. § 67-12.

[250] *Id*.

[251] FRAP 32(a)(7). If the word-count or line-count options are used, the brief must contain a certificate by the attorney, indicating (i) the number of words in the brief, or (ii) the number of lines of monospaced text in the brief. FRAP 32(a)(7)(C).

monospaced text.[252] FRAP 28.1(c)(2) requires that an appellee combine the response to appellant's main brief and appellee's cross appeal in one brief with the same page limitation. Counsel considering this an undue limitation may, by motion, request permission to file an oversized brief.[253]

In state court, however, the rules provide that (1) appellant's brief may not exceed 35 pages; (2) appellee's brief may not exceed 35 pages, except that if a cross appeal is included, the appellee/cross appellant's brief may not exceed 50 pages; (3) appellant's reply brief may not exceed 15 pages, except that if a cross appeal is filed, the appellant/cross appellee's reply brief may not exceed 40 pages; and (4) cross appellant's reply brief may not exceed 15 pages.[254] Where a claim relies on the state constitution as an independent ground for relief, the clerk must, upon request by letter, grant an additional five pages for the appellant's and appellee's brief and an additional two pages for the reply brief, to be used for the state constitutional argument only.[255] In addition, the Chief Justice or Chief Judge may grant permission to exceed the page limitations in any case if a compelling reason is advanced in a written letter filed with the appellate clerk.[256]

Fourth, the requirements for brief format differ in the two appellate systems. Required margins,[257] how and when to include page numbering[258] and acceptable fonts[259] vary between the

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[252] The following items do ***not*** count toward the limitations: corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certifications of counsel. *See* FRAP 32(a)(7).

[253] A motion to file an oversized brief must be made no later than seven days before the brief is due in criminal cases and two weeks before the brief is due in all other cases. Second Circuit Local Rule 27(g); Second Circuit Local Rules, Appendix Part C, ¶ 7. The motion also must be accompanied by a statement of the reasons for the request and a copy of the page proofs of the brief. Second Circuit Local Rule 27(g). In the Second Circuit, the staff attorney's office will often address a request for permission to file an oversized brief of a certain length via a letter to the clerk, though a formal motion may be necessary depending upon the additional length requested.

[254] All page limits are exclusive of appendices, the statement of issues, the table of authorities, the table of contents, and the signature page. P.B. § 67-3.

[255] P.B. § 67-3.

[256] *Id*.

[257] Both court systems require briefs to be on 8½ x 11-inch paper, with double-spaced text. *See* FRAP 32(a) and P.B. § 67-2. Federal court rules require one-inch margins on all sides. FRAP 32(a)(4). *But see* Second Circuit Local Rule 32(a)(2), which lists different specifications for a brief submitted in pamphlet form. In contrast, state court rules require margins of one-inch on

state and federal courts. Furthermore, the contents[260] and color[261] of a brief cover are also different in the federal and state appellate courts. Also, the Second Circuit requires that every brief filed by counsel be submitted in a Portable Document Format ("PDF"), in addition to the required number of paper copies, unless counsel certifies that submitting the brief in PDF format is not practical or would constitute a hardship.[262] There is no such state court requirement.

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the top and bottom of the page, 1¼ inch on the left side of the page, and ½ inch on the right side of the page. P.B. § 67-2.

[258] Federal court briefs ***may*** be page-numbered in the margins, FRAP 32(a)(4), whereas state court briefs ***must*** have page numbers in the center of the bottom of each page. P.B. § 67-2.

[259] The federal rules provide that text and footnotes may appear in a proportionally spaced font, of 14-point or larger, or a monospaced font that does not contain more than 10½ characters per inch. FRAP 32(a)(5). In contrast, the state rules now permit the use of only two typefaces, of 12-point size or larger, specifically, Arial or Univers. P.B. § 67-2.

[260] In the Second Circuit, the cover of any brief must contain the docket number of the case, printed in type at least one-inch high, centered at the top; the name of the court; the title of the case; the nature of the proceeding and the name of the court, agency or board below; the title of the brief, identifying the party or parties for whom the brief is filed; and the name, office address, and telephone number of counsel representing the party for whom the brief is filed. FRAP 32(a)(2); Second Circuit Local Rule 32(c). The Second Circuit is particularly careful to ensure that all parties adhere to these requirements. In state court, a brief cover must contain the following information, in order from the top of the page to the bottom: the name of the court, the number of the case, the name of the case as it appears in the judgment file from the trial court, the nature of the brief (e.g., appellant's brief etc.), the name, telephone and fax numbers of counsel on the brief and the name of the individual counsel who is to argue the appeal. P.B. § 67-2.

[261] In federal court, the appellant's brief is blue, appellee's brief is red, intervenor or *amicus curiae* briefs are green, and any reply brief is gray. FRAP 32(a)(2). The cover of a supplemental brief must be tan, the cover of a brief in support of a motion must be white, and the cover of a petition for rehearing or rehearing *en banc* must be white. *See* FRAP 27(d)(1)(B), 32(a)(2) & 32(c)(2)(A), as amended effective December 1, 2002. In state court, an appellant's brief cover is light blue, appellee's brief cover is pink, reply briefs have a white cover, and *amicus curiae* briefs have green covers. P.B. § 67-2. Back covers are not required, but if the brief has one, it must be white. *Id*.

[262] Second Circuit Local Rule 32(a)(1). Pro se parties are encouraged, but not required, to submit a PDF copy of a brief, and any party who does not provide a brief in PDF format must file an unbound copy of the brief. The numerous requirements that accompany submittal of a PDF version are contained in Second Circuit Local Rule 32(a)(1). Particularly noteworthy is the

Fifth, the state and federal appellate courts require a different number of briefs to be filed with the appellate court clerk. In federal court, parties must file an original and 25 copies of all briefs and serve two copies on all opposing counsel.[263] However, in the Second Circuit, Local Rule 31(b) reduces the number to be filed to the original and nine copies. In state court, the number of copies that must be filed with the original differs depending on which court is hearing your appeal—in the Supreme Court, parties must file the original and 25 copies of each brief and appendix, whereas in the Appellate Court, parties must file the original and 15 copies of each brief and appendix.[264]

Sixth, an important difference between state and federal briefs is that the federal rules provide for an addendum to the brief, which shall include all "statutes, rules, regulations, etc." that are necessary to the court's determination of the issues presented.[265] The addendum to the brief is filed in addition to the parties' joint appendix, discussed *infra*. In state court, a party must include copies of necessary statutes, rules and regulations in its ***appendix***, and the state rules do not provide for the filing of an addendum to a brief.[266]

Seventh, both court systems have a procedure for alerting the court to significant authorities that develop while an appeal is pending. In federal court, if significant authorities come to a party's attention after it has filed its brief, that party may advise the court through a letter to the clerk, stating the reasons for the supplemental citations.[267] In state court, a party may advise the court of pertinent and significant authorities that come to its attention after the brief has been filed by sending a letter to the appellate clerk, with a copy certified to all counsel of

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fact that "[c]onverting a document into PDF format by scanning the document does ***not*** comply with this rule." Second Circuit Local Rule 32(a)(1)(C) (emphasis added).

