



Criminal Appeals: Handling Criminal Appeals Step by Step

DATE: Tuesday, November 1, 2022
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MCLE: 1.0 Professional Practice

This program has been approved for credit in
New York State for all attorneys
including those who are Newly Admitted
(less than 24 months) and administered by
the Onondaga County Bar Association.

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Matt Chivers serves as a Court Attorney Referee and Special Counsel to the Town & Village Courts in the Fourth Judicial District. He joined the court system in 2007, working as a Resource Center Attorney at the Office of Justice Court Support before moving to the District Office in 2015. Prior to that, Matt served as an Infantry Officer in the United States Marine Corps and was engaged in the private practice of law based in Saratoga County. Originally from Binghamton, New York, he is a graduate of Siena College and Albany Law School.

Criminal Appeals

HANDLING CRIMINAL APPEALS STEP BY STEP

INCLUDING UPDATES FROM 2022 AMENDMENT OF CPL 380.55 FOR INDIGENT DEFENDANTS

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CRIMINAL APPEALS



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Important Terms: Review

Notice of Appeal:

written document **created by the party appealing** containing the caption of the case and specifying the party that is appealing, what they are appealing and the court to which the appeal is being made.

Stenographer:

an officer of the court under the NYS Judiciary Law who is trained in the taking of stenographic minutes.

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Important Terms: Review

Stenographic Minutes:

full verbatim mechanical **notes** of a proceeding taken by a person qualified under Article 9 of the NYS Judiciary Law as a court stenographer on a stenographic device.

Stenographic Transcript:

the typed verbatim transcription of the stenographic minutes taken by a stenographer.

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Important Terms: Review

Record on Appeal (ALSO CALLED RETURN ON APPEAL IN CIVIL APPEALS):

documents necessary for the appellate court to decide the issues raised on appeal (term used most often in appeals done with stenographic transcripts).

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Important Terms: Criminal Appeals

Affidavit of Errors (CRIMINAL APPEALS ONLY DIGITAL RECORDER): written document **created by the party appealing** setting forth the alleged errors or defects in the case which the party wishes the appellate court to review.

Judge's Return (CRIMINAL APPEAL ONLY DIGITAL RECORDER): written document **created by the judge** summarizing evidence, facts or occurrences in or adduced at the proceeding which constitute the **factual** foundation for the contentions alleged in the Affidavit of Errors.

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Additional Important Terms: Review

Settlement Conference:

Gives the parties an opportunity to review the minutes and Return on Appeal and to make objections. Any disagreements are usually resolved at that time, and the record is settled.

Minutes (ONLY DIGITAL RECORDER):

If no stenographic recording, the **Court Clerk or Judge** creates “minutes” of the proceeding. The “minutes” are a summary of the testimony.

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People v. Smith

27 N.Y. 3d 643 decided 6.23.16

PUT SIMPLY:

A transcript of an electronic recording from a digital recorder **IS NOT** the equivalent of a stenographic transcript created by a court stenographer from their stenographic minutes.

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Location, location, location - where an appeal goes from your court depends on where your court is

1st and 2nd Judicial Departments:

New York City (all boroughs)
Richmond, Nassau, Suffolk,
Dutchess, Orange, Putnam,
Rockland, Westchester

Appeals are heard by the Supreme Court, Appellate Term

3rd and 4th Judicial Departments*:

All the other counties in the State not listed to the left.

* Note difference b/w Judicial Departments and Judicial Districts

Appeals are heard by the County Court in each respective County

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What Kinds of Things Are Appealable?

A **defendant's** right to appeal usually arises once the Court imposes a sentence

- ❖ **NOT** just a finding of guilty
- ❖ **NOT** a denial of a pre-trial or trial motion

The **prosecution's** right to appeal arises in very limited circumstances in CPL 450.20 (11 specific things – rare in T&V World)

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The Judge's Role: Notice of the Prosecution's Right to Appeal

If the People may appeal pursuant to CPL 450.20 the court **must** promptly notify the **defendant** on the record or in writing that:

1. The people have a right to appeal.
2. The defendant has the right to counsel to represent them on the appeal - if they cannot afford counsel.

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The Judge's Role: Notice of the Prosecution's Right to Appeal

The Defendant must provide to the court an address where they can be contacted in the event the People do appeal, and this address must be also provided to ***defense counsel***. (22 NYCRR 200.40)

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Criminal Appeal to County Court or Appellate Term

Two procedures for taking the appeal based upon if:

1. The proceeding being appealed **was taken** by a **court stenographer**;

OR

2. Was **NOT** taken by a **court stenographer** but by a **digital recorder**



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What about Defense Counsel?

