IMPEDIMENTS TO "ALBERT PUJOLS STATUS": SOME DANGER ZONES AND SAFETY NETS IN NEW YORK APPELLATE PRACTICE

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INTRODUCTION

During his term on the Court of Appeals, Judge Eugene F. Pigott, Jr., regularly lectured on the topic of appellate practice. His presentations were informative and entertaining, and I often think about one of his comments. He observed that when Albert Pujols, the great baseball player, comes up to bat, he is not thinking about the rules of the game. He just *plays* the game. The rules are part of his subconscious. He is focused upon getting the best result in relation to the projectile screeching toward him at one hundred miles per hour, and he makes his five hundred 500-foot redirection of the projectile seem routine. He is in "the zone." Judge Pigott encourages appellate practitioners to master the rules of our craft to an unconscious degree, so that we can make our advocacy as pure as Albert Pujols' home run swing.[1]

I consider Judge Pigott's Albert Pujols comments in juxtaposition to the statement, now appearing in the Siegel and Connors' *New York Practice* treatise, which I read when drafting my first notice of appeal thirty years ago. To this day, I think about this statement every time I draft a notice of appeal. It suggests, "The 'taking' of the appeal, [as compared to perfecting it], although it confronts a rigid time limitation, is probably the easiest step in civil practice. It's just the service and filing of a paper, or at worst several papers."[2]

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[1] Mr. Markarian extends his gratitude to Judge Pigott, for his jurisprudence, for his dedication to the New York State and Erie County Bar Associations (and the others he certainly must have helped), for his devotion to both the law and lawyers and, in connection with this Article, for his allowing his Albert Pujols theme to be borrowed.

[2] DAVID D. SEIGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 531, at 1024 (6th ed. 2018).

The quoted statement scared me thirty years ago and it scares me even today because, whenever I draft a notice of appeal, I imagine, based upon the language of New York's Civil Practice Laws and Rules (CPLR) and the cases interpreting it, the numerous opportunities for me to blunder *the easiest step in civil practice!*

For me, even this easiest step is not easy, and I have practiced long enough to have experienced some of the harder steps. Considering this, I view the goal of executing appellate practice "in the zone," like Albert Pujols, as formidable. Thankfully, projectiles aimed at appellate practitioners are not traveling one-hundred miles per hour. The speed of our challenges is measured in increments of, sometimes days, and usually months. This is helpful, but only to a degree. Albert Pujols faces just one pitcher at a time. Depending on caseload, appellate practitioners can be bombarded.

Albert Pujols status requires the ability to swing freely. The rules of the game can impede it. Under the appellate practice rules for New York practitioners,[3] our swings may be restricted, or entirely thwarted, if we fail to appreciate requirements under New York's Constitution,[4] statutes,[5] and court rules.[6] Issues must be recognized, and then the comprehensive resources and treatises considered.[7] This Article encourages practitioners to take advantage of those

[3] This Article will focus exclusively on New York State civil practice rules.

[4] *See* N.Y. CONST. art. VI, §§ 2–5.

[5] *See* N.Y. C.P.L.R. art. 55–57 (McKinney 2019) (setting forth rules for appeals generally, appeals to the Court of Appeals, and appeals to the appellate division).

[6] *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 500.1–.27 (2019) (setting forth the Court of Appeals Rules of Practice); *id.* §§ 600.1, 600.3, 600.4, 600.9, 600.11, 600.15, 600.17–600.19 (2019) (setting forth the First Department Rules of Practice); *id.* §§ 670.1–670.4, 670.9, 670.11, 670.15, 670.17, 670.18–670.24 (2019) (setting forth the Second Department Rules of Practice); *id.* §§ 850.1, 670.4–670.5, 670.7, 670.9, 670.11, 670.14–670.17 (setting forth the Third Department Rules of Practice); *id.* §§ 1000.1, 1000.3–1000.4, 1000.7–1000.9, 1000.11–1000.12, 1000.15–1000.16 (setting forth the Fourth Department Rules of Practice); *id.* §§ 1250.1–1250.17 (setting forth the statewide Practice Rules of the Appellate Division); *see also id.* §§ 1245.1–1245.10 (2019) (setting forth the Electronic Filing Rules of the Appellate Division).

[7] *See, e.g.*, A. VINCENT BUZARD ET AL., NEW YORK APPELLATE PRACTICE § 1.01–12.08 (2018); ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 3:1–19:13 (3d ed. 2005); SIEGEL & CONNORS, *supra* note 2, §§ 524–45, at 997–1052; CLERK'S OFFICE, N.Y. COURT OF APPEALS, THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE 3–41, https://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last visited Apr. 22, 2019); SUPREME COURT OF THE STATE OF N.Y. APPELLATE DIV.: SECOND JUDICIAL DEP'T, GUIDE TO CIVIL PRACTICE 1–15 (2018), http://www.courts.state.ny.us/courts/AD2/pdf/Guide%20to%20Practice%20-%2020180917.pdf; *Appeals to the Appellate Division*, NYCOURTS.GOV, https://www.nycourts.gov/courts/ad4/Clerk/Forms/perf-appeal.pdf (last visited Apr. 22, 2019); *Frequently Asked Questions (22 NYCRR) Parts 1250 and 600 – Effective September 17, 2018, Practice Rules in the Appellate Division, First Department*, NYCOURTS.GOV, http://www.courts.state.ny.us/cou rts/AD1/Practice&Procedures/FAQNewPracticeRules.pdf (last visited Apr. 22, 2019); *Motion FAQs*, NYCOURTS.GOV, http://www.courts.state.ny.us/ad3/Clerk/Motions%20FAQs.pdf (last visited Apr. 22, 2019).

resources, which are impressive in their thoroughness and mastery of the subject matter. This Article is not one of them, but is instead an encouragement to seek them out. This Article is simply a reminder that the rules have real consequences on the actual field of play and that there are numerous obstacles to overcome before the Albert Pujols zone can be contemplated. This is just a warm-up discussion of some things to think about. In other words, this is batting practice.