[263] FRAP 31(b). However, an unrepresented party proceeding *in forma pauperis* only needs to file four copies with the clerk, and serve one copy on each party.

[264] P.B. § 67-2.

[265] FRAP 28(f).

[266] *See* P.B. § 67-4(e).

[267] FRAP 28(j). The federal rules permit the party to present argument in the letter, but provide that the body of the letter may not exceed 350 words. *See* FRAP 28(j). The Second Circuit Local Rules do not state how many copies of the letter must be filed with the court, although the clerk's office generally requires ten copies of the letter (same number as required for briefs). Because the rules do not explicitly state a required number of copies, however, this is a good opportunity to consult with the case manager before filing the letter with the Court.

record, stating concisely and without argument the relevance of the supplemental opinions and attaching copies of any unpublished opinions.[268]

L. Appendix

There is an important difference in the procedure for filing an appendix to the briefs in the state and federal appellate courts. Although in state court, each party may file its own separate appendix, the parties in a federal court appeal must agree upon an appendix and file one joint appendix. It is particularly important in federal court to include everything you may rely upon in the appendix because the record generally stays with the district court. The appellant is responsible for preparing and filing the joint appendix in federal court, and it must file ten copies of the agreed-upon appendix, with service on all counsel, at the same time it files its brief.[269] The court of appeals may order, in certain cases or classes of cases, to defer the filing of the appendix until 21 days after the appellee's brief is served.[270] In the Second Circuit, the appendix must include (a) the relevant docket entries in the proceeding below; (b) the relevant portions of the pleadings, charge, findings or opinion; (c) the judgment, order or decision in question; (d) the notice of appeal; and (e) other parts of the record to which the parties wish to direct the court's attention.[271]

Unlike in federal court, each party in state court may, and usually does, file its own appendix. An appendix is not required unless the brief cites an unreported decision; then that decision must be in an appendix.[272] An appendix also may be required to present certain issues involving evidentiary rulings and jury charge issues.[273] In addition, the text of the pertinent portions of any constitutional provision, ordinance or regulation at issue must be set forth in

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[268] *See* P.B. § 67-10. The party must provide the clerk with the original and seven copies of the letter.

[269] FRAP 30(a).

[270] FRAP 30(c). For example, in the Second Circuit, a deferred appendix is permitted in any case where the parties so stipulate or where, on application, a judge of the court so directs. Second Circuit Local Rules 30(a). Deferred appendices are discouraged, however, because they generally are costly to the parties. *See 2d Circuit Handbook*, *supra* note 129, at 9.

[271] FRAP 30(a); Second Circuit Local Rule 30(d) (requiring notice of appeal in appendix). A new addition to the Second Circuit Local Rules provides that if the joint appendix exceeds 300 pages, the parties must submit the orders and opinions being appealed in a "special appendix." *See* Second Circuit Local Rule 32(d).

[272] P.B. § 67-8.

[273] P.B. § 67-4(d) (requiring certain materials, such as relevant portions of jury charge, to appear in either the brief or an appendix).

either the brief or an appendix.[274] As in federal court, it is always a good idea to include in your appendix anything from the case file that you refer to in your brief.

M. *Amicus Curiae* Brief

In both federal and state appellate courts, certain specified parties may file an *amicus curiae* brief as of right. In federal court, the United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an *amicus* brief without the consent of the parties or leave of the court.[275] In state court appeals, if a non-criminal appeal attacks the constitutionality of a state statute, the state attorney general may appear and file an *amicus* brief as of right.[276]

In both court systems, any other person seeking to file an *amicus* brief on appeal must seek permission from the applicable court,[277] or, in federal court only, state in the brief that all parties have consented to its filing.[278] In federal court, a motion for leave to file an *amicus curiae* brief must state: (a) the movant's interest; and (b) the reason why an *amicus curiae* brief is desirable and why the matters asserted are relevant to the disposition of the case.[279] An *amicus* in federal court must submit the proposed brief with its application to appear as *amicus*.[280] An *amicus curiae* brief must comply with the form requirements for other briefs, except that it may not exceed 15 pages.[281] The cover must also identify the party or parties supported and indicate whether the brief supports affirmance or reversal.[282] The brief must be filed no later than seven days after the principal brief of the party being supported is filed, or, if the *amicus* does not

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[274] P.B. § 67-4(e).

[275] FRAP 29(a). The *amicus* brief is due seven days after the principal brief of the party being supported is filed. FRAP 29(e).

[276] P.B. § 67-7. The state rules provide that the Attorney General must give notice to the appellate clerk and counsel of record of his intention to file a brief no later than the date on which the party whose position he supports files its brief, and the AG's brief is due 20 days after the filing of the brief of the party the AG supports, unless the court orders otherwise.

[277] *See* FRAP 29(a); P.B. § 67-7.

[278] FRAP 29(a). Receiving consent from the parties is an option only in federal courts. The state courts permit *amicus* briefs only upon a grant of permission from the appellate court with jurisdiction over the appeal.

[279] FRAP 29(b).

[280] *Id*.

[281] FRAP 32(a)(7) & 29(d).

[282] FRAP 29(c).

support either party, no later than seven days after the appellant's brief is filed.[283] In most circuits, an application to file an *amicus* brief will be heard by one or more judges assigned to hear procedural motions, although the appellate clerk also might have authority to grant unopposed applications to file an *amicus* brief.[284] An *amicus* may participate in oral argument only with the court's permission, and permission is rarely granted.[285]

In state court, an application for permission to appear as *amicus curiae* must be filed with the court within 20 days of the filing of the brief of the party whom the proposed *amicus* wishes to support, if any, or within 20 days of the filing of the appellee's brief.[286] The application must state the nature of the applicant's interest and the reasons why a brief should be allowed. In contrast to the federal rules, the state rules do not require a potential *amicus* to submit the brief with the application to appear as *amicus*.[287] This is an important distinction for potential *amici* to consider before deciding whether to move for permission to file a brief in each of the court systems.[288] An *amicus* brief must comply with the format requirements for other briefs and may not exceed ten pages unless a specific request for more than that length is made specifically in

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[283] FRAP 29(e).

