

## **CRIMINAL LEAVE APPLICATIONS**

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The rules of all four Departments of the Appellate Division require assigned or retained defense counsel in that court to advise defendants of their right to appeal, and to timely file an application for leave to appeal to the Court of Appeals in the event of the intermediate appellate court's affirmance or modification of the defendant's conviction, if the defendant requests that such application be made. Thus, even intermediate appellate court counsel having no intention of pursuing an appeal to this Court must be familiar with the procedure for timely filing a Criminal Leave Application, which is part of counsel's representation in that court

The best place to start for anyone not experienced in this area is by reading the applicable statutes and rules. Fortunately, in the area of Criminal Leave Applications to Judges of this Court, this is not a daunting task -- the relevant sections of articles 450 and 460 of the CPL, and Rule 500.10 of the Court of Appeals Rules of Practice, can be read and re-read in just a few minutes. Few other sources exist; however, the best of these, which should answer any questions not covered in this outline is Meyer, *The Defense Point of View*, The Defender, Spring 1987, p 27; see also 25 Ostertag and Benson, *General Practice in New York*, sections 39.47 and 39.48.

The outline below is designed to summarize these and other pertinent provisions, provide a few practice hints, and serve as a convenient reference. This outline is not an official communication of the Court of Appeals. In the event of any conflict between the text of an applicable Court Rule and a statement in this outline, the Rule controls. The information in this outline is intended only as a research guide, and is not a substitute for professional advice or individual legal research.

### **I. Necessity for Criminal Leave Application**

A. No appeal of right except in cases involving death penalty (compare CPL 450.70, 450.80 [right to direct appeal from court of original instance in death penalty cases] with CPL 450.90 [appeals in all other cases must be from order of intermediate appellate court and may be taken only if a certificate is issued pursuant to CPL 460.20]).

### **II. Orders appealable (CPL 450.90)**

A. What is a criminal case?

1. CPL 1.20(16) defines a criminal action as commenced "with the filing of an accusatory instrument against a defendant in a criminal court" (generally, any case captioned "People v \_\_\_\_\_").

2. Exceptions to above, considered civil cases:

a) appeal pursuant to CPL 330.20(21)(c) (commitment order);

b) proceeding for remission of forfeiture of bail (CPL Article 540, see *People v Public Serv. Mut. Ins. Co. [Robinson]*, 37 NY2d 607).

3. Does not include "quasi-criminal" proceedings which are governed by the civil appeal provisions of the CPLR.'

a) *habeas corpus* (People *ex rel.* \_\_\_\_\_):

b) CPLR article 78 to review prison discipline, parole determination, etc., or to compel or prohibit a Judge or prosecutor from taking some action within a criminal action.

B. Order sought to be appealed must be adverse or partially adverse to party seeking leave to appeal (CPL 450.90[1]) (note exceptions to appealability of "partially adverse" orders in *People v Griminger*, 71 NY2d 635,641, and cases cited).

1. Intermediate appellate court order of affirmance is adverse to party who was appellant in that court (dismissal of an appeal by the intermediate appellate court is also appealable [CPL 470.60(3)]).

2. Intermediate appellate court order of reversal is adverse to party who was respondent in that court.

3. Intermediate appellate court order of modification is partially adverse to each party.

4. **NOTE** that an appealable order must affirm (or dismiss an appeal), reverse or modify a judgment or order-- any order denying or granting a motion (such as for leave to appeal or for a stay) or an application for a writ (e.g., *coram nobis*) is not appealable pursuant to CPL 450.90(1), though an order of an intermediate appellate court affirming the granting of a writ of *coram nobis*, e.g., is appealable).

C. In addition, where the order of the intermediate appellate court is one of reversal or modification, CPL 450.90(2) requires:

1. That the Court of Appeals determine<sup>1</sup> that the determination of reversal or modification was "on the law alone or upon the law and such facts. which, but for the determination of law, would not have led to reversal or modification (CPL 450.90[2][1]); or

2. The appeal is based upon a contention that corrective action, as that term is defined in section 470.10, taken or directed by the intermediate appellate court was illegal" (CPL 450.90[2][1,]).

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<sup>1</sup> The Appellate Division's characterization of its order is thus not binding on the Court of Appeals.