I. TAKING AN APPEAL TO THE APPELLATE DIVISION

One rule engrained in our subconscious is the deadline for filing and serving a notice of appeal or motion for leave to appeal. We have thirty days.[8] We are warned to treat this deadline as a statute of limitations.[9]

Confronted with this deadline, many lawyers rush to file a notice of appeal without assessing whether what the judge did was appealable.[10] Is there an appealable paper (an order or judgment), and does it address an appealable subject matter? Many lawyers are unaware of the technicalities. My telephone usually rings after trial or motion counsel has already filed (and hopefully served) a notice of appeal. I have received calls in cases where counsel filed a notice of appeal from a "verdict" or from a "memorandum decision," neither of which was appealable.[11] Nor can an appeal be taken from an ex parte order[12] or from certain rulings on motions in limine.[13] I, therefore, appreciate the lawyers who contact me early in the process and ask me to assist them in drafting, filing and serving the notice of appeal. Other attorneys play it safe by appealing from "everything in sight,"

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[8] *See* N.Y. C.P.L.R. 5513(a) (McKinney 2019).

[9] *See* SIEGEL & CONNORS, *supra* note 2, § 534, at 1032.

[10] *See* Michael Nolan, *A Case Study on Court of Appeals Finality*, 79 ALB. L. REV. 1307, 1325 (2015).

[11] *See* C.P.L.R. 5512(a) (defining appeal paper); Raymond Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 849 N.Y.S.2d 101, 103 (App. Div. 2007) (finding no appeal from memorandum decision); Smith v. Field, 756 N.Y.S.2d 83, 85 (App. Div. 2003) (citing People v. Pugh, 686 N.Y.S.2d 764, 765 (App. Div. 1999)) (finding no appeal from verdict).

[12] *See, e.g.*, *In re* Scotti, 385 N.Y.S.2d 659, 661–62 (App. Div. 1976) (citing James v. Powell, 292 N.Y.S.2d 135, 136 (App. Div. 1968), *aff'd*, 243 N.E.2d 746 (1968); *In re* State v. Fuller, 296 N.Y.S.2d 37, 41 (App. Div. 1968); Haner v. Van Buren, 266 N.Y.S. 513, 513 (App. Div. 1933); *In re* Bean, 201 N.Y.S. 827, 831 (App. Div. 1923), *aff'd sub nom.* Bean v. Stoddard, 144 N.E. 916 (N.Y. 1924)).

[13] *See, e.g.*, Winograd v. Price, 800 N.Y.S.2d 649, 650 (App. Div. 2005) (first quoting Chateau Rive Corp. v. Enclave Dev. Assoc., 725 N.Y.S.2d 215, 215 (App. Div. 2001); then citing Curtis v. Fishkill Allsport Fitness & Racquetball Club, Inc., 769 N.Y.S.2d 411, 411 (App. Div. 2003)); Farmer v. Nostrand Ave. Meat & Poultry, 735 N.Y.S.2d 425, 425 (App. Div. 2001)).

as recommended by Professors Siegel and Connors.[14] I appreciate these lawyers too.

Before the notice of appeal is filed and served, someone—either the prevailing party or the loser—should serve the appealable paper on opposing counsel.[15] Filing a notice of appeal before this is done makes the notice premature,[16] which is not uncommon because some attorneys are so worried about meeting the thirty-day deadline that they file their notice of appeal too soon. The appellate court is authorized to treat a premature notice as valid, "in its discretion, when the interests of justice so demand."[17] Perhaps more significantly, until the order or judgment is served with notice of entry, the thirty-day clock for filing and serving a notice of appeal has not started to run.[18] This has saved the day for many appellants who believed it too late for them to take an appeal.[19] It has also led to my receiving telephone calls from attorneys asking whether the notice of appeal the caller received was untimely because they received it more than thirty days after the order or judgment was granted. These callers often respond with silence when I ask when the order or judgment was served with notice of entry. Their silence signals that the thirty-day clock had not even started to run.

If the thirty-day deadline for filing and serving a notice of appeal is blown—meaning that neither is done within thirty days— the opportunity for appellate review may be lost.[20] It is time to check the statutes and treatises to see if one of the rare extension opportunities applies.[21]

If the thirty-day deadline has expired and is not extendable, but the appealable paper is a non-final order, there might be a second chance for appellate review.[22] CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review

> any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the

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[14] *See* SIEGEL & CONNORS, *supra* note 2, § 532, at 1028.

[15] *See id.* § 534 at 1031.

[16] *See* Paternosh v. Wood, 56 N.Y.S.3d 747, 749 (App. Div. 2017) (citing Montanaro v. Weichert, 43 N.Y.S.3d 843, 844 (App. Div. 2016)).

[17] *See* N.Y. C.P.L.R. 5520(c) (McKinney 2019); *Paternosh*, 56 N.Y.S.3d at 749 (citing *Montanaro*, 43 N.Y.S.3d at 844).

[18] *See* C.P.L.R. 5513(a).

[19] *See, e.g.*, Reynolds v. Dustman, 804 N.E.2d 411, 412–13 (N.Y. 2003).

[20] *See* C.P.L.R. 5513(a).

[21] *See* C.P.L.R. 5514(b), (c). See CPLR 1022 and 5520, along with SIEGEL & CONNORS, *supra* note 2, § 534, at 1031–32, for additional extension exceptions to the thirty-day deadline.

[22] C.P.L.R. 5501(a)(1).

> respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken[.][23]

This statute—which was interpreted by the famous or infamous *In re Aho*[24] decision—may afford a second opportunity for appellate review of, for example, a non-final order denying summary judgment.[25] But, this second chance is not guaranteed.

> Where a party appeals from an intermediate order, thereafter abandons the appeal by failing to perfect, and the appeal is then dismissed by an appellate court, the party is estopped for reasons of judicial economy from seeking review of issues which could have been raised on the appeal from the intermediate order.[26]

If these situations seem hypothetical and unlikely to occur, my experiences have been different. My telephone rings when attorneys discover they are facing an issue under CPLR 5501(a)(1) and *In re Aho*. In fact, lately, I am seeing an epidemic of *In re Aho* dilemmas.

Of course, an on-time notice of appeal solves nothing if the notice is otherwise defective. A notice of appeal must "designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken."[27] These requirements can also be blown.[28] Thankfully, the CPLR may allow these types of errors to be corrected.[29] To guard against them, some practitioners attach the judgment or order appealed from to their notice of appeal to eliminate doubt about what they are appealing from.

