SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

Preserving and Promoting the Exercise of Appellate Rights

FACULTY
Robert Dean, Esq.
Edward Smith, Esq.

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Robert S. Dean is the Attorney-in-Charge of the Center for Appellate Litigation, a 40-lawyer not-for-profit group representing indigent criminal defendants on appeal and in post-conviction proceedings. He has also taught appellate advocacy and post-conviction remedies at the NYU School of Law and Brooklyn Law School. A graduate of NYU Law School, with over 40 years of experience as an appellate public defender, he has personally briefed and argued over 350 cases in New York's intermediate appellate courts, more than 35 cases in the New York Court of Appeals, and one winning case in the United States Supreme Court (Cruz v. New York). He is a principal author of the West Book New York Pretrial Criminal Procedure, first and second editions. He has chaired the Committee on Criminal Justice Operations and the Committee on Criminal Courts at the New York City Bar Association and the Appellate Courts committee at the New York County Lawyers' Association. He is Chair of the Appellate Practice Section of the State Bar Association's Criminal Justice Section Executive Committee, and Vice Chair of the State Bar's Committee on Mandated Representation. He is on the board of the Chief Defenders Association of New York. In January 2013 he received the State Bar Criminal Justice Section's Award for Outstanding Appellate Practitioner.

Edward E. Smith serves as Bureau Chief of the Appeals Bureau at The Legal Aid Society of Suffolk County, which represents indigent criminal defendants on direct appeal and in post-conviction proceedings. He has given presentations to practicing attorneys covering criminal law and procedure, evidence, and appellate practice. He also has participated in public presentations concerning civil liberties and immigrants' rights. Born and raised in Suffolk County and determined to serve as an appellate public defender, he joined Suffolk Legal Aid immediately after graduating *cum laude* from The George Washington University Law School in 2013. During that time, he has argued several cases before New York State's intermediate appellate courts and one case before the New York Court of Appeals. He is an active member of the Appellate Courts Committee at the New York County Lawyers' Association.

THE TRIAL LAWYER'S RESPONSIBILITY TO EFFECTUATE THE CLIENT'S CRIMINAL APPEAL

PART 1: WHAT COUNSEL NEEDS TO DO

This CLE program is in two parts. Part 1 covers what trial lawyers are responsible for, in order to effectuate their client's criminal appeal. Part 2 covers the mechanics of how to meet these responsibilities – including forms and practical advice.

Introduction to Part 1

This outline covers what the criminal defense attorney, whether assigned or retained, must do to fulfill their ethical, constitutional, court-rule, and professional-norms responsibilities regarding notices of appeal, effectuating assignment of appellate counsel, appeal waivers, and guilty pleas. Included are practical tips as to how to reduce trial counsel's exposure to ethical violations, malpractice actions, and 6th Amendment claims.

I. Trial Lawyer's Responsibility Vis-a-Vis Filing a Notice of Appeal

After sentence is imposed, trial counsel must advise the client of his right to appeal, in writing, and the requirement of filing a notice of appeal. If the client requests, counsel must file the notice of appeal. This is true whether the sentence is imposed for a felony, misdemeanor, violation, or administrative code or town ordinance violation. Whether or not there has been an appeal waiver does not alter this responsibility.

The decision whether to take an appeal belongs to the defendant, not the lawyer. Jones v. Barnes, 463 U.S. 745 (1983). See also McCoy v. Louisiana, ___U.S.___, 2018 WL 2186174 (May 14, 2018) (decision whether to "forgo an appeal" belongs solely to the criminal defendant).

The rule in the First Department is as follows:

> Where there has been a conviction after trial or otherwise ... it shall be the duty of counsel, retained or assigned, immediately after the pronouncement of sentence ..., to advise the defendant ... in writing of his right to appeal ..., the time limitations

> involved ... in the manner of instituting an appeal and of obtaining a transcript of the testimony, and of the right of a person who has an absolute right to appeal ... and is unable to pay the cost of an appeal to apply for leave to appeal as a poor person. It shall also be the duty of such counsel to ascertain whether defendant ... wishes to appeal and, if so, to serve and file the necessary notice of appeal ....

22 N.Y.C.R.R. §606.5(b)(1) (First Dept.) (emphasis added). The rule is essentially the same in all Departments. See also §671.3(a) (Second Dept.), 821.2(a) (Third Dept.), and 1015.7(a) (Fourth Dept.).

The failure to notify the defendant of his right to appeal, in writing, even where there has been an appeal waiver, is improper and violates court rules. People v. June, 242 A.D.2d 977 (4th Dept. 1997).

Bar association standards are quite clear that, upon any a conviction, counsel must have a substantive discussion with his or her client about whether to appeal – including possible issues, the merits, and likely outcome. In case there is any skepticism about this requirement, the standards are quoted at length below:

> "(a) After conviction, defense counsel should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal. Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.
>
> (b) Defense counsel should take whatever steps are necessary to protect the defendant's right of appeal."

ABA Standards for Criminal Justice, Defense Function, 4-8.2.

"(a) Counsel, whether retained or appointed to represent a defendant during trial court proceedings, should continue to represent a sentenced defendant until a decision has been made whether to appeal ....

(b) Defense counsel should advise a defendant on the meaning of the court's judgment, of defendant's right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing. Counsel should also advise of any post trial proceedings that might be pursued before or concurrent with an appeal. While counsel should do what is needed to inform and advise defendant, the decision whether to appeal, like the decision whether to plead guilty, must be the defendant's own choice."

ABA Standards for Criminal Justice, Defense Function, 21-2.2.

"(a) Counsel should inform the defendant of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. In circumstances where the defendant wants to file an appeal but is unable to do so without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the defendant's right to appeal, such as ordering transcripts of the trial proceedings.

(b) Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty and in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court."

NLADA Performance Guidelines for Criminal Defense Representation. Guideline 9.2(a)(b).

"... [R]epresentation at the trial court stage means, at a minimum:

* * *

> i. Following a final disposition other than a dismissal or acquittal: (i)-advising the client of the right to appeal and the requirement to file a notice of appeal; (ii)-filing a notice of appeal on the client's behalf if the client requests; (iii)-advising the client of the right to seek appointment of counsel and a free copy of the transcript;...."
>
> NYSBA Revised Standards for Providing Mandated Representation. I-7(j).

An attorney has a constitutionally imposed duty to consult with a defendant whenever there is reason to think that (a) a rational defendant would want to appeal, or (b) the defendant has reasonably demonstrated to counsel that she is interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

A trial attorney who fails to file a notice of appeal requested by her client is constitutionally ineffective, even where there has been a waiver of the right to appeal. People v. Syville, 15 N.Y.3d 391, 397-398 (2010); Campusano v. United States, 442 F.3d 770 (2d Cir. 2006). See also Roe v. Flores-Ortega, 528 U.S. 470 (2000) (a lawyer who disregards a defendant's specific instruction to file a notice of appeal acts in a manner that is professionally unreasonable within the meaning of the 6th Amendment).

II. Trial Attorney Obligation to Assist the Client in Applying for Assignment of Appellate Counsel.

Merely filing a notice of appeal does not constitute a request for counsel. The appeal will languish and ultimately be dismissed unless, after a notice of appeal is filed, such a request is made for an indigent defendant.