D. Examples of determinations held not to satisfy CPL 450.90(2)(a):

1. Reversal or modification in the interest of justice:
  - a) on unpreserved issue (*People v Dercole*, 52 NY2d 956);
  - b) based on improvident exercise of discretion (as opposed to abuse).
2. Reversal or modification predicated on determination of mixed question of law and fact, or pure question of fact (for list of mixed questions, see *People v Harrison*, 57 NY2d 470), such as:
  - a) probable cause to search or arrest (but whether correct standard employed may be question of law that will support an appeal);
  - b) whether a verdict is contrary to the weight of the evidence (factual question, distinguish sufficiency of evidence, a question of law that will support an appeal),
  - c) whether there has been consent to questioning or search;
  - d) whether action under given circumstances was reasonable.

E. Even if order is appealable, application will be dismissed if:

1. It appears that defendant is not available to obey the mandate of the Court of Appeals in the event of an affirmance of the conviction (see *People v Shaw*, 72 NY2d 838); or
2. The defendant dies (in which case the prosecution abates) (see *People v Parker*, 71 NY2d 887); or
3. If a previous application for permission to appeal has been made and denied (*People v McCarthy*, 250 NY 358, 361).

**III. To whom application may be made**

A. **NOTE:** Unlike civil motions for leave to appeal from final orders of the Appellate Division, only one application is available in a criminal case (see *People v McCarthy*, 250 NY 358, 361, *supra*)

B. From order of Appellate Division, application may be made to

1. A Judge of the Court of Appeals designated by the Chief Judge to hear the application (CPL 460.20[2][a][i]) (no choice on the part of the applicant); or

2. If the order of the Appellate Division is one of affirmance, reversal or modification (but not dismissal, in which case the application may only be made to a Judge of the Court of Appeals), any Justice of the Appellate Division of the department that entered the order sought to be appealed (CPL 450.20[2][a][ii]).

**NOTE**

a) Where the order of the Appellate Division has dismissed an appeal taken to that court only a Judge of the Court of Appeals may grant leave to appeal (CPL 470.60[3]; *People v Santos*, 64 NY2d 702, 704).

b) Although the statute does not require that the Justice have been on the panel that issued the order, applicable Appellate Division rule may so require.

c) The applicant may choose the Justice, (including a dissenting Justice, if any).

C. From an order of any other intermediate appellate court, an application may be made only to a Judge of the Court of Appeals designated by the Chief Judge to hear the application (CPL 460.20(2)[b]; CPL 470.60[3])

**IV. Time within which application must be made**

A. Normally, 30 days after service upon the appellant of a copy of the order sought to be appealed (CPL 450.10[5][a]). **NOTE** that service with notice of entry is not required, as in civil cases.

B. Extension of time for making application (CPL 460.30)--

1. Available only by motion addressed to full Court in compliance with Rule 500.11.

2. Motion for extension of time must be made within one year of expiration of 30-day period for making application.

3. Statutory grounds for motion -- failure to timely make application must have resulted from:

a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney; or

b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to the defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant

4. An application under CPL 460.30 is available only to a defendant, not to the People.

**V. Form of Criminal Leave Application to Judge of Court of Appeals (Rule 500.10)**

A. Application itself should be in letter form, sent to the attention of the Clerk of the Court, with a copy sent to opposing counsel, the adverse party or both, as circumstances warrant (formal affidavit of service not required), and should state:

1. That an application has not been made to a Justice of the Appellate Division;
2. Whether oral argument of the application is requested;<sup>2</sup>
3. Whether there are any co-defendants and the status of their appeals; and
4. The issues sought to be raised on appeal to the Court of Appeals, and why such issues are reviewable and leaveworthy (avoid repeating arguments made in briefs where possible).

B. The following should be enclosed with the application (papers will be returned when the application is decided if requested in cover letter):

1. Briefs filed by both parties in the intermediate appellate court;
2. Order of the intermediate appellate court sought to be appealed;
3. Opinion or decision of intermediate appellate court and any relevant writings of other courts in the case; and
4. Bound record or appendix (not required by Rule, but helpful to include if available).

**VI. By whom made on behalf of a defendant seeking leave to appeal**

A. The application may be made pro se if the defendant chooses, but still must be timely accomplished.

B. If the defendant has assigned or retained counsel in the intermediate appellate court, counsel is required by the rules of each judicial department to prepare and submit the application if defendant so requests (Court of Appeals does not assign counsel until leave to appeal is granted).

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<sup>2</sup> Rule 500.10(a). NOTE that a request will not automatically entitle one to an oral hearing on an application and that telephone conferences often are used instead of face-to-face meetings.

## **VII. Stays**

A. In a non-capital case, the taking of an appeal by either party does not stay the execution of any judgment, sentence or order of either a criminal court or an intermediate appellate court (CPL 460.40).