[284] *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3975 at 541 & n.9. The Second Circuit will ordinarily deny leave to file an *amicus* brief where, by reason of a relationship between a judge who would hear the proceeding and the *amicus* or counsel for the *amicus*, the filing of the brief would cause the recusal of the judge. Second Circuit Local Rule 29.

[285] FRAP 29(g). Although this section formerly provided that an *amicus* would be permitted to argue "only for extraordinary reasons," that language was deleted by the 1998 Amendments to the Rules. *See* Advisory Committee Notes to the 1998 Amendments, cited in 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3975.1 at 542 n.1 ("The change is made to reflect more accurately the current practice in which it is not unusual for a court to permit an *amicus* to argue when a party is willing to share its argument time with the *amicus*. The Committee does not intend, however, to suggest that in other circumstances an *amicus* will be permitted to argue absent extraordinary circumstances.").

[286] P.B. § 67-7. The provision of 20 days from the ***appellee's*** brief, in contrast to seven days from the ***appellant's*** brief in federal court, provides state court *amici* with a substantially longer time period in which to apply for permission to file a brief.

[287] *See* P.B. § 67-7. In practice, the order granting the application will specify the filing deadline, typically ten days from the order.

[288] As a practical matter, the application process is much more labor-intensive in federal court, as the prospective *amicus* must actually write the brief before receiving any confirmation that the Court will entertain it, although typically the federal court will grant the application.

the application, and granted by the court.[289] Oral argument by *amici* is only permitted when the court grants a specific request for such argument, which is rare.

N. Oral Argument

The permissibility and length of oral argument is also very different in federal and state appeals courts. The federal appellate courts generally do not hear oral argument in every case.[290] Although the Second Circuit is the only federal circuit that has traditionally granted oral argument to any party who requested it, it has recently implemented a Non-Argument Calendar system for asylum cases.[291] In state court, the Supreme Court hears oral argument in every appeal that it entertains. However, the Appellate Court denies oral argument in a small percentage of the cases filed before it.[292]

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[289] The statement of the interests of the *amicus curiae* is not included in the ten-page limit. *See* P.B. §§ 67-3, 67-7.

[290] *See generally* TIGAR & TIGAR, *supra* note 166, § 10.02 at 480-86. FRAP 34(a)(2) provides that oral argument must be allowed unless a panel of three judges that has examined the briefs and record unanimously agrees that oral argument is unnecessary because (a) the appeal is frivolous; (b) the dispositive issue or issues have been authoritatively decided; or (c) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

[291] Second Circuit Local Rule 0.29, as amended February 23, 2007 (available at http://www.ca2.uscourts.gov/Docs/News/Interim_LRs.pdf), provides that asylum cases are to be placed on the Non-Argument Calendar and that a party wishing oral argument may request transfer to the Regular Argument Calendar. *See also 2d Circuit Handbook*, supra note 129, at 11 n.1. In other cases, Second Circuit Local Rule 34(d) provides that, where the Court contemplates deciding an appeal without oral argument, it must give each of the parties an opportunity to file a statement setting forth reasons for hearing argument. If the parties agree to submit an appeal without argument, the Second Circuit will entertain the appeal solely on the briefs. FRAP 34(f); *see also* Second Circuit Local Rules, Appendix Part C, § 8.

[292] *See* HORTON & BARTSCHI, *supra* note 12, at 233-34 (noting that "[t]he Appellate Court aggressively uses this rule to deny oral argument to about 15-20% of its docket," while "[t]he Supreme Court has never used this rule"). In state courts, oral argument is allowed as of right except in civil cases where: (a) the appeal is frivolous; (b) the dispositive issue or set of issues has been recently authoritatively decided; or (c) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. P.B. § 70-1. Furthermore, as in federal court, the parties in state court may submit an appeal for decision on the briefs without oral argument. P.B. § 70-2. However, the success rate for appeals submitted without oral argument is quite low. *See* Horton and Bartschi, *supra* note 1, at 23-24 ("[O]nly 51 cases were submitted on briefs without argument [in 2006], while 62 cases were decided on briefs alone [in 2005]. Although five cases decided on briefs [in

The scheduling of oral argument is similar in the Second Circuit and the state appellate courts. In the Second Circuit, the clerk prepares a calendar of cases awaiting oral argument, giving preference to appeals in criminal cases, extraordinary writs, and other proceedings and appeals entitled to preference by law.[293] The clerk then notifies all parties to an appeal whether oral argument will be scheduled and, if so, the date, time and place for it, and the time allotted to each side. A typical appeal will be set for hearing within eight to twelve weeks from the date the appellee's brief is filed.[294] A motion to postpone argument or to allow longer argument must be filed at least two weeks in advance of the hearing date.[295] In practice, once the court schedules argument, it is extremely difficult, if not impossible, to change the argument date.[296] Therefore, an attorney with a conflict should notify the court immediately of dates on which argument may ***not*** be scheduled. On the Thursday preceding the assigned argument date, the Second Circuit clerk's office generally will divulge the names of the judges who are scheduled to hear the appeal.

Similarly, in state court appeals, the appellate clerk prepares a printed docket of cases ready to be scheduled for argument. Counsel may write letters to the clerk requesting argument in their case not be scheduled for certain dates, with good cause shown. The Chief Justice or Chief Judge and/or her designee are responsible for the scheduling of cases for oral argument. Cases usually are scheduled in the order in which they become ready, but parties may move to expedite a certain appeal, or the Chief Justice or Chief Judge may *sua sponte* move a case up in the order due to its importance. Once the case is scheduled, parties may learn the judges who are on the panel by calling the appellate clerk's office, usually the week before the argument.[297]

2005] resulted in reversals, all cases submitted on briefs were affirmed or dismissed, reinforcing the point that waiving oral argument is generally a bad idea.").

[293] FRAP 45(b)(2). Extraordinary writs are entitled to preference over ordinary civil appeals pursuant to FRAP 21(b)(6).

[294] *2d Circuit Handbook*, *supra* note 129, at 11.

[295] Second Circuit Local Rules, Appendix Part C, ¶ 7.