The CPLR also requires that the notice describe the part of the

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[23] *Id.*

[24] *In re* Aho, 347 N.E.2d 647, 651–52 (N.Y. 1976).

[25] *See, e.g.*, Am. Express Bank, FSB v. Scali, 36 N.Y.S.3d 220, 221 (App. Div. 2016) (citing *In re Aho*, 347 N.E.2d at 651–52).

[26] Montalvo v. Nel Taxi Corp., 494 N.Y.S.2d 406, 407–08 (App. Div. 1985) (citing Bray v. Cox, 342 N.E.2d 575, 576 (N.Y. 1976); Smith v. John J. McManus & Sons, Inc., 476 N.Y.S. 178, 178 (App. Div. 1984)).

[27] *See* C.P.L.R. 5515(1).

[28] *See, e.g.*, Hopkins v. Tinghino, 669 N.Y.S.2d 735, 736 (App. Div. 1998).

[29] *See* C.P.L.R. 5520(c).

judgment or order being appealed from.[30] In one case, where the appellant's notice of appeal indicated that the appeal was taken only with respect to the plaintiff's first and second causes of action, the appellant's contentions about the third and fourth causes of action were held "not properly before [the] [c]ourt."[31] To avoid this problem, may practitioners provide in their notice of appeal that the appeal is from "each and every part" of the order or judgment or each and every part of the order or judgment from which the appellant is aggrieved.[32]

It is not enough to file *or* serve the notice of appeal within thirty days. The appellant must do *both*.[33] I have observed, several times, where only one of the required steps was done. In those cases, the error can be excused by way of a motion to either "the court from or to which the appeal is taken," and upon a showing of "excusable neglect."[34] The error has also been excused where the "appellant timely files the notice of appeal in the appropriate court and there is no evidence that the opposing party has been prejudiced by the lack of service," in which case the failure to serve has been held "harmless error."[35] It must be emphasized, however, that this "safety net" exists only where one of the steps was taken: a notice of appeal was filed *or* served.[36] If neither was done, the appellant is likely doomed.

So far, the discussion has assumed that an "appeal of right" was authorized. Appeals from judgments may be taken as of right to the appellate division,[37] and there is an expectation among New York practitioners (in contrast to our friends in federal court) that even non-final orders are appealable of right. This expectation arises from the section of the CPLR that authorizes appeals to the appellate division from non-final orders which affect a "substantial right."[38] But, the view that all orders are appealable of right in New York practice is overstated.

Practice long enough and you will confront scenarios where an

[30] *See* C.P.L.R. 5515(1).

[31] Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722, 723 (App. Div. 2013) (citing Hatem v. Hatem, 919 N.Y.S.2d 901, 901 (App. Div. 2011); Paterno v. Carroll, 905 N.Y.S.2d 653, 656 (App. Div. 2010); City of Mount Vernon v. Mount Vernon Hous. Auth., 652 N.Y.S.2d 771, 772 (App. Div. 1997)).

[32] *See, e.g.*, Berger v. Polizzotto, 539 N.Y.S.2d 401, 402 (App. Div. 1989).

[33] *See* C.P.L.R. 5515(1).

[34] *See* C.P.L.R. 5520(a).

[35] Dalton v. City of Saratoga Springs, 784 N.Y.S.2d 702, 704 (App. Div. 2004) (citing Morrison v. Piper, 553 N.Y.S.2d 548, 550 n.2 (App. Div. 1990), *rev'd on other grounds*, 566 N.E.2d 643 (N.Y. 1990); Carp v. Marcus, 525 N.Y.S.2d 395, 397 (App. Div. 1988)).

[36] *See Dalton*, 784 N.Y.S.2d at 704 (citing *Morrison*, 553 N.Y.S.2d at 550 n.2; *Carp*, 525 N.Y.S.2d at 397).

[37] *See* C.P.L.R. 5701(a).

[38] *See* C.P.L.R. 5701(a)(2)(v).

appeal of right is not permitted. Orders denying re-argument are not appealable, *ever*.[39] Other orders are not appealable as of right.[40] I was once asked to oppose an appeal from an order that denied the defendant's motion to direct a witness to answer questions posed at a deposition. I learned—to my client's benefit—that the defendant had no automatic right to appeal from that order.[41] When an order is appealable but not as of right, the would-be appellant must obtain permission to appeal from the judge who made the order or from a justice of the appellate division.[42] What happens if the appellant files a notice of appeal instead of applying for permission to appeal? Sometimes the appellate division treats the notice as an application for permission to appeal and grants permission,[43] and sometimes it dismisses the appeal.[44]

If you have avoided the traps and accomplished all of the necessary steps–properly filed and served a notice of appeal or obtained permission to appeal–congratulations, you have just "taken" an appeal, the so-called "easiest step in civil practice."[45] Perhaps it is the catastrophic consequence of blowing this step that makes it seem—to me—more difficult than it is.

But, hold on. Taking the appeal may not be enough and another step may be necessary before the appeal is perfected. A stay may be prudent or required.[46] Failing to stay a money judgment enables the party who prevailed to enforce the judgment while the appeal is pending, and failing to obtain a stay or injunctive relief, in some scenarios, may render the appeal moot.[47]

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[39] *See, e.g.*, Fahey v. County of Nassau, 489 N.Y.S.2d 249, 250 (App. Div. 1985) (citing Alessi v. County of Nassau, 473 N.Y.S.2d 487, 488 (App. Div. 1984); Magliano v. Merckling, 472 N.Y.S.2d 419, 420 (App. Div. 1984)).

[40] *See* C.P.L.R. 5701(b).

[41] *See, e.g.*, Kinkela v. Inc. Vill. of Mineola, 761 N.Y.S.2d 284, 285 (App. Div. 2003) (citing McGuire v. Zarlengo, 673 N.Y.S.2d 200, 201 (App. Div. 1998); Mann v. Alvarez, 661 N.Y.S.2d 250, 252 (App. Div. 1997)). Note also, for example, that under CPLR 5701(b) non-final orders in article 78 proceedings against a body or officer, and orders requiring a more definite statement or striking scandalous or prejudicial matters from a pleading, are not appealable of right. *See* C.P.L.R. 5701(b).

[42] *See* C.P.L.R. 5701(c).