The best practice is, if the client tells you that he or she wants to appeal, or if it is obvious that he or she should appeal, for you to not only file the notice of appeal but also ensure that appellate counsel is assigned. In fact, often court rules require you to take this additional step.

A. Bar Association Standards

Assigned trial counsel is obligated not only to advise the client of the right to seek assignment of counsel to an appeal, but also to "apply[] for appointment of counsel ... if the

client requests...." NYSBA Revised Standards for Providing Mandated Representation. I-7(j)(iv).

According to the American Bar Association:

> "(a) Counsel, whether retained or appointed to represent a defendant during trial court proceedings, should continue to represent a sentenced defendant until a decision has been made whether to appeal and, if an appeal is instituted, to serve the defendant at least until new counsel is substituted, unless the appellate court permits counsel to withdraw at an earlier time."

ABA Standards for Criminal Justice, Criminal Appeals, Transition from Trial Court to Appellate Court, Standard 21-2.2(a) (1980).

B. Individual Appellate Division Rules

Second Department rules require trial counsel to actively solicit from the client whether he needs appellate counsel to be assigned; if the client says yes, trial counsel must ask, on the client's behalf, for the appellate court to assign counsel. 22 N.Y.C.R.R. § 671.3 (b) (3)-(4).

Fourth Department rules require trial counsel to advise the client, in writing, of his or her right to apply for the assignment of appellate counsel; counsel must, "when appropriate, move for" assignment of counsel on the client's behalf. 22 N.Y.C.R.R. § 1015.7 (a).

In the First and Third Departments, trial counsel must advise the client in writing of his or her right to assigment of counsel on appeal; however, there is no requirement that counsel make the motion for assignment of appellate counsel. 22 N.Y.C.R.R. 606.5 (b) (1) (First Department); 22 N.Y.C.R.R. 821.2 (a) (Third Department).

Note: In most, but not all, courtrooms, there is an OCA form notice of the right to appeal, etc., available to hand to the defendant upon imposition of sentence. Just be aware that these (a) may not necessarily conform to what the Department rules actually require of you, (b) are not user-friendly for the literate client of above-average intelligence, and (c) are incomprehensible to every other client.

C. The Necessary Paperwork: Unified Practice Rules of the Appellate Division (Part 1250)

Criminal Procedure Law § 380.55 provides a mechanism for assigned trial counsel to effectuate the assignment of appellate counsel at sentencing by making an application before the sentencing judge for a finding of continued indigency:

> Where counsel has been assigned to represent a defendant at trial on the ground that the defendant is financially unable to retain counsel, the court may in its discretion at the time of sentencing entertain an application to grant the defendant poor person relief on appeal. As part of an application for such relief, assigned counsel must represent that the defendant continues to be eligible for assignment of counsel and that granting the application will expedite the appeal. If the court grants the application, it shall file a written order and shall provide a copy of the order to the appropriate appellate court. The denial of an application shall not preclude the defendant from making a de novo application for poor person relief to the appropriate appellate court.

If the sentencing court signs such as order, and if counsel attaches that order to the notice of appeal when it is filed, then the appellate court may, upon receipt of these papers assign appellate counsel without the need for a further motion or application. 22 N.Y.C.R.R. 1250.11 (a) (1).

Section 380.55 has its limitations, however. The current wording of the statute has led many judges and practioners to mistakenly believe that the statute applies to sentences after trial only. Moreover, in plea cases, an OCA memo has advised judges that the judge should inquire of counsel as to the merits of the appeal. Nonetheless, § 380.55 can be very useful in trial cases.

Absent a § 380.55 order, the appellate court will assign counsel to represent a defendant on appeal only upon defendant's submission of a detailed notarized affidavit, pursuant to CPLR 1101(a), setting forth facts sufficient to establish that the defendant has no funds or assets with which to prosecute the appeal, including the amount and sources of his income and listing his property with its value. 1250.4(d)(1)(4).

If trial counsel was retained, the affidavit should set forth the terms of the retainer agreement, the amount and sources for trial counsel's fees and an explanation of why similar funds are not available to prosecute the appeal. Id.

If bail was posted pretrial, the affidavit must set forth the amount and sources of the bail, the disposition of the bail money, and an explanation as to why similar funds are not available to prosecute the appeal. Id.

Practice Tips:

- Upon filing a notice of appeal, send a copy to the client with instructions as to the applicable next steps.

- Unless the sentencing court has signed an order pursuant to C.P.L. § 380.55, you should include in these instructions an IFP affidavit for the client to fill out and get notarized. If the client retained trial counsel or made bail, make sure the affidavit form prompts the defendant to explain why this money is no longer available to pursue the appeal.

- In many cases, court rules and bar association standards require counsel to make the IFP motion on the client's behalf. In other cases, the instructions should also include a form pro se motion for assignment of counsel.

- Note that, under court rules, one can ask to proceed as a poor person on the original record without also asking for counsel to be assigned. This would allow the defendant to get a free transcript and proceed without having to print the brief. This would be appropriate, for example, if the appeal is civil in nature, so assignment of counsel is not possible.

III. Timeliness and the Ramifications of Failure to File a Timely Notice of Appeal

Filing a timely notice of appeal is easy. Filing a motion for permission to file a late notice of appeal is relatively easy. Being held ineffective because you did not properly file, or advise the client about filing, a notice of appeal is, to say the least, undesirable.

Therefore, in general, the better practice is to file a notice of appeal. Doing so does not mean an appeal will necessarily ensue. Nor can it harm the client. It just protects the client's right to appeal.

A. The Timeliness Requirement

Notices of appeal from judgments of conviction must be filed within 30 days of sentence being imposed. C.P.L. § 460.10(1)(a).

If sentence is imposed *in absentia,* the 30 days runs from that date, not the date the sentence is eventually executed once the defendant is found and returned to court. If you have a client sentenced *in absentia,* protect your client and yourself by filing a timely notice of appeal. People v. Syville, 15 N.Y.3d 391, 394 (2010).

If sentence is imposed on one count of an indictment while a retrial or separate trial is planned on another count of the same indictment, the 30 days in which to appeal as to the sentenced count runs from that sentencing date. Do not delay until there is a resolution of the remaining counts. If they are eventually resolved by a conviction, file a second notice of appeal within 30 days of the date of sentencing on those counts.

If there is a resentencing proceeding, you must also file a notice of appeal from the resentence. If the resentencing flows from a VOP, be aware that the appeal will only be from what happened at the VOP proceeding, unless you filed a notice of appeal from the original sentence.

B. Completeness of the Notice of Appeal

If the client is convicted (by trial or plea) under more than one indictment or SCI, a notice of appeal must specify all indictment or SCI numbers. If the client is sentenced on all cases on the same date, file one notice of appeal, but make sure you include all Indictment or SCI numbers to the right of the caption and that you describe all the judgments in the body of the notice. If the defendant, for example, is sentenced after a trial conviction under one indictment, and then enters a plea and is sentenced on a different date under a second indictment, file a timely notice of appeal as to each sentencing/indictment.

Additionally, if the client receives a SORA adjudication at sentencing, the notice of appeal should specify that the appeal is from both the judgment and sentence and the SORA adjudication.

C. Late Notices of Appeal

An up-to-one-year extension of time beyond the 30 days may be sought by motion to the Appellate Division pursuant to C.P.L. §460.30, based upon a trial attorney's "improper conduct" or a lapse in communication with the defendant. If you realize within that year that

you have not filed a timely notice of appeal, make the motion. These are pretty liberally granted when the defendant is indigent and you need only mildly fall on your sword ("through inadvertence, my office failed to file a timely notice of appeal," for example, will usually be sufficient).