B. Stay granted by a Judge of the Court of Appeals (CPL 460.60)--

1. A Judge to whom a leave application has been assigned may, upon reasonable notice by the applicant to the opposing party and reasonable opportunity to be heard:

a) stay execution of the judgment pending: the determination of the application for leave to appeal and, if that application is granted, stay or suspend execution of the judgment pending determination of the appeal; and

b) either release the defendant on his own recognizance or continue bail previously determined or fix bail pursuant to CPL article 530 (but see *People v Lettelough*, 86 NY2d 259, 263 (stay of enforcement of condition of sentence other than imprisonment]).

2. If the application for leave to appeal is denied, the interim stay terminates upon the signing of the certificate denying leave.

3. Only one stay application pursuant to CPL 460.60 is permitted between entry of the order sought to be appealed and determination of the appeal by the Court of Appeals.

4. Any stay pursuant to CPL 460.60 will terminate if the appeal is not argued within 120 days of the issuance of the certificate granting leave to appeal, unless the Court of Appeals:

a) extends the time for argument or submission beyond the specified period of 120 days; and

b) upon application of the defendant, expressly orders that the stay continue until the determination of the appeal or some other designated future date or occurrence

## **VIII. Factors considered in deciding applications**

A. Assuming order is appealable, an application must also present issues that are reviewable;

1. Issues must be preserved (if order sought to be appealed is one of reversal or modification, lack of preservation may result in non-appealability; see Section II, C, 1, *supra*) (also note limited exception for "mode of proceeding errors" that may be reviewed even if not preserved).

2. Issues must not be of the type not reviewable in the Court of Appeals, even if preserved:

- a) excessiveness of lawful sentence;
- b) whether verdict is contrary to weight of evidence (compare sufficiency, which is a legal question);
- c) factual question or mixed question of law and fact (Section II, D, 2, *supra*)

B. If issues are renewable, the ones most likely to warrant a grant of leave to appeal are:

1. Those on which the judicial departments of the Appellate Division have split;
2. Those presenting questions of widespread, statewide impact or of first impression;
3. Those involving recent U. S Supreme Court decisions and how they are to be applied in New York (e.g., should New York adopt a different rule under the State Constitution, under which it may give greater rights than those given under the Federal Constitution);
4. Those possibly determined erroneously in a published writing at the intermediate appellate court, which may mislead other courts, the bar and the public;
5. Those involving construction of new statutory schemes.

**IX. Reconsideration (Rule 500.10[b])**

A. Requests for reconsideration must, like original applications, be made through the Clerk of the Court:

1. Letter request, with copy to opposing counsel, adverse party, or both, as circumstances warrant, is sufficient;
2. Request will automatically be assigned to Judge who ruled on original application

B. Time to request reconsideration (Rule 500.10 [b]) --

1. Request must be made within 30 days of date after original application has been decided;
2. Assigned Judge may permit application after expiration of 30-day period, but only for compelling reasons;

C. Reconsideration is unavailable for entertaining new arguments not raised on the original application.

**X. Miscellaneous practice pointers**

A. If you intend to present additional written submissions in support of your application but do not have time to draft a detailed initial letter, make sure you get all the required materials in on time, and indicate in your letter, or by telephone call to the Judge after an assignment is made, that you would like some time to follow up. Such a request will ordinarily be granted.

B. A motion in the Appellate Division for reconsideration or reargument of the appeal to that court does not suspend the running of the 30day period during which a Criminal Leave Application from the order of that court determining the appeal must be made. If such motion has been made, you should so inform the judge assigned to your application.

C. If you are requesting a stay, call your adversary first to see if you can reach any sort of agreement before contacting the Clerk's Office or the judge assigned to your application. Moreover, if your client is not incarcerated, attempt to determine whether a surrender date has been set and indicate the date, if any, in your papers.

D. It is the applicant's burden to establish appealability and reviewability. Toward this end, Rule 500.10(a) requires that you include with your papers actual portions of the record indicating the appropriate objection was taken, etc.

E. If you wish to continue your representation as assigned counsel after leave to appeal is granted, you must move to be assigned (Rule 500.11 governs general motion practice).

F. If your application for assignment is granted, you must, within ten days of the issuance of the order granting your motion for assignment, serve and file a jurisdictional statement as required by Rule 500.2.

G. Of the 2,982 Criminal Leave Applications decided by Judges of the Court of Appeals in 1998,57 were granted. Of the 2,799 applications decided by Judges of the Court of Appeals in 1999, 44 were granted

H. If you work in a large office, include your direct-dial telephone number, if you have one, in all correspondence.