[43] *See, e.g.*, *Kinkela*, 761 N.Y.S.2d at 285 (citing *McGuire*, 673 N.Y.S.2d at 201; *Mann*, 661 N.Y.S.2d at 252).

[44] *See, e.g.*, Dolback v. Reeves, 696 N.Y.S.2d 270, 272 (App. Div. 1999).

[45] *See* People v. Idema, 518 N.Y.S.2d 292, 296–97 (Just. Ct. 1987).

[46] *See* C.P.L.R. 5519; Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation, 564 N.Y.S.2d 839, 840 (App. Div. 1991).

[47] *See, e.g.*, Graf v. Town of Livonia, 991 N.Y.S.2d 211, 212 (App. Div. 2014); *Niagara Mohawk Power Corp.*, 564 N.Y.S.2d at 840–41 (citing Serafin v. Wallace, 499 N.Y.S.2d 20, 21 (App. Div. 1986); Friends of Pine Bush v. Planning Bd. of Albany, 450 N.Y.S.2d 966, 967–68 (App. Div. 1982)).

II. PERFECTING APPEALS TO THE APPELLATE DIVISIONS: NEW RULES, MORE DEADLINES AND CONTINUING CHALLENGES

Until recently, the four departments of the appellate division had their own practice rules, which varied in many respects.[48] Assuming one department's approach would be acceptable in another department could be dangerous or embarrassing.[49] For example, at the Appellate Division, Fourth Department, my personal experience has been that attachments to briefs were permitted,[50] and, at CLE programs, I had learned that the Fourth Department justices appreciated attachments if they came from the record on appeal and were highly instructive (e.g., a critical document or photograph). The Third Department has had a different approach, which I found out the hard way upon receiving a call from their clerk's office indicating that the attachment to my reply brief violated the court's interpretation of its rules.[51] I was advised that my options were (1) rejection of the brief by the court, or (2) consenting to having the attachment ripped out. I chose the latter, cringing as I envisioned the mutilation of my work product.

Effective September 17, 2018, the four departments of the appellate divisions have agreed upon new statewide "Practice Rules of the Appellate Division."[52] The departments have also jointly approved "Electronic Filing Rules of the Appellate Division."[53] Each department has promulgated exceptions to the statewide Practice Rules, so while great uniformity has been achieved, it is not complete.[54] However, the differences among the departments are now significantly fewer.[55] They are also easier to recognize because,

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[48] *See* BUZARD ET AL., *supra* note 7, § 1.04(1)(a).

[49] *See* COMM. ON COURTS OF APPELLATE JURISDICTION, N.Y.S. BAR. ASSOC., REPORT ON APPELLATE DIVISION RULES 17 (2014), https://www.nysba.org/appellatedivisionrules/. The Report on Appellate Division Rules observes that, before adoption of the statewide Practice Rules of the Appellate Division, addenda to briefs "may [have been] the most controversial subject under the topic of briefs." *Id.* The Report identifies a First Department rule allowing attachments of, among other things, statutes and regulations, and a Second Department rule prohibiting attachments of maps or photographs. The Report also notes that the Third and Fourth Departments had "no rules regarding addenda." *Id.*

[50] This was my experience at the Fourth Department in, among other cases, *Veley v. Manchester*, 56 N.Y.S.3d 761 (App. Div. 2017), where a brief attachment was accepted.

[51] This was my experience at the Third Department in *Lightning Capital Holdings, LLC v. Erie Painting & Maintenance, Inc.*, 51 N.Y.S.3d 680 (App. Div. 2017).

[52] *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1250.1–1250.17 (2019); BUZARD ET AL., *supra* note 7, § 1.04(1)(a).

[53] *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1245.1–1245.10 (2019); BUZARD ET AL., *supra* note 7, § 1.04(1)(a).

[54] *See supra* note 6.

[55] *See* Joan Fucillo, *New Appellate Division Practice Rules Go into Effect on Sept. 17*, N.Y.

once the statewide rules are understood, the local exceptions are easily discerned upon review of a particular department's local rules.[56] However, the new Practice and Electronic Filing Rules impose their own requirements and deadlines.[57] These are new danger zones.

The new rules provide that, for all civil actions unless the court directs otherwise, (1) the appellant or petitioner must file an initial information statement with the notice of appeal for transmittal to the appellate division, (2) the appellate division may actively manage the appeal and may issue a scheduling order, and (3) participation in a settlement or mediation program may be required.[58] These mandates apply only in the First, Second and Third Departments; the Fourth Department has opted out of these requirements.[59] And, in contrast to my previous example where my brief attachment was ripped out at the Third Department, the new rules provide that, in the First and Second Departments, certain attachments are *required.*[60]

The new Electronic Filing Rules require that within fourteen days of "taking" an appeal, appellants must now, in designated cases, electronically enter information and electronically file documents with the appellate division.[61] The appellate division then assigns a case or docket number for the appeal.[62] Upon receiving it, the appellant has seven days to serve a notification of the docket number upon respondent's counsel and e-file proof that it was done.[63] The respondent's attorney then has twenty days to electronically register with the appellate division or to notify the appellate division that he or she qualifies for an exemption to the electronic filing requirements.[64] With electronic registration of the appeal, after twenty days, service upon attorneys shall be by e-filing (unless an attorney proves entitlement to an exception).[65]

ST. B. ASS'N J., https://www.nysba.org/Journal/2018/Sep/New_Appellate_Division_Practice_Rules_Go_Into_Effect_on_Sept__17/ (last visited Apr. 24, 2019).

[56] *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1250.1–1250.17 (setting forth the statewide Practice Rules of the Appellate Division); *id.* §§ 1245.1–1245.10 (setting forth the Electronic Filing Rules of the Appellate Division).

[57] *See id.* §§ 1250.1–1250.17; *id.* §§ 1245.1–1245.10.

[58] *See id.* § 1250.3

[59] *See id.* § 1000.3.

[60] *See id.* § 1250.8(b)(7), (8) (requiring an appellant to attach CPLR 5531 statement, order, judgment, decision, and notice of appeal and, in administrative appeals, hearing officer and agency findings, determinations, and decisions).

[61] *See id.* § 1245.3(a).

[62] *See id.* § 1245.3(b).