D. Coram Nobis Relief

Failure to file a notice of appeal due to trial counsel's omission, when that omission deprives the defendant of his right to appeal, constitutes ineffective assistance of counsel. People v. Syville, 15 N.Y.3d 391, 397-398 (2010).

If no notice had been timely filed and no motion made within the one-year grace period, the client may obtain relief only by filing a *coram nobis* application with the Appellate Division, arguing that trial counsel was ineffective in failing to properly file, or advise the client about the need to file, a timely notice of appeal.

E. People's Motion to Dismiss the Appeal

In some jurisdictions, the prosecutor will move to dismiss an appeal where there has been no follow-up, within a certain amount of time, after a notice of appeal has been filed. Some will move after two years of no follow-up; others rarely so move. When filing such a motion, the prosecutor will serve the defendant at his or her last known address, and also serve the attorney who filed the notice. If you receive such a motion, don't ignore it. If you are not yourself filing an opposition, you should follow up with the client or the local appellate public defender regarding potential opposition to the motion.

IV. The Importance of Filing Notices of Appeal in Guilty Plea Cases

Many potential issues arise on the appeal of guilty plea cases. Do not deprive your client of the chance to get appellate relief on such an issue. The ability to file a notice of appeal, and your obligation to do so, is not restricted by the fact that your client pleaded guilty, and/or that he waived his right to appeal.

Filing a notice of appeal is a simple clerical task and does not automatically mean that an appeal will ensue. Nor does it necessarily require that trial counsel take any additional steps beyond sending the client a copy of the notice of appeal with instructions as to what he needs to do next in order to continue with the appeal.

Since all the filing of the notice of appeal does is preserve the client's right to appeal should he wish to do so at some future point, you should always err on the side of filing the notice.

Keep in mind that, by the time of sentencing, you might not recall precisely what was said on the record at the plea proceeding, which is what controls whether there is an appealable issue. You may recall something vividly although it occurred only off-the-record. Or so much time might have elapsed that you simply do not recall the plea very well. The appellate attorney, who will get the record and go through it with a fine tooth comb, may well see an issue of which you are unaware.

Typical appellate issues after guilty pleas include:

A. Excessiveness of Sentence

Unless the client received the legal minimum, the Appellate Division can generally consider whether his sentence was excessive and reduce it. It does not matter that the sentence was negotiated with the People or agreed to by the defendant. At the trial court level, if the defendant pleads to less than the full indictment and balks at receiving the agreed-upon sentence, the People get a chance to withdraw their consent to the plea. People v. Farrar, 52 N.Y.2d 302 (1981). But on appeal, if the Appellate Division thinks the sentence is too harsh, it can reduce it and the People do not get to undo the bargain. People v. Thompson, 60 N.Y.2d 513 (1983). The plea stands and the client simply benefits from the sentence reduction.

If the prison sentence your client received was above the minimum, file a notice of appeal. It is especially important to file a notice of appeal if the judge suggests that he or she might have been inclined to impose a lighter sentence but is stuck with what the People will agree to.

If your client has received a state-prison sentence: Even if you think the plea agreement was reasonable and your client seems satisfied, it is still a good idea to file a notice of appeal if he did not receive the minimum legal sentence, since your client may have a change of heart once he is in state prison.

B. Improper Enhancement of a Sentence

The Appellate Division can find that the trial judge improperly enhanced the defendant's sentence because it believed he violated some condition it set. The grounds for doing so may include that:

(1) the condition was not clearly spelled out in the plea minutes,

(2) the proof that the defendant violated the condition was insufficient, or

(3) even though there was a technical violation, the interests of justice dictate a more lenient sentence under all the circumstances.

Whenever an enhanced sentence is imposed, file a notice of appeal.

C. Improper Sentencing of a Defendant for a Failure in Treatment

Many appellate issues may arise when the court finds that a defendant failed in treatment after a drug problem or similar plea. These may include that:

(1) the program placement failed to give the defendant a fair chance to succeed (the program was itself drug-infested, it would not let the defendant take medication he needed, it was inadequate to meet his mental health needs);

(2) the court pulled the plug too soon or for too technical a violation (especially if there are equities in the defendant's favor or the program or the program was willing to continue working with the defendant). Remember, the standard drug court protocol is to give even serious recidivists multiple chances in treatment; or

(3) the allegations of program failure were contested and the court had an insufficient basis for finding them to be established).

If you think any treatment-related issue may exist, file a notice of appeal. But again, even if you do not see an issue, filing a notice of appeal is a minimal effort and protects your client. A second set of eyes, in the form of assigned counsel on appeal, may see an issue and the client may be dissatisfied once he is in prison.

D. Denial of Youthful Offender Treatment

The Appellate Division can substitute a youthful offender adjudication for a conviction (and change the sentence accordingly or remand the case for resentencing as a YO). It can do this regardless of whether the negotiated plea deal involved a denial of YO or imposition of a sentence that would be illegal for a YO adjudication. As with a finding that a sentence was excessive, a finding that a defendant should be afforded YO does not let the People undo the plea itself. If your client was YO eligible, file a notice of appeal.

E. Suppression Hearing Issues

Provided you get a decision denying suppression, that decision can be considered on appeal after a guilty plea. (If a plea is taken before a suppression decision is rendered, at least orally on the record, the suppression issue will not be available on appeal.) Regardless of whether you believe suppression was properly or improperly denied, if you got a decision denying it, file a notice of appeal.

F. Issues as to the Validity of the Guilty Plea

The client may be happy with the plea bargain at sentencing, but may well change his mind once he hits the state prison system, or learns more fully of the collateral consequences of his plea. If there is any conceivable issue about the validity of his plea (Boykin rights, factual allocution, legality of the plea, failure to follow proper SCI procedures, etc.), protect him by filing a notice of appeal. Whenever the client is getting state prison time, it is best to file a notice of appeal.

V. Ancillary Benefits from Filing a Notice of Appeal

Even when you see no potential appellate issue, filing a notice of appeal, so that your client has a direct appeal pending may benefit him in ways you may be unable to predict. For example:

A. A New Issue May Arise that Does Not Apply Retroactively

As we have seen in the Peque (22 N.Y.3d 168) context, a new legal development favorable to defendants may be held not to be retroactive. In general, however, even a non-retroactive change in the law will apply to cases that are still pending on direct appeal.

B. Some Issues Are Available Only on Direct Appeal

If all the facts that establish an issue appear on the record, that issue must be raised on direct appeal, not by a 440.10 motion. For example, a Catu issue must be raised on direct appeal because the facts that establish the claim (a plea with no mention of PRS and a sentencing at which PRS is imposed) are on the record.

The only way to even attempt to raise such an issue by means of a 440.10 motion is by alleging additional, off-the-record facts -- usually, that counsel was ineffective and the client therefore pled guilty without knowing the critical facts. Obviously, filing a notice of appeal is more desirable than being called ineffective later.

C. The Pendency of a Direct Appeal May Delay Removal

The pendency of a direct appeal may allow a non-citizen defendant to delay his removal. This may buy him time to, for example, pursue a 440 issue, build equities to improve his case in immigration court, or remain close to his American family and plan for the future. Indeed, the mere existence of a notice of appeal could prevent the non-citizen client's immediate deportation if he/she is picked up by ICE, and may entitle the client to release from immigration detention.