[296] *See* Second Circuit Local Rules, Appendix Part C, ¶ 7 ("Motions to alter the date of arguments placed on the calendar are not viewed with favor and will be granted only under extraordinary circumstances."). However, prior to the scheduling of oral argument, counsel may provide the case manager with information regarding future scheduling conflicts, which the Court will attempt to accommodate, if possible.

[297] *See* TAIT & PRESCOTT, *supra* note 15, §5.18 at 220-21; P.B. §§ 69-1, 69-2 and 69-3.

The Second Circuit generally sits in panels of three judges,[298] and it never hears appeals *en banc* in the first instance.[299] In contrast, the state Supreme Court often sits *en banc* in the first instance.

In state court, the Appellate Court sits in panels of three, and the Supreme Court sits in panels of five.[300] In contrast to Second Circuit practice, the majority of judges do not need to vote for *en banc* consideration of an appeal—instead, before a case is assigned for oral argument, the Chief Justice or Chief Judge alone may order, on motion or *sua sponte*, that a case be heard *en banc*.[301] After argument, the entire court votes on whether to order *en banc* consideration, with or without further oral argument.[302] The Connecticut Supreme Court entertains a number of *en banc* cases each term.[303] As in the Second Circuit, the Connecticut Appellate Court will only overrule a prior panel decision when sitting *en banc*.[304]

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[298] Due to the Second Circuit's caseload, many panels do not consist of three active Second Circuit judges. Often, a senior judge, a visiting judge from another circuit or a district court judge will be on the panel.

[299] See *infra* for a discussion of Second Circuit practice on rehearings *en banc*.

[300] CONN. GEN. STAT. §§ 51-207 and 51-197c(a). As in the Second Circuit, the state appellate courts have been using senior judges and visiting judges with more regularity. The Appellate Court has made great use of senior judges of late. *See* Horton and Bartschi, *supra* note 1, at 24 (noting as a "constant" the "participation of several 'retired' Supreme Court justices and Appellate Court judges," and remarking "that the willingness of these judges to sit on cases and write decisions plays an important role in keeping the docket current."). Moreover, a panel on either the Appellate or Supreme Court often may include a trial judge sitting by designation. *See* CONN. GEN. STAT. §§ 51-207 and 52-434.

[301] P.B. § 70-7(a).

[302] P.B. § 70-7(b) & (c). For example, in Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc., 239 Conn. 708, 713 n.10, 687 A.2d 506 (1997), the Court ordered supplemental briefing and additional oral argument after adding two more justices to the original panel of five. For an interesting discussion of when the court should *sua sponte* order *en banc* consideration of a case after argument but before decision, *see* Doyle v. Metro. Prop. and Cas. Ins. Co., 252 Conn. 912, 746 A.2d 1257 (1999) (Berdon, J., dissenting).

[303] *See* HORTON & BARTSCHI, *supra* note 12, at 240 ("Approximately 2-3 cases each Term, or about 20 each year, are assigned for *en banc* hearing. This is about 10% of the cases heard. The Appellate Court hears one or two cases a year *en banc*."). An *en banc* panel in the Supreme Court consists of all seven active justices, but, in the event of a disqualification or scheduling conflict, may include a senior justice or a Superior or Appellate Court judge sitting by designation. This is in contrast to the practice in the Second Circuit, where a visiting judge may not sit with an *en banc* panel. Senior judges are likewise excluded, except that a senior judge

The time allotted for oral argument in the state and federal appellate courts differs substantially, with the Second Circuit typically providing only a portion of the time permitted in state courts. The presiding judge sets the time allowed for argument by each party, which normally is 10 or 15 minutes.[305] However, the panel may, and often does, allow argument to extend beyond the allotted time if it has questions for the parties that need to be answered. The state rule provides that argument in state appellate courts may not exceed 30 minutes per side, unless the court grants additional time.[306] In practice, the Appellate Court provides parties with only 20 minutes per side, while the Supreme Court permits the entire 30 minutes allotted by the rule.[307] In both state appellate courts, an appellant must reserve time for rebuttal at the beginning of the argument.

As of November 6, 2006, the Second Circuit no longer permits argument by videoconferencing, though it does permit the occasional videotaping of argument.[308] Argument by videoconferencing is not permitted in the state appellate courts. However, it is now presumed that the state appellate courts will allow all proceedings to be broadcast, televised, videotaped, audio recorded or photographed, except in those cases involving sexual assault, risk of injury to a child, abuse or neglect of a child, termination of parental rights, and contested questions of child custory or visitation.[309]

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who was a member of the panel issuing the decision under review may elect to sit on the en banc Court. *See 2d Circuit Handbook*, *supra* note 129, at 4.

[304] *See* Consiglio v. Transamerica Ins. Group, 55 Conn. App. 134, 138 n.2, 737 A.2d 969 (1999). *See also infra* note 336 and accompanying text (discussing Second Circuit practice).

[305] *See* Second Circuit Local Rule 34(b). *Pro se* arguments are allowed only five minutes per side. *Id*.

[306] P.B. § 70-4.

[307] The Supreme Court has permitted oral argument to exceed the one-hour limit in certain cases, however. *E.g.*, State v. Johnson, 253 Conn. 1, 751 A.2d 298 (2000) (death penalty appeal presenting 28 issues in which oral argument lasted three hours).

[308] *See 2d Circuit Handbook*, *supra* note 129, at 24; Second Circuit Local Rules, Appendix Part F (prescribing guidelines for videotaping oral argument).

[309] P.B. § 70-9(a), (c) (effective June 1, 2007), Conn. L.J. 3C–6C (Apr. 24, 2007). The "right to permit or exclude coverage, whether partially or totally, any time in the interests of the administration of justice" is reposed with the panel of jurists assigned to hear the appeal. In acting upon a motion to limit or preclude coverage, or on its own, the panel will apply the presumption that all judicial courtroom proceedings in the appellate courts are subject to coverage by cameras and electronic media, and it will limit or prohibit coverage only if good cause is shown, there are no reasonable alternatives to such limitations, and the limitation is no broader than necessary to address the competing interests. If the panel orders a limitation or

IV. POST-APPEAL ISSUES

The differences between appeals in state and federal courts are not limited to post-judgment considerations and the appeal process—indeed, many key differences arise during the period following the briefing and argument of an appeal. Whether and when the court will publish a decision in the case varies greatly between the Second Circuit and the state appellate courts. In addition, the court systems each take different approaches to whether a remand for a new trial goes back to the same, or a different, trial judge. Petitions for rehearing also differ substantially between the Second Circuit and the state appellate courts. These and many other distinctions arise in the post-appeal period of the appellate process.