[63] *See id.*

[64] *See id.* §§ 1245.3(d), 1245.5.

[65] *See id.* § 1245.5(c).

What happens if an appellant's attorney fails to electronically register an appeal within the fourteen-day deadline? The rules state that registration "shall" be done but do not state a penalty for non-compliance.[66] Hopefully, there will be a grace period while practitioners become acclimated to this rule.

What happens if a respondent's attorney neither registers an e-filing appearance nor establishes entitlement to an exception? The rules explicitly address that scenario. "[A]n attorney who has neither entered information nor given notice as an exempt attorney . . . shall be deemed served with any e-filed document."[67] In other words, they will be deemed served when papers are electronically filed even though they will not know about it because, by not registering their appearance electronically, they will not receive electronic notice when documents are e-filed. A manifest risk of default thus exists for attorneys who do not electronically register their appearance.[68]

Assuming you have "taken" your appeal within the thirty-day deadline imposed by the CPLR, and you have "registered" your appeal within fourteen-days in accordance with the Electronic Filing Rules, how much time do you have to perfect your appeal? Prior to the statewide Practice Rules, the answer varied among the appellate division departments.[69] For example, in the Fourth Department a respondent could move to dismiss an appeal after sixty days, in which case the appellate division, Fourth Department would routinely grant a sixty-day extension if the appellant asked for it, but if the respondent did not make a sixty-day motion the appellant had nine months to perfect their appeal.[70] The other departments had slightly different rules.[71] They are now more uniform.[72] In the First, Second, and Third Departments, the perfection deadline will depend on whether the court is actively managing the case.[73] Without active

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[66] *See id.* § 1245.3; *see generally id.* §§ 1245.1–1245.10 (failing to state a penalty for non-compliance with the fourteen-day deadline for failing to electronically register an appeal).

[67] *See id.* § 1245.5(c).

[68] *See id.* § 1245.3, 1245.5(c).

[69] *See* Rob Rosborough, *The Appellate Division Adopts New Uniform Rules of Practice Effective September 17, 2018*, N.Y.S. APPEALS (July 10, 2018), https://nysappeals.com/2018/07/10/the-appellate-division-adopts-new-uniform-rules-of-practice-effective-september-17-2018/.

[70] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1000.2(b) (repealed 2018); *id.* § 1000.12(a) (repealed 2018); *id.* §1000.12(b); *id.* § 1000.13(e) (repealed 2018); *id.* § 1000.13(f) (repealed 2018).

[71] *See* Rosborough, *supra* note 69.

[72] *See id.*

[73] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1250.3(a), (b) (2019) (setting forth the statewide rule); *see also id.* § 600.3 (setting forth the First Department's rule); *id.* § 670.3(a), (b) (setting forth the Second Department's rule); *id.* § 1000.3 (setting forth the Fourth Department's opt-out rule).

management in the First, Second, and Third Departments, and in all instances in the Fourth Department, unless a court order mandates otherwise, the appellant has six months to perfect their appeal but can, by letter or stipulation, request, first a sixty-day extension and, after that, another thirty-day extension.[74] The total of these extensions would provide an appellant nine months to perfect their appeal. "Any further application for an extension of time to perfect the appeal shall be made by motion."[75]

The statewide Practice Rules provide, on the one hand, a welcome change insofar as they eliminate some motion practice. On the other hand, the new rules create a new series of deadlines. For example, in the Fourth Department, appellants previously had to diary only the thirty-day "notice of appeal" deadline and the nine-month perfection deadline unless and until the respondent moved for a shorter deadline under the sixty-day rule.[76]

Now, the appellant must be vigilant about the thirty-day notice of appeal deadline, the fourteen-day electronic registration deadline, the seven-day notification-service deadline, the six-month deadline to request a first extension, the eight-month deadline to request a second extension, and the nine-month deadline to move for an extension if reasonable grounds for granting one exist.[77] With all of these new deadlines, the opportunities for disaster are multiplying.

While the clock is ticking on these deadlines, a record on appeal must be prepared. After the record documents are assembled the appellant must decide whether to (1) "certify" the record, (2) seek a stipulation from opposing counsel, or (3) move the trial or motion court for an order settling the record.[78]

It is reasonable to expect that assembling the record should be a ministerial task and that counsel will work cooperatively to agree upon it. Record preparation is increasingly ministerial for appeals in cases that were electronically filed at supreme court. The record in those cases should be indisputable because it already exists electronically. But beware. Relying upon another attorney, a

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[74] *See id.* § 1250.9(a), (b).

[75] *Id.* § 1250.9(b).

[76] *See Frequently Asked Questions About the New Practice Rules and Electronic Filing Rules in the Appellate Division, Fourth Judicial Department*, NYCOURTS.GOV, https://ad4.nycourts.gov/rules/help/newrules (last visited Mar. 29, 2019); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 1000.2(b) (repealed 2018) (setting forth the sixty-day rule previously applicable in the Fourth Department).

[77] *See* N.Y. C.P.L.R. 5513(a) (McKinney 2019); N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1000.13(a)(2)(i), 1245.3(a), 1250.9(a)–(b).

[78] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1250.7(b)(5).

paralegal or an appellate printer to assemble the record, without review and verification, is dangerous. As an example, I was once asked to review a case after the appellate division decided it because the appellant's attorney could not reconcile the court's description of what happened with the facts of the case as the attorney understood them. It turned out that the critical photograph of the accident site was mislabeled in the record. When the court looked at the photograph of the supposed accident scene, no dangerous condition was visible because the photograph they were directed to was not the photograph of the accident site!

Some cases are not e-filed and, even in e-filed cases, not all documents are e-filed. For example, confidential proceedings and guardianship proceedings under the Mental Hygiene Law are not e-filed.[79] And even if a case is e-filed, where there is a trial, the trial exhibits are not ordinarily entered into the electronic docket. In these cases disputes may arise over what the record on appeal should include.