VI. Do Not Be Deterred by an Appeal Waiver

The failure to advise the defendant of his right to appeal is improper even if there is an appeal waiver. People v. June, 242 A.D.2d 977 (4th Dept. 1997). See also Campusano v. United States, 442 F.3d 770, 771-772 (2d Cir. 2006). Therefore, the purported waiver of the client's right to appeal should not deter you from filing a timely notice of appeal.

An appeal waiver never forfeits a client's right to appeal. C.P.L. §450.10(1) authorizes defendants to appeal to the Appellate Division, as a matter of right, from a judgment of conviction. And the Appellate Division has a constitutionally-imposed duty "to entertain all appeals from final judgments in criminal cases." People v. Pollenz, 67 N.Y.2d 264, 268 (1986); see, New York Constitution, Art. VI, §4[k].

The only thing a valid appeal waiver does is preclude the Appellate Division from considering some claims that the defendant might otherwise have a right to have it consider. But many claims are not encompassed by even a valid appeal waiver. And many appeal waivers are invalid, meaning they do not preclude the Appellate Division from considering any issue the client could otherwise raise.

Since many appeal waivers are invalid, and since even valid ones do not waive all appellate issues, the presence of an appeal waiver should not deter you from filing a notice of appeal and advising the defendant how to obtain appellate counsel. If you would have filed a notice of appeal in the absence of a waiver, file it. An appeals lawyer, looking over the record, is in the best position to determine if valid appellate issues survive the purported waiver. Hence, the appeal waiver process should not in itself, deter defendants from appealing.

A. Issues Not Encompassed Within Even a Valid Appeal Waiver

Some issues are not foreclosed even by an otherwise valid waiver because they implicate society's interest in the integrity of the criminal process. These include:

1) Constitutional speedy trial.

2) The legality of the sentence (including whether consecutive sentences were improperly imposed, and whether the defendant was improperly adjudicated and sentenced as a predicate felony offender).

3) The defendant's competency to stand trial/plead guilty.

4) The knowing and voluntary nature of the plea itself.

See People v. Callahan, 80 N.Y.2d 273, 280 (1992); People v. Seaberg, 74 N.Y.2d 1 (1989).

A valid appeal waiver will also not encompass:

5) Issues that turn on post-plea events (including whether there was a proper finding of a drug program failure, whether there was a proper Outley hearing or finding, and whether there was some other breach of a court condition that justified imposing an enhanced sentence). See People v. Saad, 286 A.D.2d 782 (2001); People v. Miles, 276 A.D.2d 566 (2000).

6) Excessive sentence (including an enhanced sentence) if the defendant was not told the maximum sentence he could face. People v. Hidalgo, 91 N.Y.2d 733 (1998); People v. Eldridge, 8 A.D.3d 294 (2d Dept. 2004); People v. Cormack, 269 A.D.3d 815 (4th Dept. 2000); People v. Shea, 254 AD2d 512 (3d Dept. 1998).

7) Imposition of a sentence that included PRS if the defendant was not told at the plea that he would get PRS. People v. Louree, 8 N.Y.3d 541 (2007).

Note that the scope and limitations of appeal waivers is an area of the law that is constantly changing, with the various Appellate Divisions in disagreement. See Marks et. al., New York Pretrial Criminal Procedure, §11.17 (2d. Ed. 2007). This makes it hard for trial lawyers to authoritatively advise their clients of the specific effects of any waiver of the right to appeal.

B. Many Appeal Waivers Are Invalid

Due process requires that an appeal waiver (like the waiver of any other important right) be knowing, voluntary, and intelligent. A valid waiver cannot be assumed from a silent record. Therefore, a written appeal waiver alone, without a proper oral waiver colloquy, is insufficient to show a valid waiver. People v. Callahan, 80 N.Y.2d 273, 283 (1992).

Many appeal waivers have been held invalid by the Appellate Division. Some of the most common bases for invalidating a purported appeal waiver are:

1) The court's failure to make clear that the right to appeal is separate and distinct from the rights one automatically forfeits by pleading guilty (if the court, for example, says, "by this plea" you are giving up your right to appeal, or "if you went to trial and were convicted, you would have a right to appeal"). People v. Lopez, 6 N.Y.3d 248 (2006).

2) The court's failure to explain what the right to appeal means, especially if the defendant is young, mentally challenged, or inexperienced in the criminal justice system.

3) The court's misleading explanation of the right to appeal, for example, by suggesting that it mostly means the defendant cannot change his mind and withdraw his guilty plea.

4) The court's reliance, in part, on a written waiver form without ascertaining that the defendant has read and understood it, or even that the defendant can read or can read English.

VII. Do Not Be Deterred by a Potential Appellate Risk

Do not be deterred from filing a notice of appeal because of a potential risk to the client.

First, although pursuing a particular issue on appeal (such as plea withdrawal) may create a risk to the client, simply filing a notice of appeal does not create any such risk.

Second, some issues that would present a risk if you raised them at the trial level do not create a risk if they are raised on appeal. These include (1) that a negotiated sentence is

excessive, and (2) that a denial of YO was improvident, even if the negotiated plea involves a YO denial or a sentence that would be illegal for a YO.

Third, appellate attorneys are in the best position to advise defendants of the risks and potential benefits involved in pursuing particular issues on appeal. No reasonable appellate attorney will raise an issue that puts the client at risk without thoroughly explaining the risk to the client and, as a rule, getting his consent to run the risk in writing.

Fourth, even a client who may be highly risk-averse at the time of his sentencing may have a change of heart later on. Filing the notice of appeal merely protects him if he does have that change of heart.

VIII. Do Not Be Deterred by a Client's Receipt of a Favorable Disposition if There Is Any Chance It Will Become Less Favorable Later

If your client pleads guilty to a felony and is sentenced to probation, you might not think of filing a notice of appeal since the client is happy with that disposition. But keep in mind that, if he messes up while on probation, he can be violated and end up with a prison sentence, maybe a very hefty one. He can file a notice of appeal from the VOP adjudication and resentencing. But that does not give him the right to appeal from the original guilty plea and sentence to probation. If the client has a potential plea withdrawal issue, he may well want to raise it now that he is doing 5 years in prison. That may, in fact, be his best issue.

To protect the client, if he takes a felony plea and gets probation, file a timely notice of appeal. If he successfully completes his probation, he need never pursue the appeal further -- no harm, no foul. But if you think there is any chance at all that he will violate and end up with prison time, give him the chance to appeal from the original plea as well as from the VOP proceeding.

IX. Do Not Be Deterred by a Client's Likely Deportation

It used to be that, if a client faced deportation, especially after serving only a short sentence, there was little point in appealing because the deportation would result in the dismissal of his appeal.

That is no longer true. In People v. Ventura, 17 N.Y.3d 675 (2011), the Court of Appeals held that a defendant's appeal as of right to the Appellate Division cannot be dismissed simply because he was deported. The Appellate Division, moreover, must consider any issue that has not become moot, including dismissal issues and new trial issues.