A. Opinions

Once the briefing and argument have been completed, the appellate process, for the most part, turns into a waiting game in the federal and state court systems. The length of time it takes any appellate court to decide a case and issue an opinion depends on a variety of factors, including the complexity of the case, the judges on the panel, whether a dissent or concurrence is being prepared, and the manner in which the court chooses to dispose of the case.

For example, in the Second Circuit, approximately 75 percent of the cases that proceed to oral argument or submission are decided by summary order.[310] Summary orders are not "published" in the federal reporters and do not have precedential effect. However, summary orders filed after January 1, 2007 may be cited.[311]

All decisions of the state appellate courts are published in the Connecticut Law Journal[312] and then compiled into the Connecticut Reports and Connecticut Appellate Reports. The

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preclusion on coverage, it must provide a statement of its reasons in writing or on the record in open court. P.B. § 70-9(b)(ii)-(iv).

[310] *2d Circuit Handbook*, *supra* note 129, at 17.

[311] *See* Second Circuit Local Rule 32.1(c) (effective June 26, 2007; available at http://www.ca2.uscourts.gov/Docs/Rules/Rule32.1.pdf). A party citing a summary order must include a citation to the Federal Appendix, where the summary order may be found, or be accompanied by the notation, "(summary order)." Citation to summary orders filed prior to January 1, 2007 is not permitted in the Second Circuit or any other court, except in a subsequent stage of the same case, in a related case, or in any case for the purposes of estoppel or res judicata. *See id.*

[312] CONN. GEN. STAT. § 51-213. In addition, state appellate court opinions are available at http://www.jud.state.ct.us in advance of their publication in the Connecticut Law Journal. Counsel in the case generally receives notice of the rescript of the case a few days before it appears on the judicial website.

Supreme Court usually issues full written decisions in each case, even in *per curiam* decisions.[313] However, the Appellate Court often disposes of cases with very short *per curiam* decisions, such as "The judgment is affirmed," or "There is no error."[314]

B. Further Stay of Proceedings

Both federal and state appellate courts provide a procedure for staying the execution of the appellate judgment pending the resolution of motions for reconsideration or other post-appeal filings. However, because the federal and state appellate courts take different approaches to stays of execution pending the appeal, it follows that they also take different approaches to stays of execution after an appeal has been decided. As discussed above, state court proceedings generally are stayed pending the outcome of an appeal. In the post-appeal stages, this automatic stay in state court is simply extended until the time for filing motions for reconsideration or petitions for certification expires, or, if such motion or petition is granted, until the appeal is finally determined.[315] In the few instances in state court where a stay pending appeal is not in effect (either due to an exemption from the automatic stay or the trial court's lifting of the automatic stay *sua sponte* or upon motion), proceedings following an appellate decision are stayed pending the motions for reconsideration and petitions for certification only if the appellate decision changes the position of any party.[316] Furthermore, a party seeking review of the state Supreme Court decision by the United States Supreme Court may move in the state Supreme Court within 20 days of the final judgment for a stay of execution pending a petition for *certiorari* to the United States Supreme Court.[317]

In federal court, where there is no automatic stay pending the outcome of an appeal, the time for the execution of the appellate judgment is determined by the issuance of the formal mandate. The formal mandate consists of a certified copy of the judgment, a copy of the court's opinion and any direction about costs.[318] The clerk of the court of appeals sends the mandate to the district court clerk, and this signifies the transfer of jurisdiction from the court of appeals back to the district court for execution in accordance with the mandate. Under the federal rules,

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[313] *See* HORTON & BARTSCHI, *supra* note 12, at 249.

[314] *Id*. For example, in the 2005-2006 term, the Appellate Court published 496 opinions, 40 of which (or 8 percent) were one-line *per curiam* decisions. *See* Horton & Bartschi, *supra* note 1, at 23.

[315] *See* P.B. § 71-6 (stays pending motions for reconsideration), and P.B. § 84-3 (stays pending petitions for certification to the Connecticut Supreme Court).

[316] P.B. §§ 71-6 & 84-3.

[317] *See* P.B. § 71-7. The filing of the motion operates as an interim stay of execution until the state Supreme Court rules on the motion. *Id*.

[318] FRAP 41(a).

the mandate ordinarily issues seven days after the time to file a petition for rehearing has expired, or seven days after entry of an order denying a timely petition for rehearing.[319] This delay in issuing the mandate serves as an informal stay of execution of the appellate judgment. In addition, a party may move in the court of appeals to stay the issuance of the mandate pending a petition for *certiorari* to the United States Supreme Court by demonstrating that the *certiorari* petition would present a substantial question and that there is good cause for a stay.[320] If the court grants such a stay, it must issue the mandate immediately when a copy of the Supreme Court order denying the petition for *certiorari* is filed.[321]

C. New Trials

There is a notable and very important difference between an order remanding a case for a new trial in the federal and state court systems. In federal court, absent unusual circumstances, the original trial judge will conduct a retrial.[322] When a case is remanded to the trial court for retrial in state court, however, the trial judge who originally tried the case cannot preside at the new trial.[323] Whether the original trial judge may preside over subsequent proceedings on remand that do not constitute a new trial is somewhat uncertain.[324]

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[319] FRAP 41(b). The rule states that a court may shorten or extend the time for issuance of the mandate. Second Circuit Local Rule 41 has shortened the time in certain cases by providing that the mandate shall issue "forthwith," *i.e.* immediately, in all cases in which "(1) an appeal from an order or judgment of a district court or a petition to review or enforce an order of an agency is decided in open court, (2) a petition for a writ of mandamus or other extraordinary writ is adjudicated, or (3) the clerk enters an order dismissing an appeal or petition to review or enforce an order of an agency for a default in filings, as directed by an order of the court or a judge."

[320] FRAP 41(d)(2).

[321] FRAP 41(d)(2)(D).

[322] *See* Mackler Productions., Inc. v. Cohen, 225 F.3d 136, 146-47 (2d Cir. 2000); *see also* Mark R. Kravitz, *A New Judge*, NAT'L L.J., Apr. 22, 2002 at B9.

[323] *See* CONN. GEN. STAT. § 51-183c. By its terms, this statute applies regardless of whether the first trial was a jury trial or a bench trial.

