



# PROTECTING THE RIGHT TO APPEAL A CRIMINAL CONVICTION IN NEW YORK

## A PRACTICE GUIDE



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## Protecting the Right to Appeal a Criminal Conviction in New York<sup>1</sup>

This guide provides practical resources and tips on how to initiate a criminal appeal in the Appellate Division in New York State. The guide is divided into three sections, corresponding to the three main ways to pursue a criminal appeal. The options available will depend on how much time has passed since the sentencing proceeding.

Here is an overview:

Time Elapsed After Sentencing	Timely?	How to Protect the Right to Appeal
Within 30 days	Yes	<ul style="list-style-type: none"> <li>• File a Notice of Appeal (“NOA”), <b>AND</b></li> <li>• File a CPL 380.55(2) Certification of Continuing Eligibility for assigned counsel<sup>2</sup></li> </ul>
Within 1 year + 30 days	No	<ul style="list-style-type: none"> <li>• File a Motion requesting permission to file a Late Notice of Appeal (“LNOA”) pursuant to CPL 460.30, <b>WITH</b> <ul style="list-style-type: none"> <li>○ A CPL 380.55(2) Certification (best practice for assigned trial counsel), <b>OR</b></li> <li>○ A Motion for Waiver of Costs, Fees and Expenses and Assignment of Counsel (best option for litigates who had retained trial counsel or who are proceeding <i>pro se</i>)</li> </ul> </li> </ul>
More than 1 year + 30 days	No	<ul style="list-style-type: none"> <li>• File a coram nobis petition alleging ineffective assistance of counsel (IAC) for failure to file a timely NOA, <b>AND</b></li> <li>• Include a request for assigned appellate counsel, documenting financial eligibility</li> </ul>

For a more detailed chart outlining the procedures at each of these stages, consult the [Criminal Appeals to the Appellate Division: Timing Chart](#) in Appendix A1.

<sup>1</sup> This guide was prepared by Elizabeth Isaacs, Michelle Stroe, and Carolyn Walther at the Statewide Appellate Support Center (SASC) at the NYS Office of Indigent Legal Services. The SASC Team is grateful for guidance and input contributed by Lena Janoda, Director of the Access to Appeals Project at the Center for Appellate Litigation. This guide does not constitute legal advice and should not be used as a substitute for independent legal research.

<sup>2</sup> Note: CPL § 380.55(1) provides an alternative option to CPL § 380.55(2) but is more cumbersome. Both options are discussed more in-depth on page 3 of this guide.

## The Right to Appeal: Trial Counsel's Obligations<sup>2</sup>

In New York, people convicted of criminal offenses have a statutory right to appeal their convictions to an intermediate appellate court. The decision whether to take an appeal belongs to the client, not the lawyer.<sup>4</sup> Effective representation by trial counsel includes the obligation to advise the client in writing about both the right to appeal and the process for doing so, and to consult with the client on whether they want to appeal.

If the client wants to appeal, the best practice is to file *both* the NOA and the Certification of Continued Eligibility for Assigned Counsel at the same time, as explained below. It is important to note that the default should be to pursue an appeal on behalf of a client, since the client can always opt to withdraw the appeal at a later time.

### Timely Appeals (within 30 days post-sentencing)

#### Filing the Notice of Appeal

If the client wants to appeal, trial counsel must file<sup>5</sup> the NOA within 30 days of the client's sentence being imposed,<sup>6</sup> regardless of the nature of the conviction, and regardless of whether the client has executed an appeal waiver as part of a negotiated plea. Failure to do so constitutes ineffective assistance of counsel. *People v Syville*, 15 NY3d 391 (2010).<sup>7</sup> For non-citizen clients, filing the NOA has the additional benefit of making their conviction non-final for immigration purposes. A template [Notice of Appeal](#) is included in Appendix B1.