X. Maximize Your Client's Chances for a Successful Appeal

There are a number of things you can do to maximize your client's chances of success on appeal. These include:

A. Put the Favorable Sentencing Facts on the Record

Even if the client pled guilty and agreed to a negotiated sentence, if there is favorable information about the client that might not be clear from the record, set it forth in whatever detail is necessary to make it clear at sentencing. Then it will be part of the appellate record in support of an excessive sentence argument.

If you cannot do this comfortably or adequately on the record at sentencing, consider sending the court a letter in advance of the sentencing, setting forth the favorable facts. You can always ask at sentencing that the letter accompany the pre-sentence report to prison with the defendant, a reasonable request that should not create ill will on the court's part.

B. Ask for YO if the Client Is Eligible

Even if the client pled guilty and the agreement was "no YO" or a sentence incompatible with YO, ask for YO at sentencing. The court will deny it, but you will have a preserved issue for appeal. Preservation may well make the difference between whether the Appellate Division grants YO or not. And try to get the sympathetic facts on the record if they are not there already.

C. Argue Against an Enhanced Sentence

If you think the client should get another program opportunity, a better chance to contest a finding that he violated a condition of his plea, etc., make that argument on the record so it is preserved for appeal.

D. Challenge Out-of-State or Otherwise Questionable Predicates

Very often, attorneys fail to challenge predicate felony convictions, making it much harder to correct these matters on appeal. The most frequently missed issues are:

1) An out-of-state predicate for a crime that is not the equivalent of a New York felony, or a New York violent felony. You should carefully consider whether any out-of-state predicate the People want to use can be challenged on this basis.

2) Lack of sequentiality for an adjudication as a persistent or persistent violent felony offender. This is a particular problem if the priors are for burglary, because although the 2 prior burglary convictions may seem to be sequential, the client might have ben arrested for the first burglary only after he was arrested for the second one, based on a retroactive DNA hit.

3) Confusion about whether a conviction of CPW 3 or attempted CPW 3 is violent. Sometimes, the state database will show the wrong subdivision of CPW 3. And attempted CPW 3 is violent only if it is a plea down under an indictment, not if it is a plea pursuant to an SCI.

E. Do Not Gratuitously Make an Appeal Waiver Better

Naturally, if the court asks you whether you have explained the waiver or believe the defendant understands it, you need to answer. But avoid volunteering anything that will make assailing the waiver's validity harder. For example, you should not gratuitously say, "I have explained the waiver to my client and we have discussed it very thoroughly and in my professional opinion, he understands it completely and is agreeing to it voluntarily."

Also, it is better if counsel does not sign a written appeal waiver. The Legal Aid Society in New York City has a policy of not signing, and that can be helpful when we are challenging a waiver on appeal.

F. Help the Client Apply for Counsel on Appeal

Filing a timely notice of appeal protects the client, but does nothing to advance the appeal itself. To do that, you must apply to the Appellate Division for poor person relief and assignment of counsel. If you are filing a notice of appeal "just in case" (for example, just in case the client violates probation later on), you don't need to do anything more. But if there is an appeal at all worth pursuing, nothing will happen until counsel is assigned. Filing the application is necessary to avoid loss of the right to appeal.

XI. The Trial Lawyer's Responsibility Where the People Are Appealing

If trial counsel obtains a favorable decision or order from which the People may appeal, counsel should make sure to file a notice of entry upon the People; additionally, if

the People file a notice of appeal, counsel should make sure that the client will have representation on that appeal.

The best practice, once the People file a notice of appeal, is – unless assigned trial counsel can and will represent the client on the People's appeal, to immediately ask the appellate court to assign a lawyer to represent the client on that appeal.

"... [R]epresentation at the trial court stage means, at a minimum:"

* * *

> k. Following a disposition from which the prosecutor has a right to appeal: (i)-advising the client of the possibility that the prosecutor will pursue an appeal; (ii)-advising the client of the client's right to appointment of counsel should the prosecutor appeal; (iii) - applying for appointment of counsel if the client requests.

NYSBA Revised Standards for Providing Mandated Representation. I-7(k).

For a People's notice of appeal from an adverse order to be considered timely, it must be filed within 30 days of the date the defendant, the prevailing party in trial court, formally serves the order on the People with notice of entry. People v. Washington, 86 N.Y.2d 853 (1995). Hence, the People's mere receipt of the order from the court does not start the time to run, nor would defense counsel's sending the notice to the People without notice of entry. Id. See also People v. Lynch, 195 Misc.2d 814, 815 (N.Y. City Crim. Ct. 2003).

Assigned trial counsel's responsibility with respect to the People's appeal depends upon whether the appeal is from a superior court decison/order, and which Department counsel is in. As to appeals from superior court matters, the unified Appellate Division rules (Part 1250) govern unless the local Appellate Division rule dictates otherwise. As to all other appeals, the local rule governs.

Under the unified rules, upon a People's appeal assigned trial counsel shall continue to represent the client on the People's appeal "[u]nless otherwise ordered by the court." 22 N.Y.C.R.R. 1250.11 (a) (2). Thus, if assigned counsel cannot or does not wish to represent the client on that appeal, counsel should immediately ask the appellate court to assign other counsel.

Alternatively, these are the individual rules of the Appellate Divisions:

A. For counties within the jurisdiction of the Appellate Division, First Department (i.e., Manhattan and the Bronx) (§606.5[d]): If trial counsel receives a favorable order from the court which is appealable by the People pursuant to CPL Article 450, retained or assigned counsel has the duty

> to forthwith notify defendant in writing that the People have the right to take an appeal, the consequences of the People's appeal and the defendant's rights, including the right to retain appellate counsel or, if indigent, to apply or leave to appear as a poor person.

Thus, counsel should not wait to get a notice of appeal from the People before notifying the defendant of the possibility of a People's appeal.

Once the People file a notice of appeal and serve a copy on counsel, moreover, unless counsel takes action the next thing that will happen is that you are served with a copy of the People's appellate brief and appendix. It would then be incumbent on assigned trial counsel to

> make diligent efforts to locate the defendant and notify the defendant, in writing, that the People have filed a brief, the consequences of the People's appeal and the defendant's rights, including the right to retain appellate counsel, or if indigent, to apply for leave to appeal as a poor person.

Unless assigned trial counsel is also on the appellate panel, he will not be able to represent the defendant in the Appellate Division (§600.8[g]). As soon as possible, and upon receiving a copy of the People's notice of appeal if possible, assigned trial counsel should apply (with his client's permission) to the Appellate Division to assign the defendant an appellate lawyer.

B. For counties within the jurisdiction of the Appellate Division, Second Department (§671.3): where the People are seeking to appeal an adverse order, they must serve a copy of the notice of appeal on the defendant's last-appearing trial attorney (§671.3[d]), whose duties are then as follows:

> (e) If, pursuant to CPL 460.10, subdivision1(c), the People as appellant elect to serve a copy of their notice of appeal in the first instance upon the attorney who last appeared for the

> defendant in the court in which the order or sentence being appealed was entered, or if they serve the attorney as required in subdivision (d) hereof, it shall be the duty of the attorney so served to give, either by mail or personally, written notice to his client confirming the fact that such appeal has been taken by the People. Such notice shall also advise his client of his right (1) to retain counsel to represent him as respondent on the appeal, or (2) to respond to the appeal pro se, or (3) upon proof of his financial inability to retain counsel and to pay the cost and expenses of responding to the appeal, to make application to the appellate court, for the following relief: for the assignment of counsel to represent him as the respondent on the appeal; for leave to respond to the appeal as a poor person and to dispense with printing; and, if stenographic minutes were taken, for a direction the clerk and the stenographer of the trial court that a typewritten transcript of such minutes be furnished without charge to the respondent's assigned counsel or, if the defendant appears as respondent pro se, to respondent. In such notice counsel shall also request the written instructions of his client, and, if the client thereafter gives counsel timely written notice of his desire to make such application, counsel shall proceed promptly to do so.