Prior to adoption of the Statewide Rules, at the Fourth Department, the parties to the appeal were required to either stipulate to the contents of the record, or the court below had to settle the record on motion.[80] Other departments, and the Court of Appeals, as an additional option, allowed the attorney for the appellant to unilaterally "certify," under CPLR 2105, that the record was complete.[81] The Statewide Rules allow for attorney certification, as well as stipulation or court settlement, of an appellate division record,[82] and the Fourth Department has not opted out from this rule.[83] Attorney certification appears to be an attractive option for those e-filed cases, mentioned above, where the record contents are indisputable. However, an attorney who certifies a record where the contents are debatable is inviting motion practice at the appellate level after an appeal is filed. I expect that the appellate divisions detest such motions. Stipulating to the record, or having it settled by the court below, appears the better option in those cases. In addition, where the appeal is from a judgment or order involving a transcript of proceedings, the procedures for settlement of the transcript must be followed.[84]

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[79] *See* C.P.L.R. 2111(b)(2)(A).
[80] *See* C.P.L.R. 5532.
[81] *See* C.P.L.R. 2105; N.Y. COMP. CODES R. & REGS. tit. 22, § 500.14.
[82] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1250.7(f)–(g).
[83] *See id.* § 1000.1.
[84] *See* C.P.L.R. 5525; N.Y. COMP. CODES R. & REGS. tit. 22, §1250.7(f).

If you practice long enough, you may encounter an opposing counsel who insists that the appellate record include documents which were not presented to the court below.[85] There are also cases where trial exhibits have been lost.[86] Assembling the record in these scenarios may involve adversarial motion practice or a reconstruction hearing.[87]

III. NEXT LEVEL COURT OF APPEALS DANGER ZONES

If a jurisdictional predicate for review by the Court of Appeals may exist, and if the client is willing, then the appellate practitioner must learn the high court's rules. Court of Appeals practice is thrilling, but its rules present another gauntlet of procedural landmines.

The biggest impediment to Court of Appeals review is its limited jurisdiction. The court's jurisdiction, in and of itself, requires and has received treatise,[88] law review,[89] and practice guide[90] discussion, and the court has a staff of attorneys devoted to assessing whether a jurisdictional basis exists for appeals sought to be taken there.[91]

To appeal of right to the Court of Appeals, there must (1) be a final order or judgment and two dissents at the appellate division on an issue of law, or (2) a final order or judgment and a substantial constitutional question, or (3) a "[s]tipulation for [j]udgment [a]bsolute" (a rare scenario).[92]

Where an appeal of right is authorized, the appeal is "taken" to the Court of Appeals by filing and serving a notice of appeal.[93] For my first appeal-of-right to the Court of Appeals I wondered where the notice of appeal should be filed. It is filed "in the office where the judgment or order of the court of original instance is entered," just like a notice for an appellate division appeal.[94] The clerk at the court receiving the notice of appeal must then send a copy of it to the Court

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[85] *See, e.g.*, People v. George, 559 N.Y.S.2d 209, 209 (App. Div. 1990) (citing Bligen v. Kelly, 511 N.Y.S.2d 985, 985 (App. Div. 1987); Broida v. Bancroft, 478 N.Y.S.3d 333, 337 (App. Div. 1984)).

[86] *See, e.g.*, Ramos v. Torres, 452 N.Y.S.2d 275, 275–76 (Sup. Ct. 1982).

[87] *See, e.g.*, People v Yavru-Sakuk, 772 N.E.2d 1145, 1148–49 (N.Y. 2002); City of Binghamton v. Serafini, No. 1996-2091, 2003 WL 27377120, at *1 (N.Y. Sup. Ct. May 9, 2003).

[88] *See, e.g.*, KARGER, *supra* note 7.

[89] *See, e.g.*, Nolan, *supra* note 10, at 1307.

[90] *See, e.g.*, THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE, *supra* note 7, at 1.

[91] *See* COURT OF APPEALS OF THE STATE OF N.Y., 2017 ANNUAL REPORT OF THE CLERK OF THE COURT (2017).

[92] *See* N.Y. C.P.L.R. 5601(a)–(c) (McKinney 2019).

[93] C.P.L.R. 5515(1).

[94] *Id.*

of Appeals.[95] It is apparent to me, and implicit in the court's rules providing for *sua sponte* jurisdictional review by the court, that the notice of appeal is forwarded to the Court of Appeals because it wants to know as soon as possible who is trying to invoke its jurisdiction.[96] The court will examine whether the would-be appellant truly has a jurisdictional basis for their appeal.[97] To assist in that examination, the court's rules require that, within ten days after taking an appeal, the appellant "shall" file a "preliminary appeal statement on the form prescribed by the court," with required attachments.[98] Respondents who doubt that Court of Appeals jurisdiction exists do not have to wait for *sua sponte* review by the court. They may move to dismiss the appeal,[99] an experience I have had to weather.

Most civil cases do not qualify for an appeal of right to the Court of Appeals[100] which begs the question whether a safety net exists if the hopeful appellant files a notice of appeal, but the court dismisses the appeal on the ground that the appeal did not qualify for an appeal of right. The answer is yes. An additional thirty days is provided to seek permission to appeal.[101] The reverse is also true. If a would-be appellant moves for leave to appeal and the motion is denied, they may then seek to take an appeal of right by filing a notice of appeal within thirty days.[102]

Except in a limited class of cases involving public officers or public entities,[103] only an appellate division may grant permission to appeal to the Court of Appeals from a non-final order.[104] If the appellate division order *is* final, in most cases leave to appeal can be granted "by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application" to the Court of Appeals.[105] This means that if an appellant wishes to do so, he or she has "two bites of the apple."[106] They may seek leave to appeal from the appellate division first and, if it is denied, then seek

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[95] *See* C.P.L.R. 5515(2).

[96] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.10 (2019); SIEGEL & CONNORS, *supra* note 2, § 531, at 1025.

[97] *See* KARGER, *supra* note 7, § 19:2, at 631.

[98] N.Y. COMP. CODES R. & REGS. tit. 22, § 500.9(a) (2019).

[99] *See, e.g.*, Doherty v. Merchs. Mutual Ins. Co., 936 N.E.2d 913, 913 (N.Y. 2010).

[100] *See* COURT OF APPEALS OF THE STATE OF N.Y., *supra* note 91, at 4.

[101] *See* N.Y. C.P.L.R. 5513(b), 5514(a) (McKinney 2019); KARGER, *supra* note 7, § 12:4 at 438.

[102] *See* C.P.L.R. 5513(b).

[103] *See* C.P.L.R. 5602(a)(2).