#### Facilitating Assignment of Appellate Counsel

Filing the NOA preserves the right to appeal, but it does not initiate the appeals process. If a trial attorney *only* files the NOA, without facilitating the process of seeking assigned appellate counsel, the client will have to navigate the process of proving their eligibility *pro se*, often while incarcerated, which can be cumbersome and confusing. Notably, the Appellate Division courts do not have a regular practice of proactively informing litigants who have filed their NOA that they are lacking the paperwork to seek assignment of counsel. This can result in unnecessary delays and confusion, since clients may believe they have an appeal in progress

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<sup>3</sup> For guidance on what should be contained in the NOA, consult [A Trial Lawyer's Ethical Obligation to Smooth the Path to a Client's Appeal](#) (Appendix E1), as well as [Attorney Resource: Filing Direct Appeals of New York City Criminal Convictions and Assignment of Counsel](#), by the Immigrant Defense Project (Appendix E31).

<sup>4</sup> *McCoy v Louisiana*, 583 US 414, 414 (2018); *Jones v Barnes*, 463 US 745 (1983).

<sup>5</sup> Attorneys should file with the *clerk's office* of the sentencing court, not with the court part itself. In New York City, however, the general practice is to file with the relevant *appeals bureau* of the sentencing court.

<sup>6</sup> CPLR 5515(1).

<sup>7</sup> For more information about where to file the NOA, refer to [A Trial Lawyer's Ethical Obligation to Smooth the Path to a Client's Appeal](#) (Appendix E1), specifically pages E26-E27.

and fail to take necessary action to get counsel assigned. Therefore, trial attorneys should take this additional, minimal step to ensure prompt assignment of appellate counsel.

There are several ways to facilitate the assignment of appellate counsel:

- **CPL 380.55(2) Certification with the NOA (best practice for assigned trial counsel):** As indicated in the [Timing Chart](#) (Appendix A1), the best practice is for assigned trial counsel to file, within 30 days of sentencing,<sup>8</sup> not only the NOA (Appendix B1), but also a [Certification of Continued Eligibility](#) (Appendix B2) for assigned counsel on appeal pursuant to CPL § 380.55(2). This is a simple affirmation by the trial attorney attesting that, to the best of the attorney’s knowledge, the client’s financial situation has not changed, and they remain eligible for assigned counsel on appeal. The Certification means the client will not have to file a motion requesting assigned counsel with the Appellate Division, thereby smoothing the path to representation on appeal. Each Appellate Division department also has their own form for this certification, available on the departments’ websites.<sup>9</sup>
- **CPL § 380.55(1) Application for Court Order at the Time of Sentencing:** CPL § 380.55(1) provides an alternative option to CPL § 380.55(2), which is more cumbersome: at the time of sentencing, assigned counsel can make an application to the sentencing court for an order granting the client a waiver of costs, fees, and expenses on appeal. As part of a CPL § 380.55(1) application, counsel must represent that their client continues to be eligible for assignment of counsel and that granting the application will expedite the appeal. If choosing this option, counsel should come to sentencing with a prepared order for the court to execute. A template [Order Granting Waiver of Costs, Fees, and Expenses on Appeal](#) is included in Appendix B5. Note that while this procedure is available to assigned counsel, it is much easier for assigned attorneys to simply submit to the clerk of

***\*\*Practice Tip for the Fourth Department:***

In the Fourth Department, the Certification should not be filed with the clerk of the trial court (but the NOA should). Instead, trial counsel should file the Certification directly with the Fourth Department. In the First, Second, and Third Departments, however, the Certification and NOA should be filed together with the clerk of the trial court (with an alternative option to file with the Appellate Division – see more below).

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<sup>8</sup> While the preferred practice is for defense counsel to submit the CPL § 380.55(2) certification within 30 days of sentencing, it may still be submitted directly to the Appellate Division afterward, so long as it is filed within a reasonable time and prior to any motion for assignment of counsel on appeal.