In the event trial counsel was assigned, however, there is a special rule requiring trial counsel to stay with the case unless otherwise relieved:

> (f) In the event, however, the attorney was the defendant's assigned counsel in the court in which the order or sentence being appealed was entered such assignment shall remain in effect and counsel shall continue to represent the defendant as the respondent on the appeal until entry of the order determining the appeal and until counsel shall have performed any additional applicable duties imposed upon him by these rules, or until counsel shall have been otherwise relived of his assignment. In the event the assignment remains in effect as herein provided, the written notice to the client as provided in subdivision (e) hereof may be dispensed with, except to the extent of confirming the fact that such appeal has been taken by the People.

Under such circumstances, unless trial counsel is able and willing to respond to the People's appeal, he or she, upon service of the People's notice of appeal, should apply to the Appellate Division for other, appellate, counsel to be assigned to respond to the appeal.

Counsel's merely letting the People's appeal proceed without submitting a brief would constitute ineffective assistance, People v. Brun, 15 NY3d 875 (2010), which claim could be raised via writ of error coram nobis. Id.

C. For counties within the jurisdiction of the Appellate Division, Third Department, the only relevant rule is §800.14(h)(4), governing expedited People's appeals from orders dismissing counts of an indictment or dismissing an indictment with directions to file a prosecutor's information. In that circumstance, assigned trial counsel may continue to represent the defendant on this appeal, or may ask the Appellate Division to assign appellate counsel. No guidance is offered regarding other People's appeals.

D. For counties encompassed by the Fourth Department, the rule is the same as in the Third Department. See § 1000.7(c).

Practice Tips:

- As soon as the trial court issues an order dismissing an accusatory instrument or count thereof, or any other order which is appealable by the People, and counsel has reason to believe that the People will appeal, trial counsel should formally serve the People with a copy of the court's order with notice of entry, to start the 30 days running.

- As soon as the People file their notice of appeal, you should take steps to obtain appellate representation for your client on People's appeal. You should have your client fill out and get notarized an in forma pauperis application and (unless trial counsel plans on handling the appeal) make a motion in the appellate court to have counsel assigned to represent the defendant on appeal. Do not wait until the People's appellate brief lands on your desk. If it turns out that the People don't end up appealing, no harm no foul.

XII. Trial Attorney's Obligation to Cooperate Fully with Appellate Counsel.

Assigned trial counsel must "cooperat[e] fully with appellate counsel...." NYSBA Revised Standards for Providing Mandated Representation. I-7(i)(iv).

> Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in trial court.

NLADA Performance Guidelines for Criminal Defense Representation. Guideline 9.2(c)

It is possible that trial counsel will receive a call from appellate counsel asking why trial counsel took certain actions during trial. If this occurs, trial counsel should be guided by the following:

> (a) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground.
>
> (b) If defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.
>
> (c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the defendant and seek to withdraw from representation with an explanation to the court of the reason therefor.
>
> (d) Defense counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense reasonably

believes necessary, even though this involves revealing matters which were given in confidence.

ABA Standards for Criminal Justice, Defense Function, 4-8.6.

Practice Tips:

- Even though your representation of the client may be long over, you have a continuing duty of loyalty that extends into the post-conviction phase, even when a claim of IAC is being made. *See* New York Rules of Professional Conduct 1.6, 1.9, 1.16; ABA Standards for Criminal Justice: The Defense Function, Standard 4-1.3.

- Keep your trial file available to you after the case is over, and make it available to appellate counsel on request. You are required to comply with such a request. NYSBA, Comm. On Prof'l Ethics, Opn. 766 (2003); NYSBA Rules of Prof'l Conduct, Opn. 970 (2012); NYRPC 1.15 (c)(4), 1.16(e); Sage Realty Corp. v. Proskauer Rose Goetz & Mendolsohn, LLP, 91 N.Y.2d 30 (1997) (affirming general right of client to the contents of the attorney's file upon termination of the attorney-client relationship). You can require appellate counsel to pay for copies, or to provide a release from the client, but ethical rules do require you to give us access (with a limited and non-absolute exception when you are still owed money).

- Respond promptly to all reasonable requests of appellate counsel for information.

- Trial counsel's continuing duty of confidentiality generally bars revealing a former client's confidential information or using it to the disadvantage of the former client or the advantage of the lawyer. NYRPC Rules 1.6(a), 1.9 (c), (2).

- If your conduct is "drawn into question" you are not "precluded from disclosing the truth concerning the accusation," even if it reveals client confidences, but only to the extent reasonably necessary. You should not respond to a prosecutor's inquiries,

absent court order. ABA Standards for Criminal Justice 4-9.6 (c).

- A claim of IAC waives privilege *to a degree*, but not for all purposes. The claim does not mean that a defense lawyer should cooperate with the District Attorney during motion practice! ABA Formal Ethics Opinion 10-456: "[I]t is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

- It is *highly unlikely* that a finding of ineffectiveness against you will ever put you at risk of a malpractice suit for damages, as a cause of action exists only if the 440 alleges the client's innocence or a colorable claim of innocence AND the criminal proceeding has been finally terminated in the client's favor, as by dismissal of the indictment or an acquittal after a new trial. As long as the charges are pending, even if the 440 results in vacatur of the conviction, there is no cause of action. See Carmel v. Lunney, 70 N.Y.2d 169 (1987); Britt v. Legal Aid Society, Inc., 75 N.Y.2d 443 (2000).

XIII. Trial Attorney's Obligation Regarding Bail Pending Appeal

(a) Where a client indicates a desire to appeal the judgment and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.

(b) Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

NLADA Performance Guidelines for Criminal Defense Representation Guideline 9.3.

Robert S. Dean
July 2018

THE TRIAL LAWYER'S RESPONSIBILITY TO EFFECTUATE THE CLIENT'S CRIMINAL APPEAL

PART II: THE SPECIFICS OF MEETING THIS OBLIGATION IN SUFFOLK COUNTY

This is the second part of this CLE program. Part I covered the extent of trial counsel's responsibilities post-trial generally. This part will provide an overview of how counsel is to fulfill those responsibilities in Suffolk County.

INTRODUCTION to PART II

This brief outline summarizes the practical mechanics that criminal defense attorneys—whether assigned or retained—must employ in Suffolk County in order to fulfill their ethical, rules-based, professional norms-based, and constitutional obligations regarding notices of appeal, applications to proceed *in forma pauperis* on appeal, and ensuring proper assignment of appellate counsel for indigent clients.

I. WHAT TO DO DURING AND FOLLOWING THE TRIAL/PLEA STAGE

A. **Familiarize Yourself with the Appellate Process, End-to-End!**
   1. If you are not familiar with the specifics, fret not! Contact the Appeals Bureau at The Legal Aid Society of Suffolk County. We are here to help and will answer your question(s) as best we can!