[104] *See* C.P.L.R. 5602(b).

[105] *Id.* at 5602(a).

[106] SIEGEL & CONNORS, *supra* note 2, § 528, at 1012.

leave from the Court of Appeals.[107] There may be obvious reasons for first seeking leave to appeal from the appellate division (e.g. if there was one dissent or a recognition during oral argument that a significant issue of statewide import was presented).[108] There may also be practical reasons (e.g. an *amicus* wishes to participate but needs time).[109]

An appellant who thinks he is being efficient and files simultaneous motions for leave to appeal at both the appellate division and the Court of Appeals may pay a price. If the Court of Appeals decides its motion first, the appellate division motion must be dismissed.[110]

A motion for leave to appeal must be made within thirty days from when the appellate division order was served with notice of entry.[111] If leave was first sought from the appellate division and denied, the "second-bite-of-the-apple" motion to the Court of Appeals must be made within thirty days of service of the appellate division order denying leave with notice of entry.[112]

Regarding motions for leave to appeal to the Court of Appeals, motion-adjournment possibilities under the new Statewide Appellate Division Practice Rules may create a trap for an appellant seeking leave from an appellate division. Under CPLR 5516, the return date for a motion for leave to appeal must fall within a precise window.[113] CPLR 5516 states,

> A motion for permission to appeal *shall* be noticed to be heard at a motion day at least eight days and not more than fifteen days after notice of the motion is served, unless there is no motion day during that period, in which case at the first motion day thereafter.[114]

The Court of Appeals' Rules appear to confirm the importance of the CPLR 5516 return-date scheduling requirement, reiterating that motions for leave to appeal "*shall* be noticed for a return date in

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[107] *See* C.P.L.R. 5602(a); SIEGEL & CONNORS, *supra* note 2, § 528, at 1012.

[108] *See* N.Y. CONST. art. VI, § 3(b); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.11(b) (2019).

[109] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.23(a)(1).

[110] *See* Lumsby v Donovan, 892 N.E.2d 857, 857 (N.Y. 2008); SIEGEL & CONNORS, *supra* note 2, § 528, at 1012.

[111] C.P.L.R. 5513(a).

[112] C.P.L.R. 5513(b); SIEGEL & CONNORS, *supra* note 2, § 528, at 1012.

[113] *See* C.P.L.R. 5516.

[114] *Id.* (emphasis added).

compliance with CPLR 5516."[115] This is highlighted further by the Court of Appeals' "Notice to the Bar" in *Dellarata v. International House of Pancakes*,[116] which called to the Bar's attention that the motion in that case was dismissed because the motion papers were not served in compliance with "*the statutory return date*."[117] This signals that the court takes the return date requirement seriously, a point which it has confirmed at least two more times.[118]

I struggled with this return-date requirement in a case where I first moved for leave to appeal to the appellate division. After making the motion with a scheduled return date which complied with CPLR 5516, I was asked by opposing counsel to consent to an adjournment of the motion. I responded by expressing my uncertainty whether my consent would put me out of compliance with CPLR 5516, subjecting my leave motion to possible dismissal. When I explained my dilemma, opposing counsel graciously appreciated the problem and did not press the issue.

In light of my personal experience on this issue, a provision in the new Statewide Appellate Division Rules caught my attention. The new Statewide Rules provide that where a party has filed an appellate division motion, which would include a motion for leave to appeal, "[o]ne adjournment . . . *shall* be permitted upon written consent of the parties to the appeal."[119] This rule may be an enticement to grant an adjournment of an appellate division motion for leave to appeal. But if such an adjournment is granted, pushing the motion return date outside of the CPLR 5516 window, will the consenting movant unwittingly be jeopardizing their chance of Court of Appeals review? Are they out of compliance with CPLR 5516? If so, is the error jurisdictional, precluding consideration of the leave motion?

Careful practitioners may be wise to guard their compliance with CPLR 5516 and politely explain why they cannot consent to an adjournment unless and until the Court of Appeals issues a decision or further Notice to the Bar clarifying that such an adjournment is permissible. In my view—notwithstanding my preference to consent to any and all reasonable adjournment requests—until there is

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[115] N.Y. COMP. CODES R. & REGS. tit. 22, § 500.22(a) (2019) (emphasis added); *see* SIEGEL & CONNORS, *supra* note 2, § 531 at 1025.

[116] Dellaratta v. Int'l House of Pancakes, 388 N.E.2d 388 (N.Y. 1979).

[117] *Id.* at 348.

[118] *See* Murphy v. Southside Hosp., 474 N.E.2d 258, 258 (N.Y. 1984) (citing *Dellaratta*, 46 N.Y.2d at 936); Braga v. N.Y. State Div. of Human Rights, 406 N.E.2d 1080, 1080 (N.Y. 1980) (*citing Dellaratta*, 46 N.Y.2d at 936).

[119] N.Y. COMP. CODES R. & REGS. tit. 22, § 1250.4(a)(9) (2019) (emphasis added).

certainty, it is better to be safe than sorry on this issue.

When leave to appeal to the Court of Appeals is granted, the appellant must, as with an appeal of right, file a preliminary appeal statement.[120] As discussed previously, the preliminary appeal statement provides the court with information to assess whether jurisdiction for an appeal exists.[121] Another purpose of the preliminary appeal statement is manifest. It also allows the court to assess the significance of the appeal.[122] It requires that the appellant "[s]et forth, in point-heading form, issues proposed to be raised on appeal," and the appellant is required to attach copies of the decisions below.[123] If the Court of Appeals has already granted leave to appeal, the preliminary appeal statement may be less significant, because it may be likely that the court has already determined that issues of statewide importance are presented. But what if the appellate division granted leave, or the appeal is taken of right based upon a two-justice dissent? The Court of Appeals will be on the lookout to see whether the appeal involves a narrow issue affecting just the litigants.[124] If that is what the court believes after reviewing the preliminary appeal statement, it may assign the case to its SSM (*sua sponte merits*) track and decide the case on the appellate division briefs, with supplemental letters, but no additional briefing and no oral argument.[125]

If your case is at the Court of Appeals do you want it to be directed to the SSM track? If you represent the respondent, the answer may be yes. But what if you represent the appellant?