<sup>9</sup> Each department’s template Certification of Continued Eligibility can be found here: [First Dept.](#); [Second Dept.](#); [Third Dept.](#); [Fourth Dept.](#)

the court an affirmation pursuant to CPL § 380.55(2), avoiding the process of getting a court order.

- **Motion for Assignment of Appellate Counsel (the only option if trial counsel was retained, or for *pro se* litigants):** The procedures laid out in CPL § 380.55 are only available for counsel that was *assigned* by the trial court. But a client who had retained counsel in trial court may nonetheless be eligible for assigned appellate counsel. Retained counsel should discuss with the client their ability to retain appellate counsel and, if the client will not be able to do so, the retained lawyer should assist the client with filling out the paperwork to request assigned counsel. See below (“[Motion for Waiver of Costs, Fees and Expenses and Assignment of Counsel](#)”) for more information.

### When the NOA is Timely Filed Without Financial Eligibility Paperwork

If trial counsel timely filed the NOA but did not file a certification or court order under CPL § 380.55 within 30 days of sentencing, there are two options:

- **File a CPL 380.55(2) Certification with the Appellate Division:** Assigned trial counsel can still submit a [Certification for Continued Eligibility](#) for assigned counsel pursuant to CPL § 380.55(2) to the Appellate Division if there is no reasonable basis to conclude that the client’s financial circumstances have changed. This is by far the preferable option! It is a simple certification that avoids the need for a motion; **OR**
- **File a Motion for Assigned Counsel with the Appellate Division:** Alternatively, either assigned OR retained trial counsel (OR a litigant proceeding *pro se*) can file a [Motion for Waiver of Costs, Fees and Expenses and Assignment of Counsel](#)<sup>10</sup> (Appendix B6) to the Appellate Division. Each Appellate Division department also has its own template for these motions, available on the departments’ websites.<sup>11</sup> Note that this motion is the only option for appellants who had *retained* counsel in trial court, since they will need to establish that, while they could afford counsel below, their financial situation now makes them eligible for assigned appellate counsel. This may be the case, for example, if a client’s family paid for retained counsel in trial court, but there are no longer funds available for appellate counsel. For clients who had assigned counsel in trial court, this motion is a cumbersome step that can easily be avoided by trial counsel submitting the CPL § 380.55(2) certification (see above).

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<sup>10</sup>Motions for waiver of costs, fees, and assignment of appellate counsel were formerly referred to as an “applications for poor person relief,” or “IFP.” Recent amendments to the Rules of Practice of the Court of Appeals, 22 NYCRR Part 500, have changed the phrase “poor person relief” to “financial relief pursuant to CPLR 1101” to more accurately reflect the financial eligibility requirements. See <https://dos.ny.gov/system/files/documents/2025/03/030525.pdf>

<sup>11</sup> Each department’s template Motion for Waiver of Costs, Fees and Expenses and Assignment of Counsel can be found here: [First Dept.](#); [Second Dept.](#); [Third Dept.](#); [Fourth Dept.](#)

## Untimely Appeals (before 1 year + 30 days post-sentencing)

If the NOA is not filed within 30 days of sentencing, a motion can be filed in the Appellate Division requesting permission to file a Late Notice of Appeal (“LNOA”) pursuant to CPL § 460.30. This motion can be filed up to one year and 30 days after sentencing. It must state the reason(s) for the delay.

If trial counsel realizes that a NOA was not timely filed, the best practice is for counsel to assist the client with this motion, even if their representation has technically ended. Refer to the [Checklist for Filing a CPL § 460.30 Motion](#) (Appendix C1), which can be helpful to attorneys and *pro se* litigants alike. A [Template Motion Pursuant to CPL § 460.30](#), requesting permission to file a LNOA, is included in Appendix C7. Litigants can also file a motion *pro se*, in which case they would file the Notice of Motion, Appellant Affirmation, and Affidavit of Service (but not the Attorney Affirmation).