CPL 380. 55 was amended effective January 14, 2022.

It previously only called for Defendants who were convicted *at trial* to be able to reapply for appellate counsel. The statute was amended to change “at trial” to “in a criminal action.” That language was then made into Section 1 of the statute while Section 2 was also added.

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CPL 380.55(2)

“Where counsel has been assigned to represent a defendant in a criminal action on the ground that the defendant is financially unable to retain counsel, the appellate court shall presume the defendant eligible for assignment of counsel on appeal without further proof of eligibility, and, thereby issue an order assigning such counsel, if counsel provides a sworn representation that the defendant continues to be eligible for assignment of counsel.”

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No Need to Reapply

This new section makes it much easier for defendants to secure appellate counsel and it does not require defendants to lose at trial first.

In other words, defendants can get counsel to appeal plea bargains as well.

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Counsel's Office Memo & Forms

See Anthony Perri, Esq. Memo dated January 18, 2022 for additional information and DRAFT forms that will likely be promulgated soon.

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5 Steps In Criminal Appeals Procedure: COURT STENOGRAPHER

1. Notice of Appeal served and filed with the trial court.
2. Trial Court sends the Notice of Appeal to the appellate court.
3. Providing a copy of the stenographic transcript.
4. Filing Court's Return with the appellate court.
5. Notification of filing to the parties.

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STEP 1 : Filing of a Notice of Appeal

Appellant (Defendant/Prosecution) Must File a Notice of Appeal **with the Clerk of the Local Criminal Court:**

1. Within 30 days of sentence, resentence, judgment or order
2. Must file with the clerk duplicate copies (2 copies)
3. **No Filing Fee**

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STEP 1 : Filing of a Notice of Appeal (cont.)

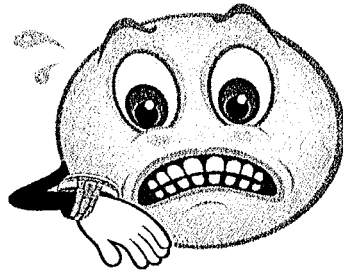
If the **Defendant is appealing**, they must also serve - within the same 30-day period - a copy of the Notice of Appeal upon the District Attorney of the County. CPL 460.10(1)(b).

If the **People are appealing**, they must also serve - within the same 30-day period - a copy of the Notice of Appeal upon the defendant or upon the attorney for the defendant who last appeared on the defendant's behalf in the proceeding being appealed. CPL 460.10(1)(c).

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What If The Notice of Appeal Is Filed with
the Court Late or Appears Defective?

Still accept it. No matter what.



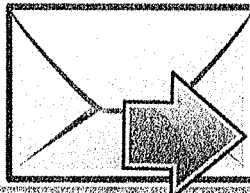
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STEP 2 : Send Notice of Appeal to the Appellate Court

After the Notice of Appeal has been filed with the clerk of the local
criminal court, the **court clerk** must:

1. Write the date the Notice was filed on the Notice of Appeal
AND
2. File a copy of the Notice of Appeal with the Appellate Court

Local Criminal Court



Appellate Court

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Step 3: Stenographic Transcript of the Proceedings

The party who is appealing is responsible for obtaining two (2) copies of the stenographic transcript from the stenographer.

The cost of the transcript and copy are borne by whoever orders the transcript.

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Step 3: Stenographic Transcript of the Proceedings

If the defendant is indigent, the appellate court may order that you furnish a photo copy of *some or all* of the stenographic transcript.

If so, the expense is a **State** expense. CPL 460.70(1).

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Step 4 : Filing Record on Appeal with the Appellate Court

Within **10 days** after **receiving the stenographic transcript**, you must file with the appellate court:

1. Notice of Appeal
2. Stenographic Transcript of the proceedings
3. Copy of the accusatory instruments
4. Any motion papers and court decisions

This constitutes the **Record on Appeal**.

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Step 5 : Notification to the Parties

You must notify the parties when the Record on Appeal has been filed with the appellate court.

What's next?

YOU ARE DONE! PROBABLY.

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Settling the Record on Appeal Court Stenographer

Occasionally there are objections to the content (accuracy/completeness) of the stenographic transcript or other papers in the Record on Appeal.

Where the **appellate court is a County Court**, the parties may be ordered to **Settle the Record** before your court.

Where the **appellate court is an Appellate Term**, the stenographic transcript of the proceedings must be settled by your judge prior to the appeal being heard.