B. **Advise Your Client About His or Her Right to Appeal!**
   1. Your client has an absolute right to appeal.
   2. Oftentimes, many clients (and especially clients who plead guilty) are unaware that they have this right.
   3. You have a legal and ethical obligation to both make the client aware of their appellate rights and promote their exercise. You can do this by advising them of the following:
      a. **Everyone has a right to appeal** their conviction and/or sentence, even if they executed an appeal waiver in court.
      b. If the client is indigent, taking an appeal **can be done at no cost** to them.

c. The client **will not have to return to court** once the case reaches the appellate stage.
d. **Define what it means to appeal**: An appeal is a review by a higher court of the actions and events of the lower court. The higher court will determine whether any serious errors occurred throughout the case.
e. **Inform the client of where the appeal is taken**: Suffolk County convictions/sentences are appealed to the Appellate Division: Second Department (for felony cases) or the Appellate Term: Second Department (for misdemeanor cases).
f. **Instruct the client on how to protect his or her right to appeal:** Notice of Appeal must be filed within 30 days of sentence.
    i. Offer to file it for them!
g. **Inform the client that merely filing Notice of Appeal in itself does not impact the conviction or sentence.**
h. **Make the client aware of his or her <u>right to counsel</u> on appeal** and that appellate counsel will review the case for potential issues and further advise them on whether an appeal is in their best interest.
    i. **If the client cannot afford appellate counsel**, advise him or her that a motion must be filed requesting appointment of appellate counsel.
    ii. Offer to file it for them!

C. **Timely File a Notice of Appeal!**
1. <u>If you work for an institutional provider like SCLAS</u>:
    a. When you close out the case, notify support staff that a Notice of Appeal must be filed by: (1) marking it on the case file; **<u>AND</u>** (2) sending him or her an email.
    b. Follow up and confirm with the support staff member that the NOA has been filed.
    c. Notify the client that a Notice of Appeal has been filed.
2. <u>If you are a private or appointed attorney</u>:
    a. Follow the procedures set out *infra*, § II.
    b. Notify your client that a Notice of Appeal has been filed.

D. **Prepare and File An Application to Proceed *In Forma Pauperis* and for the Assignment of Appellate Counsel!**

1. <u>If you work for an institutional provider like SCLAS:</u>
   a. Notify the same support staff member tasked with filing Notice of Appeal that the client lacks the funds to pay for court costs and retain counsel.
   b. He or she will then aid the client in filling out the application and then file it accordingly.
   c. In your follow-up regarding Notice of Appeal, confirm with the support staff member that the *in forma pauperis* application has been completed and filed.
2. <u>If you are a private or appointed attorney:</u>
   a. Be sure to advise your client of his or her right to have counsel appointed on appeal if they are indigent.
   b. Have your client fill out an *in forma pauperis* affidavit.
   c. File the affidavit per the instructions outlined *infra*, § II. Do not forget to have it notarized!
3. **<u>All attorneys:</u>**
   a. Be advised that the Appellate Division: Second Department recently implemented new rules which, among many other things, require prospective appellants to include additional information in *IFP* applications.
   b. Specifically, Under 22 NYCRR § 1250.4(d)(4), an application to proceed *in forma pauperis* and to have counsel assigned must include:
      i. The date and county of conviction;
      ii. Whether the defendant is in custody;
      iii. The name and address of trial counsel;
      iv. Whether trial counsel was appointed or retained;
      v. If trial counsel was retained, a statement as to why no funds are available to retain appellate counsel;
      vi. Whether the defendant posted bail at some point at the trial level; and,
      vii. If bail was posted, a statement as to why the defendant does not have sufficient means to retain appellate counsel.
   c. The only exception of course is in cases where trial counsel has successfully sought an order from the trial court assigning counsel for appeal pursuant to the relatively-new CPL § 380.55. There are problems with

this new statute; trial attorneys seldom utilize it, meaning that such cases should be rare.

i. With that said, if you have successfully obtained a § 380.55 order from the trial court, then you need *not* file a motion to proceed *in forma pauperis*.

ii. If the trial/plea court denies your § 380.55 application, then you *must* file a normal-course *in forma pauperis* application with the appellate court.

d. Regardless of whether and how you apply to proceed *in forma pauperis* and for the assignment of counsel, you still should file a Notice of Appeal on your client's behalf.

E. **Make Sure You Don't Run Out of Time!**

1. Notice of Appeal must be filed within 30 days of the sentencing date.

a. If this 30-day period elapses, CPL § 460.30 authorizes and sets out specific procedures for filing a Late Notice of Appeal with the Appellate Division. There are two permissible grounds for doing so:

i. Improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or

ii. Inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken.

iii. In addition, the statute requires that "motion must be made with due diligence after the time for the taking of such appeal has expired, and in any case not more than one year thereafter."

b. Once the one-year grace period expires, the appeal is likely forfeited.

F. **In some cases, file Notice of Appeal regardless of whether you have advised the client of his or her appellate rights.**

1. ALL *felony* cases.
2. ALL cases that went to *trial*.
3. ALL cases that featured a *suppression hearing*.
4. Any case that triggers negative collateral consequences, especially if there are *immigration issues*.

5. If the client received probation or even a conditional discharge where the term is lengthy and/or where you believe that a violation of its terms is likely.
6. Any case where the court imposed a sentence that is: (a) beyond the statutory minimum; or (b) indeterminate where the client is eligible for discretionary relief.
7. Any case where communication with the client about an appeal is impossible (e.g., the client is taken upstate, is detained by immigration authorities, or if not in custody, moves and fails to notify you of his or her new address).
    a. **Keep in mind that, while filing a Notice of Appeal in such cases can be done with relative ease, you will need to have the client sign an application to proceed *in forma pauperis*.**

G. **"Okay Ed, But My Client Took a Plea. Isn't that game-set-match?"**
1. ***NOOOOOOOOO!!!!***
2. Even if your client pleaded guilty (and furthermore, even if your client waived his or her right to appeal as part of the plea), you still should file Notice of Appeal and an *in forma pauperis* application.
3. True, guilty pleas present a number of barriers to appellate review, including:
    a. **Appeal Waivers**: Some courts and district attorneys require defendants to waive their appellate rights altogether in exchange for a guilty plea. Few issues survive a valid waiver, **BUT** many waivers are found invalid when reviewed on appeal.
    b. **Forfeiture**: Many issues are automatically forfeited with the entry of the plea, even if they are otherwise preserved. *People v. Hansen*, 95 N.Y.2d 227, 230 (2000). These include, *inter alia*:
        i. § 30.30 claims. *People v. O'Brien*, 56 N.Y.2d 1009 (1982);
        ii. § 30.10 claims (SoL). *People v. Parilla*, 8 N.Y.3d 654 (2007);
        iii. § 710.30 claims. *People v. Taylor*, 65 N.Y.2d 1 (1985);

iv. § 40.20 claims. *People v. Prescott*, 66 N.Y.2d 216 (1985);
v. Defects in accusatory instruments that do not affect jurisdiction. *People v. Ianonne*, 45 N.Y.2d 589, 600-01 (1978) (indictment); *People v. Keizer*, 100 N.Y.2d 114 (2003) (misd. info.'s and compl.'s); *People v. Beattie*, 80 N.Y.2d 840 (1992) (traffic ticket).
vi. Trial errors (*People v. Green*, 75 N.Y.2d 902, 904-05 (1990)).