**However, while the LNOA preserves the right to appeal, it does not ensure assignment of appellate counsel.** In addition to the LNOA, assigned trial counsel therefore should file a [Certification for Continued Eligibility](#) for assigned counsel pursuant to CPL § 380.55(2). If counsel was retained below but the client cannot afford appellate counsel, or if a client is filing a LNOA motion *pro se*, it should be accompanied by a [Motion for Waiver of Costs, Fees and Expenses and Assignment of Counsel](#).

## Coram Nobis Petitions

If more than one year and 30 days has passed since sentencing without filing a NOA, the only remaining option is to file a [Petition for Writ of Error Coram Nobis](#) (Appendix D5) often called a “coram nobis petition,” with the Appellate Division. *See People v Syville, supra*.

Historically, the coram nobis writ was used to challenge all kinds of factual errors or legal mistakes, many of which were codified in CPL § 440. In modern times, the coram nobis writ is primarily used in two situations: (1) ineffective assistance of appellate counsel for failure to advance a meritorious argument on appeal; and (2) ineffective assistance of trial counsel for failing to file the NOA and/or failing to properly advise the client of their appellate rights.

This guide is concerned with the second type of coram nobis petition: when trial counsel was ineffective for failing to timely file the NOA and/or properly advise the client regarding their right to appeal. Successful petitions often include a detailed explanation of why the client did not discover counsel’s error until the window had passed within which to seek permission to file a LNOA under CPL § 460.30, as well as any efforts the client has undertaken in the intervening time to pursue the appeal.

Coram nobis petitions are more involved than motions pursuant to CPL § 460.30, and coram nobis case law often omits the underlying facts of the petitions, making it difficult to discern from the decisions what factual allegations underlie successful petitions.

### Filing a Coram Nobis Petition Regarding a LNOA

#### ➤ When?

- The coram nobis petition is a last resort. The first and best option is to file a timely NOA within 30 days of sentencing with the trial court (see CPL § 460.10), along with a Certification of Continued Indigency (see CPL § 380.55).
- If this deadline is missed, the client can file a motion requesting an extension of time to file the NOA (see CPL § 460.30), up to 1 year after the deadline for the NOA.
- When the timeframe of 1 year + 30 days post-sentencing has expired, the coram nobis petition becomes the only remaining option.
- CPLR § 2214 governs the timing of service and filing. The motion and supporting exhibits must be served on the DA at least 8 days before the return date. Any response by the DA must be served at least 7 days before the return date. Any reply by the defense must be served at least 1 day before the return date.

#### ➤ Where?

- The coram nobis petition should be filed with the Appellate Division, in the department where the appeal will be heard.

#### ➤ What? - *The basic components of a coram nobis petition:*

- Attorney affirmation (Note: not necessary for *pro se* coram nobis petitions)
- Client affirmation
- Memorandum of law (recommended, but not required)
- Exhibits

### The Defense Burden in a Coram Nobis Petition

#### 1) Counsel was ineffective:

- Client wanted to appeal and counsel failed to file the NOA; and/or
- Counsel failed to properly advise the client regarding their appellate rights.

#### 2) Counsel's errors caused prejudice:

- As a result of the attorney’s failure to file the NOA or to properly advise on appellate rights, the client’s appellate rights were not protected. Normally, it is the inability to pursue an appeal itself that establishes prejudice.
- The defense should also allege and prove that during the one year + 30-day timeframe between sentencing and the expiration of the extension period under CPL § 460.30, the client was unable to discover the attorney’s errors/omissions. This should include a reasonable explanation of why the client did not pursue a motion for an extension of time to file a LNOA under CPL § 460.30.