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Appeals Taken From Proceedings Recorded by Digital Recorder

Appeals from a proceeding recorded by a Digital Recorder follow a different procedure, which **must be followed by your court.**

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3 Steps in Criminal Appeals Procedure Digital Recorder

1. The appellant files **Notice of Appeal** and **Affidavit of Errors**.
2. Creation of **Judge's Return**.
3. Filing of **Judge's Return with Appellate Court**

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Step 1 : Filing of a Notice of Appeal and Affidavit of Errors

The Appellant (Defendant/Prosecution) must file with the **Clerk of the Local Criminal Court**:

1. Either an **Affidavit of Errors** and/or a **Notice of Appeal** **within** 30 days of the sentence, resentence, judgment or order being appealed from.
2. **No Filing Fee**

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Step 1 : Filing of a Notice of Appeal and Affidavit of Errors

If the **Notice of Appeal** is filed **first** in the local criminal court, the party appealing must within 30 days after the filing of the Notice of Appeal also file an **Affidavit of Errors** with the local criminal court.

You should accept these documents and not reject them even if they appear late or defective!

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STEP 2 : Creation of Judge's Return

Once the **Affidavit of Errors** is filed in your court by the appellant, the judge must create the **Judge's Return**.

The Judge's Return is a written document drafted by the **judge** "summarizing evidence, facts or occurrences in or adduced at the proceeding which constitute the **factual** foundation for the contentions alleged in the Affidavit of Errors." CPL 460.10(3)(d) (Avoid using Judge's handwritten notes)

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STEP 2 : Creation of Judge's Return

Where a digital recorder was used to record the proceeding being appealed, the **Judge's Return** can consist of the submission of the transcript of the digital recording of the proceedings.

But only when the transcript adequately covers ALL of the issues raised in the Affidavit of Errors!

People v. Robinson 72 NY2d 989 (1988)

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Who Pays for Transcript of Digital Recording?

If your court orders it to assist in creating the Judge's Return, the **COURT** pays for the transcript.

If the **prosecution and/or Defendant** orders it to assist them, the **PARTY** pays for the transcript.

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Who Pays for Transcript of Digital Recording?

If the **defendant** is **indigent**, CPL 460.70(1) provides for payment for the transcript to be a state charge payable out of funds appropriated by OCA for that purpose.

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Transcript of Digital Recording? Cont.

If a party requests a transcript of digital recording:

Check for specific procedure in your district.

Options include:

1. Having the Court **ONLY** send the disc to the transcriber
2. Allowing the Appellant or his/her counsel to receive the copy of the disc and send it to transcriber

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STEP 3 : Filing of Judge's Return

The **Judge's Return** must be filed with the clerk of the appellate court within **10 days** of the filing of the **Affidavit of Errors** with your court. CPL 460.10(3)(d)

The Clerk's Role:

YOU MUST NOTIFY YOUR JUDGE AS SOON AS THE AFFDAVIT OF ERRORS IS RECEIVED BY THE COURT.

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Settling the Judge's Return

If the Judge's Return is sent back by the appellate court, your Judge may be directed to file a new Return or an amended Return. CPL 460.10(3)(e).

The Clerk's Role:

YOU MUST NOTIFY YOUR JUDGE AS SOON AS A DECISION IS RECEIVED BY THE COURT REGARDING THE APPEAL

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Stays

Town & Village Courts have **no jurisdiction** to stay a sentence during a criminal appeal (including fines and surcharges).

Only the **APPELLATE COURT** can entertain an application to stay a sentence.

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Summary and Quick Reference: Criminal Appeals – Court Stenographer

1. Notice of Appeal served and filed with the trial court.
2. Trial Court sends the Notice of Appeal to the appellate court.
3. Providing a copy of the stenographic transcript.
4. Filing Court's Return with the appellate court.
5. Notification of filing to the parties.

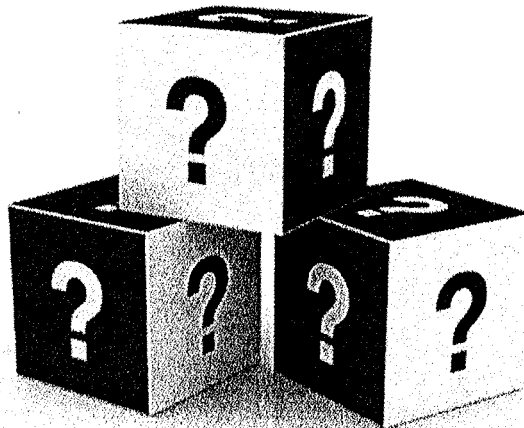
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Summary and Quick Reference: Criminal Appeals – Digital Recorder

1. The Appellant files Notice of Appeal and Affidavit of Errors.
2. Creation of the Judge's Return.
3. Filing of Judge's Return with Appellate Court (10 days).

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Questions?
Call the Resource Center!



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