[324] *See* Lafayette Bank & Trust Co. v. Szentkuti, 27 Conn. App. 15, 20-21, 603 A.2d 1215 (1992) ("The legislature's use of the term 'trial' in General Statutes § 51-183c, rather than the more general term 'proceeding,' as used in § 51-183d, must be viewed as intentional . . . . It is apparent that the legislature intended General Statutes § 51-183c to apply solely to trials and not to all types of adversarial proceedings."); L&G Assocs., Inc. v. City of Danbury, 12 Conn. L. Rptr. 276, 1994 WL 421454 (1994) (holding that CONN. GEN. STAT. § 51-183c applies only when a retrial is ordered, not when the appellate court orders "further proceedings consistent with this opinion"). *But see* Higgins v. Karp, 243 Conn. 495, 500 n.7, 706 A.2d 1 (1998) (noting that, in accordance with CONN. GEN. STAT. § 51-183c, the Court ordered the reconsideration of

D. Post-Opinion Motions

Both the federal and state appellate courts provide for petitions for rehearing after an appeal has been decided. In federal court, a petition for rehearing may be filed within 14 days after entry of judgment, except in a civil case in which the United States is a party, where the time within which any party may seek rehearing is 45 days after entry of judgment.[325] The petition must state with particularity each point of fact or law that the petitioner believes the court has overlooked or misapprehended.[326] In the Second Circuit, each petition for rehearing must be accompanied by a copy of the opinion or summary order to which the petition relates.[327] The petition may not exceed 15 pages, and must comply with the requirements for format and filing of briefs.[328] A petition for rehearing *en banc* follows the same procedure as a petition for panel rehearing, except that for rehearing *en banc*, the petition must state either (a) that the panel decision conflicts with a decision of the United States Supreme Court or of the Second Circuit and consideration by the full court is therefore necessary to secure and maintain uniformity in the court's decisions, or (b) that the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated.[329] If both a petition for panel rehearing and

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motions to set aside a default order go to a judge other than the judge who originally decided the motions); HORTON & BARTSCHI, *supra* note 12, Authors' Comments to P.B. § 71-4, at 251 ("narrow definition of 'trial' is clearly wrong" in light of *Higgins*); State v. Miranda, 260 Conn. 93, 131-132, 794 A.2d 506, 529 (2002) (trial judge who was reversed may decide resentencing issue).

[325] FRAP 40(a)(1). Unlike a notice of appeal, the filing of a timely petition for rehearing is not mandatory and jurisdictional. *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3986 at 725. It is generally recognized that courts of appeal may grant extensions of time for a party to file a petition for rehearing, or may entertain untimely petitions. *Id*. at 725-26; *see also* Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir. 1970). However, the practice of granting extensions of time or entertaining late petitions for rehearing is not favored in the Second Circuit. *E.g.*, Eastwood Auto. Body & Garage, Inc. v. City of Waterbury, 157 F.3d 137, 137-38 (2d Cir. 1998).

[326] FRAP 40(a)(2). Petitions for rehearing should not be filed simply to reargue matters already decided by the court of appeals, or to present for the first time issues that were not raised in the original appeal. 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3986.1 at 731; *see also* Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29 (2001).

[327] Second Circuit Local Rule 40(a).

[328] FRAP 40(b). FRAP 32(c)(2) provides that, if a cover is used for a petition for rehearing or rehearing *en banc*, or a response thereto, the cover must be white.

[329] FRAP 35(b)(1).

a petition for rehearing *en banc* are filed, the two together may not exceed 15 pages.[330] Other parties may not respond to the petition unless the court requests an answer.[331] However, the courts generally will not grant a petition without first asking for a response to the petition.[332] Furthermore, Second Circuit rules provide for sanctions against any party who files a petition for rehearing that is wholly without merit, vexatious and for delay.[333]

A majority of the circuit judges in regular active service and who are not disqualified may order, *sua sponte* or upon a party's motion, that an appeal or other proceeding be heard or reheard *en banc*.[334] An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless (a) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (b) the proceeding involves a question of exceptional importance.[335] An *en banc* panel consists of all active judges, although a senior judge who was a member of the panel hearing the decision under review also may elect to sit. No visiting judge may sit with an *en banc* panel. The Second Circuit very rarely hears appeals *en banc*. It typically reviews only one or perhaps two cases *en banc* each year.[336] Of note, only an *en banc* court may overrule a prior

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[330] FRAP 35(b)(2) & (3); FRAP 35(e).

[331] FRAP 40(a)(3).

[332] *Id*. *But see* United States Envtl. Prot. Agency v. Gen. Elec. Co., 212 F.3d 689, 690-92 (2d Cir. 2000) (Miner, J, dissenting) (chastising the court for granting General Electric's petition for rehearing and removing a paragraph from the original opinion without first requesting a response to the petition from the government, and noting that "in fifteen years of service on this court, I never have served on a panel that granted rehearing and proceeded to a decision on a substantive matter without requiring a response to the rehearing petition . . . I do not think it proper judicial practice or a good precedent to proceed without soliciting an answer to the rehearing petition from the government in this case.").

[333] *See* Second Circuit Local Rule 40(c). Prior to the adoption of the Appellate Rules, many circuits required a petition for rehearing to include a certificate from the attorney that the petition was well-founded, in good faith and not interposed for delay. *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3986.1 at 732-33. The absence of any requirement for such a certificate in the FRAP is noteworthy. *Id*.

[334] FRAP 35(a); Second Circuit Interim Local Rule 35.

[335] FRAP 35.

[336] The case of Green v. Santa Fe Indus., Inc., 533 F.2d 1309, 1310 (2d Cir. 1976), serves as a good example of the Second Circuit's reluctance to rehear cases *en banc*. In *Green*, the Court denied a motion for rehearing *en banc*, stating that the *en banc* procedure is "often an unwieldy and cumbersome device generating little more than delay, costs, and continued uncertainty that can ill be afforded at a time of burgeoning calendars," and announcing that it would not rehear a case *en banc* unless the case is "of such extraordinary importance that we are confident the

panel's decision, and absent *en banc* review, panel decisions are binding precedent in all future cases.[337] The Second Circuit grants few motions for rehearing *en banc*. A majority of the active judges on the court must vote to rehear the case *en banc* (a tie will result in a denial). Senior judges and visiting judges may not vote on whether a case should be reheard *en banc*. Panel rehearings are more common than rehearings *en banc*, but they also are rare. A petition for panel rehearing is most likely to be granted where there is a supervening decision or legislative enactment that could not reasonably be foreseen at the time of the initial argument, and that has great significance to the outcome of the case.[338]