- Other issues <u>*do*</u> survive the plea, including *inter alia*:
  i. A <u>final</u> order denying suppression. CPL § 710.70(2).
     - Note: This means if the plea precedes the final suppression ruling, it forfeits the suppression issue. *People v. Fernandez*, 67 N.Y.2d 686, 688 (1986).
  ii. Jurisdictional defects. *People v. Dreyden*, 15 N.Y.3d 100, 103 (2010).
  iii. The legality of the sentence. *People v. Samms*, 95 N.Y.2d 52, 56 (2000).
  iv. Constitutional speedy trial claims. *People v. Blakley*, 34 N.Y.2d 311, 314 (1974).

c. **<u>Preservation</u>**: Even if a claim is not waived or forfeited, it still must be *preserved* in order to be reviewable on appeal.
   i. **<u>When the validity of the plea itself is at issue</u>**, you must preserve it for appeal in the following manner(s):
   ii. **<u>Pre-Sentence</u>: Move to withdraw the plea** under CPL § 220.60(3) and state grounds for doing so.
      - Generally, you must show that the plea was not knowing and voluntary, or that it was induced by some foul play. *People v. Flowers*, 30 N.Y.2d 315, 318-19 (1972).
      - General assertions of innocence or "second thoughts" will not justify withdrawal. *People v. Alexander*, 97 N.Y.2d 482, 485 (2002).

- § 220.60(3) bars trial courts from summarily denying the motion. The court must conduct some minimal inquiry into the defendant's reasons for seeking to withdraw the plea. *People v. Tinsley*, 35 N.Y.2d 926, 927 (1974).

iii. **Post-Sentence: Move to vacate the conviction** under CPL § 440.10, stating specific grounds.

- Ordinarily, a claim that ineffective assistance undermined the voluntariness of the plea must be raised in a CPL § 440 motion because ineffectiveness rarely occurs on the original record. *People v. Brown*, 45 N.Y.2d 852, 853-54 (1978).

4. **The Takeaways:** (1) Yes, a plea does introduce additional barriers to appellate review, but they are surmountable if trial attorneys take appropriate steps. (2) At the very least, you should never let a plea dissuade you from protecting your client's right to appeal by filing a Notice of Appeal and an *in forma pauperis* application.

II. THE LOGISTICS: HOW TO PREPARE AND WHERE TO SERVE AND FILE THE PAPERWORK.

A. Misdemeanors and Violations—Suffolk County District Court: First District (Central Islip, NY): Notices of Appeal ("NOA's")

1. Step 1: Draft a Notice of Appeal and make *six* copies.
2. Step 2: Serve the DA's Office with one copy at the Cohalan Court Complex, 400 Carleton Avenue; Central Islip, NY 11722 at the 2d Floor booth. Have the person working the booth date and time stamp "RECEIVED" all of the copies.
3. Step 3: Serve *two* copies of the NOA with the Clerk's Office, which is located on the 'Attorney Window' on Second Floor of 400 Carleton Avenue; Central Islip, NY 11722. Have the person working date and time stamp all copies "RECEIVED."
4. Step 4: Send one copy to the client, keep another for your case file, and be sure to have another for use as an exhibit for any

application to proceed *in forma pauperis* and for the assignment of appellate counsel.

* Note: If the conviction is rendered in a West End Village/Justice Court, you must complete the same steps and follow these same steps vis-à-vis the DA's and Clerk's Offices that cover the jurisdiction.

B. Misdemeanors and Violations—Suffolk County District Court: First District (Central Islip, NY): *In Forma Pauperis* Applications ("IFP's")

Unless your client retains private appellate counsel, he or she must make a request to the Appellate Term for Poor Person Relief and the Assignment of Counsel.

1. Step 1: Have your client fill out an IFP affidavit, sign it and have it notarized.
    a. Note: If your client is in custody, it may be easier to fill in pertinent information with the aid of his/her loved ones. However, the client still must sign the affidavit and have it notarized.
2. Step 2: Prepare a Notice of Motion and Affirmation to the Appellate Term: Second Department for IFP relief. Attach the signed, notarized IFP affidavit and NOA as exhibits to the motion.
3. Step 3: Serve the DA's Office with one copy at 400 Carleton Avenue; Central Islip, NY 11722 at the 2d Floor booth. Have the person working the booth date and time stamp "RECEIVED" all of the copies.
4. Step 4: File the motion with the clerk at the Appellate Term: Second Department at 141 Livingston Street (15th Floor); Brooklyn, NY 11201.
5. Step 5: Send one copy to your client and keep another for the case file.

C. Felonies—Suffolk County Court, Suffolk County Supreme Court; 200 Center Drive; Riverhead, NY 11901: Notices of Appeal ("NOA's")

1. Step 1: Draft a Notice of Appeal and make *six* copies.

2. Step 2: Serve the DA's Office with one copy at the Cromarty Court Complex, 200 Center Drive; (Riverhead, NY) 11722 at the 6th Floor booth. Have the person working the booth date and time stamp "RECEIVED" all of the copies.
3. Step 3: Serve *two* copies of the NOA with the Clerk's Office, which is located on the 'Attorney Window' on Second Floor of 200 Center Drive; (Riverhead, NY) 11722. Have the person working date and time stamp all copies "RECEIVED."
4. Step 4: Send one copy to the client, keep another for your case file, and be sure to have another for use as an exhibit for any application to proceed *in forma pauperis* and for the assignment of appellate counsel.

* Note: If the conviction is for a felony on an SCI before the *District* Court (e.g., in "FP1"), the Notice of Appeal must be filed at the Cromarty Court Complex in Riverhead, NY pursuant to the above procedure, NOT in the District Court.

D. Felonies—Suffolk County Court, Suffolk County Supreme Court; 200 Center Drive; Riverhead, NY 11901: *In Forma Pauperis* Applications ("IFP's")

1. Step 1: Have your client fill out an IFP affidavit, sign it and have it notarized.
    a. Note: If your client is in custody, it may be easier to fill in pertinent information with the aid of his/her loved ones. However, the client still must sign the affidavit and have it notarized.
2. Step 2: Prepare a Notice of Motion and Affirmation to the Appellate Term: Second Department for IFP relief. Attach the signed, notarized IFP affidavit and NOA as exhibits to the motion.
3. Step 3: Serve the DA's Office with one copy at 200 Center Drive; Riverhead, NY 11901 at the 6th Floor. Have the person working the booth date and time stamp "RECEIVED" all of the copies.
4. Step 4: File the motion with the clerk at the Appellate Division: Second Department at 45 Monroe Place; Brooklyn, NY 11201.
5. Step 5: Send one copy to your client and keep another for the case file.

III. THE MAIN TAKEAWAYS:

A. In all but the rarest of cases, your client has absolutely nothing to lose by filing a Notice of Appeal and an application to proceed *in forma pauperis* and for the assignment of counsel on appeal!
B. You have a continuing obligation to your client once the trial stage is over, which includes cooperating with appellate counsel. And we appeals attorneys are eager to help you!

IV. CONTACT OUR OFFICE:

Edward E. Smith
440 Carleton Avenue (4th Floor)
Central Islip, NY 11722
esmith@sclas.org

Note: We will be more than happy to share our form templates once they are "rules-tested." We very recently revised our NOA and IFP forms in order to comply with the new uniform Appellate Division rules, which became effective on September 24, 2018.