Examples of Counsel Ineffectiveness for a Coram Nobis (to establish Prong 1):

- **Counsel failed to file a NOA after client requested it:**
  - Client initially said that they did not want to appeal, but changed their mind and subsequently attempted to contact counsel, but received no response;
  - Counsel determined that it would not be worthwhile to file the NOA even after the client requested it, based on counsel’s judgment that there were no valid appellate issues or that an appeal waiver would foreclose the appeal, or on counsel’s belief that an appeal would put client’s beneficial plea disposition at risk;
  - Counsel represented a client on two cases, but only filed a NOA for one case where separate judgments meant it was necessary to file separate NOAs;
  - Counsel was negligent, such as by losing track of the case or not realizing filing the NOA was part of their duty as assigned trial counsel.
- **Counsel failed to properly advise client about the scope of appellate rights:**
  - Counsel gave incorrect advice about deadlines or whether client had the right to file an appeal;
  - Counsel misadvised client about the scope of the waiver of appeal, inaccurately advising that it precluded appellate review of all issues;
  - Counsel failed to ensure client fully understood communications about appeal, including by not communicating with client in their native language or sending mail to a jail or prison where the client was no longer in custody.

Additional Resources:

- [Coram Nobis Checklist](#) (Appendix D1)
- [Template Coram Nobis Petition](#)<sup>12</sup> (Appendix D5)

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<sup>12</sup> This template includes samples of the Notice of Motion, Attorney Affirmation, Client Affirmation, and Memorandum of Law.

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**\*\*Practice Tip for Trial Counsel:**

Trial defenders face enormous professional challenges, including carrying heavy caseloads and juggling multiple and competing deadlines, often without sufficient resources or support. In this environment, sometimes mistakes happen or miscommunication occurs. As trial counsel, if you failed to properly advise a client regarding their appellate rights, accidentally failed to file a timely NOA, or misunderstood your client's desire to pursue an appeal, the best practice is to work in collegial collaboration with appellate counsel (or your former client, acting *pro se*) to rectify these errors. Ensuring that your former client gets their day in court in the Appellate Division is important, and admitting a mistake is both understandable and honorable.

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## Conclusion

It is imperative that defense attorneys fulfill their obligation to inform their clients about the right to appeal and, if the client wants to do so, to assist them with the process of filing a notice of appeal and facilitating the assignment of appellate counsel. This guide outlines the basic ways to protect the right to appeal at each stage of the appellate timeline, with templates and tips to aid the process.

If you have questions about pursuing a criminal appeal in the Appellate Division, please feel free to email the ILS' Statewide Appellate Support Center at [SASC@ils.ny.gov](mailto:SASC@ils.ny.gov) to request a consultation.

Last updated: March 2026

**DISCLAIMER:** *The ILS Statewide Appellate Support Center ("SASC") provides outlines, templates, and other resources. While every effort has been made to ensure that such materials are up-to-date, accurate, and complete, they are provided on an "as is" basis, with no express or implied guarantees of accuracy or completeness. Use of SASC resources does not create an attorney-client relationship.*

# APPENDIX

# APPENDIX A

Timing of Criminal Appeals to the Appellate Division

# Criminal Appeals to the Appellate Division: Timing Chart

How to pursue a direct appeal in New York depends on how much time has passed since sentencing and the reasons for any delay in filing a notice of appeal.

## Within 30 Days of Sentencing

### Notice of Appeal + Request for Assignment of Appellate Counsel

- **Best Practice:** Assigned trial counsel should file a Notice of Appeal and Certification of Continued Eligibility for Waiver of Costs, Fees, and Expenses & Assignment of Counsel (CPL § 380.55[2]) or a court order certifying eligibility for assigned appellate counsel (CPL 380.55[1]) with the trial court clerk's office and serve them on the DA's office within 30 calendar days of sentencing (CPL § 460.10[1]). Retained counsel needs to file a Motion for Waiver of Costs, Fees, and Assignment of Counsel on Appeal if the client cannot afford appellate counsel.
- **Disfavored:** If trial counsel files only a Notice of Appeal, the appeal cannot move forward unless the client independently seeks assignment of appellate counsel by filing a motion with the Appellate Division. See CPLR § 1101. Many people struggle with the complexity of this process, making it preferable for trial counsel to certify a client's continuing financial eligibility at the time the NOA is filed.