A namesake of the firm where I practice recounts an expedited appeal he had in the 1970s where he was called to the Court of Appeals for oral argument, but the court indicated it would decide the case on the appellate division records and briefs. This appears to have been a precursor approach to what we now consider SSM treatment. During oral argument of that appeal, counsel requested permission to file new briefs. The request was denied, with Chief Judge Breitel explaining, to the effect, that the attorneys could have confidence in the "acuity of the Court."[126] More recently, the Court of

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[120] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.9(a) (2019).

[121] *See id.* § 500.9(c).

[122] *See id.* §§ 500.9(c), 500.11(b).

[123] *See* N.Y. COURT OF APPEALS, PRELIMINARY APPEAL STATEMENT FORM 5, 6 (2010), https://www.nycourts.gov/ctapps/forms/PreAppForm.pdf.

[124] *See.* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.11(b)(3).

[125] *See* THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE, *supra* note 7, at 17.

[126] This statement was made to James L. Magavern, Esq., in *Toia v Regan*, 356 N.E.2d 276

Appeals has issued guidance to "Counter[] Misconceptions" about SSM treatment.[127] The court has explained that SSM review "is not used only when the Court decides to affirm," that such appeals are "decided by the full Court," and that the "deliberative process is essentially the same for all appeals."[128]

I have great affection for the court, complete confidence in its acuity, and the court's comprehensive SSM opinions confirm the court's deliberative process is indeed comparable in these cases.[129] However, I am in the group of lawyers who do not want to be a "potted plant,"[130] just as Albert Pujols does not want to bunt when he steps up to the plate. I also confess that my mindset may be clouded by my perfect record in SSM cases. (I have lost every time.) My tendency, therefore, is to prefer full briefing and oral argument. If you share this viewpoint, prepare the Preliminary Appeal Statement with thought and diligence in the hope that it will support the view that full briefing and argument are warranted in your case.

IV. ARE WE PLAYING YET?

Recalling Judge Pigott's encouragement that we strive for Albert Pujols status, one might wonder what any of the foregoing discussion about taking an appeal, meeting deadlines, assembling the record, and filling out forms has to do with advocating "in the zone." They have nothing to do with it. More precisely, they are obstacles for doing it because they pull us into ministerial functions and away from advocacy. But without doing these things our client may be denied an admission ticket to the courthouse.

The previously-discussed rules are not the ones Judge Pigott was describing when talking about Albert Pujols. He is concerned that attorneys—in their *briefs to the court*—are too worried about satisfying technical formatting requirements which the CPLR and court rules impose. I suspect he has observed too much rigid rule compliance resulting in lifeless briefs.

The CPLR requires that briefs contain a table of contents, a

(N.Y. 1976).

[127] *See* THE NEW YORK COURT OF APPEALS CIVIL JURISDICTION AND PRACTICE OUTLINE, *supra* note 7, at 17.

[128] *Id.*

[129] *See, e.g.*, Hinton v. Village of Pulaski, 122 N.E.3d 51, 52 (N.Y. 2019).

[130] *See Testimony of Oliver L. North (Questioning by Counsels): Joint Hearings Before the S. Select Comm. on Secret Military Assistance to Iran and Nicaraguan Opposition & the H. Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong. 263 (1988) (statement of Brendan Sullivan, Defense Att'y for Lieutenant Colonel Oliver L. North) ("I'm not a potted plant. I'm here as a lawyer. That's my job.").

statement of questions involved, a statement of the nature of the case and of the facts, and an argument.[131] The Statewide Practice Rules impose additional requirements,[132] including word count and printing specifications,[133] as well as unique requirements for the First and Second Departments.[134] The Fourth Department has its own rule addressing the color of brief covers.[135] The Court of Appeals has additional requisites.[136] We need to make these rules friends rather than foes.

By way of example, consider the basic requirement that a brief contain a statement of questions presented.[137] A brief technically does so by simply indicating, for example, that the court below erred in granting summary judgment. This approach portends a zombie brief. The creative advocate will instead use the questions involved to state what the case is about, what the issue is and why his or her client should prevail. This applies to every section of the brief. If, after reading a one-page statement of questions, the court is aware, not just of the issue presented, but why the client should prevail, and if this theme is continued by each following section in an interesting, readable and compelling presentation, the client is afforded the best opportunity for success.

We cannot let the rules get in the way of our telling the *why*. As a young lawyer, a prominent attorney asked me to write a brief for him. He wanted to handle the oral argument and asked that I drive him from Buffalo to the Fourth Department in Rochester on argument day so that he could ask questions during the trip. I learned more than he did during our drive. He said, "Eddie, you write well, but you never answered the most important question. You never explained *why*." What a great lesson for a young lawyer. Since then I am always searching for the *why*. Interesting stories always have one.

Appellate judges and their clerks want to hear the story. They work long hours. How would you feel, late at night, if you had to plow through a boring, *why*-less, zombie brief? Torturing judges and their clerks is not a formula for success. I believe that Judge Pigott is warning us not to do it when encouraging us to play like Albert Pujols.

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131 *See* N.Y. C.P.L.R. 5528(a) (McKinney 2019).
132 *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1250.8(b) (2019).
133 *See id.* § 1250.8(f), (g).
134 *See id.* § 1250.8(b)(7)–(8).
135 *See id.* § 1000.8(a).
136 *See id.* § 500.13(a).
137 *See* N.Y. C.P.L.R. 5528(a)(2) (McKinney 2019).

Even Albert Pujols strikes out and, despite my aspirations, I am no Albert Pujols. When a new case comes in, sometimes my initial impression is that the issues are stacked against my client. However, by the time my brief is completed, I will have convinced myself that my client should prevail. It is therefore humbling—at oral argument or on decision day—to learn that the appellate judges have rejected the argument I had become convinced was correct. Often, these decisions reflect my initial impression. Unlike trial lawyers, who have their arguments rejected by just one judge, as an appellate practitioner I receive extra helpings of humble pie. Five or seven judges can unanimously tell me that I am wrong.

Losing is deflating, and, with all of the rules for taking and perfecting appeals and for complying with formatting requirements–in addition to the multitasking practitioners must perform to meet the pressures of practice–fatigue is understandable. However, we must muscle through our losses and the fatigue. Albert Pujols does.

Play ball.