In state court, a motion for reconsideration must be filed with the appellate clerk within ten days of the date when the decision or order is officially released.[339] The motion must be accompanied by a receipt showing that the required $70.00 filing fee[340] was paid to a Superior Court clerk's office.[341] A motion for reconsideration must comply with the general motion requirements listed in P.B. section 66-2, which includes a limit of ten pages. A motion for reconsideration *en banc* must be filed in the same manner and time as a motion for reconsideration, except that it shall state "en banc" in the caption of the motion. The motion also must state why reconsideration *en banc* is necessary and must state the names of decisions, if any, with which the decision conflicts.[342] When any judge who sat on the panel deciding the case is not available to act on the motion for reconsideration, the court will treat the motion like a motion for reconsideration *en banc*.[343] As in federal appellate courts, the state appellate courts

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Supreme Court will accept these matters under its *certiorari* jurisdiction." The Second Circuit did not rehear the case *en banc*, but the Supreme Court later did accept *certiorari* in the case, reversing the original panel's determination. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977). No other Circuit has followed the Second Circuit in its very strict approach to *en banc* rehearings. *See* 16A WRIGHT, MILLER & COOPER, *supra* note 107, § 3981 at 608-09 & n.14.

[337] *See, e.g.*, U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd., 241 F.3d 135, 149 (2d Cir. 2001) ("[W]e will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court.").

[338] *See* 16A WRIGHT, MILLER & COOPER§ 3986.1, *supra* note 107, at 731-32. *E.g.*, United States v. Ali, 86 F.3d 275 (2d Cir. 1996) (granting petition to rehear based on supervening Supreme Court decision).

[339] P.B. § 71-5.

[340] *See* CONN. GEN. STAT. § 52-259c.

[341] The federal courts do not require a filing fee to petition for rehearing or rehearing *en banc*.

[342] P.B. § 71-5.

[343] *Id*.

may entertain untimely motions for reconsideration.[344] Although motions for reconsideration are rarely granted, the state Supreme Court does reconsider cases *en banc* more frequently than does the Second Circuit.[345]

After decision from the state Appellate Court, a party, in addition to filing motions for rehearing or reconsideration, may also petition for certification to the state Supreme Court.[346] Petitions for certification must be filed within 20 days of the date on which the Appellate Court decision is officially released, or 20 days after the order on any motions for reconsideration filed with the Appellate Court.[347] The original and one copy of the petition must be filed with the trial court clerk, together with the fee of $75.00.[348] The clerk then endorses the petition with the date and time of filing and returns it to the petitioner, who then files it with the appellate clerk with fifteen additional copies.[349] The petition may not exceed ten pages, exclusive of the appendix, and must include a statement of the questions presented, a statement of the basis for the extraordinary relief of certification, a summary of the case, an argument, and an appendix containing specified items.[350] Within ten days of the filing of the petition in the trial court, any party may file a statement in opposition with the appellate clerk, not to exceed ten pages.[351]

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[344] *See* P.B. § 60-2(6). *E.g.*, State v. Medina, 228 Conn. 281, 284 n.4, 636 A.2d 351 (1994) (granting motion for reconsideration that was filed almost two months after original decision).

[345] When the court grants a motion for reconsideration, the outcome of the case may or may not change. *Compare* Simko v. Zoning Bd. of Appeals, 206 Conn. 374, 538 A.2d 202 (1988) (*en banc* panel reached same result), *with* Town of Groton v. United Steelworkers of Am., 254 Conn. 35, 757 A.2d 501 (2000) (4-3 *en banc* vote reversed the 3-2 original decision).

[346] P.B. § 84-1. *See generally* TAIT & PRESCOTT, *supra* note 15, §§ 7.1-7.15 at 263-79.

[347] P.B. § 84-4(a). P.B. §§ 84-5 and 84-6 specify the font type and size to be used in petitions for certification and statements in opposition to such petitions, and require a certificate to be attached to the original signed petition or statement in opposition indicating that the document is in compliance with these formatting requirements.

[348] S*ee* P.B. § 84-4(a); CONN. GEN. STAT. § 52-259.

[349] P.B. § 84-4(a). This procedure, which mimics the procedure for filing a notice of appeal, does not apply for petitions for certification in worker's compensation cases. In such cases, no fee is required, and the petitioner must file the original and fifteen copies directly with the appellate clerk, not with the trial court. *See id.*

[350] P.B. § 84-5.

[351] P.B. § 84-6.

If three or more justices vote to grant the petition, the Supreme Court will hear the case on certification.[352] The order granting the petition for certification will state the question presented, which may or may not be the same question the parties petitioned the Court to certify.[353] Once the petition is granted, the appellate clerk enters the case upon the Supreme Court docket, with the petitioner as appellant.[354] The petitioner then must pay the $250.00 fee and file the docketing statement as required.[355] The appellant's brief is due within 45 days from the issuance of the notice of certification.[356] On the other hand, if the petition is denied, any stay in effect when the petition was filed remains in effect for 20 days after the order denying the petition, so that the petitioner may move for reconsideration of the denial of the petition,[357] or petition for *certiorari* to the United States Supreme Court.

Parties have the option of filing a petition for *certiorari* to the United States Supreme Court from an entry of judgment in the Second Circuit or the Connecticut appellate courts. In state court, a party may petition for *certiorari* to the United States Supreme Court from a final judgment from a state's highest court that rules on issues of federal law.[358] A petition for *certiorari* from the Second Circuit or the state appellate court must be filed within 90 days after the entry of judgment or decree sought to be reviewed.[359] As discussed, *supra*, a party petitioning for *certiorari* may move to stay the issuance of the mandate pending the petition by

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[352] P.B. § 84-8. In the 2004-2005 term, 51 petitions for certification, and one petition for writ of error, were granted. *See* Wesley W. Horton and Kenneth J. Bartschi, *2005 Connecticut Appellate Review*, 79 CONN. B. J. 2, 111 (2006).

[353] The Court may adopt the question presented in the petition verbatim; often, however, the Court rewords the question or makes other minor changes to it, or it might substantially add to or detract from the question presented in the petition. P.B. § 85-9. In any event, it is important to pay close attention to the question certified by the Court, as that is the question in which the Justices are interested.

[354] P.B. § 84-9.

[355] *Id*.

[356] *Id*.

[357] Moving for reconsideration of a denial of a petition for certification can be an important step in the appeal process. *See* State v. Burke, 254 Conn. 202, 203-04, 757 A.2d 524 (2000) (petition originally denied but granted upon reconsideration).

[358] 28 U.S.C. § 1257. Thus, a petition for *certiorari* may be filed either upon (a) a decision from the Supreme Court, or (2) a denial of certification to review a decision from the Appellate Court.

[359] 28 U.S.C. § 2101(c).

demonstrating that the *certiorari* petition presents a substantial question and that there is good cause for a stay.[360]

E. Appellate Sanctions

Both state and federal appellate courts provide for the imposition of sanctions for the filing of frivolous appeals and unnecessary delay, though appellate courts in each system appear reluctant to impose such sanctions. In the federal system, if a court of appeals determines that an appeal is frivolous, it may, after a separately-filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.[361] It is important to file a separate motion for sanctions, as the Second Circuit will not consider a request for sanctions simply included in a brief.[362] Furthermore, by statute, a court may sanction a party for delay, and may sanction an attorney (not the party) for increasing the costs of litigation by unreasonably or vexatiously multiplying the proceedings.[363] In addition, the Second Circuit rules provide that, in the event of a party's failure to file the record, a brief, or the appendix within the time prescribed, the court, on motion of a party or *sua sponte*, may impose other sanctions, including requiring the defaulting party or the defaulting party's attorney to reimburse an opposing party for the expense of making motions.[364]

State appellate courts also may sanction a party for filing a frivolous appeal,[365] as well as for failing to prosecute or defend an appeal with proper diligence.[366] Furthermore, the state

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[360] FRAP 41(d)(2); P.B. § 71-7. If a stay is not requested within twenty days, the previous stay, if any, automatically expires. F.D.I.C. v. Caldrello, 79 Conn. App. 384, 388 n.5, 830 A.2d 767, 771 n.5 (2003).

[361] FRAP 38. *E.g.*, Simon & Flynn, Inc. v. Time Inc., 513 F.2d 832, 834 (2d Cir. 1975) ("Counsel must realize that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk reaction to every unfavorable ruling.").

[362] *See* Mark R. Kravitz, *Frivolous Appeals*, THE NAT'L L. J., Feb. 11, 2002 at B10.

[363] *See* 28 U.S.C. § 1912 ("Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."); 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

[364] Second Circuit Local Rule 38; Second Circuit Local Rules, Appendix Part C, ¶ 6.

[365] P.B. § 85-2; *see, e.g.*, Connecticut Nat'l Bank v. Zuckerman, 31 Conn. App. 440, 442, 624 A.2d 1163 (1993) (granting motion to dismiss appeal as frivolous).

[366] P.B. § 85-1; *see also* TAIT & PRESCOTT, *supra* note 15, § 6.18 at 253-56.

appellate courts may sanction a party or its attorney for failure to comply with the rules and orders of the court, filing any papers which unduly delay the progress of an appeal, presentation of unnecessary or unwarranted issues on appeal, failure to attend pre-argument settlement conferences, disregard of rules governing withdrawal of appeals, and repeated failures to meet deadlines.[367]

V. CONCLUSION

As the foregoing discussion details, there are a number of important differences between appellate practice in the state and federal court systems. Several of the differences mentioned in this article are so fundamental that they can have a dramatic effect on the appellate lawyer's strategy and approach to the appeal. Others are minor and mechanical, but nonetheless important to the success of any appeal.

On a closing note, it is important to keep in mind that both the Connecticut rules and the federal rules provide for the suspension of the rules of practice in certain limited circumstances.[368] Although courts rarely use these provisions to excuse noncompliance with the rules, there are cases in which the courts have suspended the rules in order to promote equitable considerations.[369] Furthermore, the Connecticut rules also provide that the appellate rules must be liberally construed in order to deter surprise and injustice in an appeal,[370] and that the

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[367] P.B. § 85-2; *see, e.g.*, Srager v. Koenig, 42 Conn. App. 617, 623, 681 A.2d 323, *cert. denied*, 239 Conn. 935, 936, 684 A.2d 709 (1996) (excess of $1,300 sanction for abuse of the judicial process); Feuerman v. Feuerman, 39 Conn. App. 775, 667 A.2d 802 (1995) ($750 sanction for failure to attend pre-argument conference); *see also* TAIT & PRESCOTT, *supra* note 15, § 6.19 at 256-57.

[368] P.B. § 60-3 provides that the court in which an appeal is pending may suspend the requirements or provisions of any of the Practice Book rules, for good cause. Similarly, FRAP 2 permits the courts of appeals to suspend the provisions of the federal rules in a particular case.

[369] *See, e.g.*, State v. Kreske, 130 Conn. 558, 560 n.1, 36 A.2d 389 (1944) (excusing litigant's failure to follow proper procedure in the face of newly-amended rules); Monk v. Temple George Assocs., LLC, 273 Conn. 108, 122-23, 869 A.2d 179, 189 (2005) (addressing the issue as briefed despite procedural problems); United States v. Allen, 127 F.3d 260, 264 (2d Cir. 1997) (considering argument not raised on appeal in order to avoid manifest injustice).

[370] P.B. § 60-1. This section is often used to expedite appeals. *E.g.*, Buckman v. People Express, Inc., 205 Conn. 166, 169, 530 A.2d 596 (1987). More recently, the court relied on this section to order the immediate release of a defendant, when it reversed its earlier decision in a criminal case and the defendant had already served the maximum sentence on the only remaining count. State v. Miranda, 272 Conn. 430, 432, 864 A.2d 1 (2004).

appellate courts have supervisory power over appellate proceedings.[371] While these "safety valve" provisions may provide an occasional basis for excusing noncompliance with the appellate rules, in the end, there is no substitute for proper, careful attention to the rules of procedure that govern your appeal.

[371] *See* P.B. § 60-2. The court with appellate jurisdiction therefore can issue a number of different orders relating to the appeal and the trial court proceedings below. *See* Greenwood v. Greenwood, 191 Conn. 309, 313-15, 464 A.2d 771 (1983) (using supervisory powers to dismiss appeal because of contemptuous conduct by appellant).

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This article first appeared in the Connecticut Bar Journal, and was authored by Erika and former Wiggin and Dana partner Mark R. Kravitz, who now serves as a United States District Court Judge for the District of Connecticut. *See* Mark R. Kravitz and Erika L. Amarante, *Key Differences Between Civil Appeals in the Second Circuit and Connecticut's Appellate Courts*, 76 CONN. B. J. 149 (Sept. 2002). Erika and Kevin would like to thank Amos Friedland and Alexander Glage for their assistance in updating this article for publication.

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