## Between 31 Days and 1 Year + 30 days Post-Sentencing

### Motion Requesting Permission to File a Late Notice of Appeal

- If no Notice of Appeal is filed within 30 days of service of the order being appealed from, a litigant can file a motion asking the Appellate Division to grant permission to file a late notice of appeal. See CPL § 460.30.
- This motion must be filed within one year of the date the Notice of Appeal should have been filed—*i.e.*, one year and 30 days after service of the order being appealed from.
- The motion should state the reasons for the delay. A CPL § 460.30 checklist and template motion are available on the ILS website.

## More Than 1 year + 30 Days Post-Sentencing

### Petition for Writ of Error Coram Nobis

After 1 year + 30 days after service of the order being appealed from, it is too late to request an extension of time to file the Notice of Appeal under CPL § 460.30. The only remaining option is to file a Petition for Writ of Error Coram Nobis with the Appellate Division, arguing ineffective assistance of trial counsel where the lawyer failed to fulfill their obligations related to the appeal under the 6<sup>th</sup> amendment of the U.S. Constitution and article I, § 6 of the New York State Constitution. See *People v Syville*, 15 NY3d 391 (2010). A client's claim standing alone is insufficient; it must be corroborated. See *People v. Rosario*, 26 NY3d 597 (2015); *People v. Andrews*, 23 NY3d 605 (2014). The petition must also address why the attorney's error was not discovered sooner. *Rosario*, 26 NY3d at 604. Refer to ILS' Coram Nobis Guide and template position for more details on filing a coram nobis application.

Some examples of successful coram nobis arguments:

- Counsel failed to file the NOA after the client requested it. *People v Perales*, 24 NY3d 99 (2014); *People v Syville*, 15 NY3d 391 (2010).
- Counsel misadvised client about the scope of the waiver of appeal and about the right to appeal. *People v. Kimble*, 214 AD3d 826 (2d Dept 2023).

# APPENDIX B

Notice of Appeal Materials for Trial Counsel

**[SUPREME/COUNTY] COURT OF THE STATE OF NEW YORK  
COUNTY OF [COUNTY NAME], CRIMINAL DIVISION**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

**NOTICE OF APPEAL**

**-v-**

\_\_\_\_\_,  
**Defendant/Appellant.**

**Ind/SCI #: \_\_\_\_\_**

\_\_\_\_\_  
**STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss:**

PLEASE TAKE NOTICE that [*client name*], hereby appeals to the Appellate Division of the Supreme Court of the State of New York in the [*Department number – First, Second, Third, or Fourth*] Judicial Department from a judgment rendered against [*him/her/them*] on [*sentence date*], in the [*Supreme/County*] Court, [*County name*] County, and from each and every part of such judgment of conviction and sentence.

Dated: \_\_\_\_\_

\_\_\_\_\_  
[*Attorney name*]

To: \_\_\_\_\_  
[*Name of District Attorney's Office*]  
[*Address*]



4. \_\_\_\_\_ [*client's name*] has indicated an intention to pursue the appeal and requests that counsel be assigned for that purpose.
5. A copy of this certification has been served upon the District Attorney and provided to \_\_\_\_\_ [*client's name*].

Wherefore, it is respectfully requested that the Court issue an order assigning counsel on appeal and grant such other relief the Court deems just and proper.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Attorney's Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Address

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

-v-

\_\_\_\_\_,  
**Appellant.**

**AFFIRMATION  
OF SERVICE**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

\_\_\_\_\_  
**STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss:**

On \_\_\_\_\_ [date], I served a true copy of the certification by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official deposition of the U.S. Postal Service within the State of New York, addressed to the last known addressee(s) as indicated below:

[Name and address of District Attorney's office]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I, \_\_\_\_\_ [attorney], affirm this \_\_\_\_\_ [date] of \_\_\_\_\_ [month], \_\_\_\_\_ [year], under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

*[SUPREME/COUNTY]* COURT OF THE STATE OF NEW YORK  
COUNTY OF *[COUNTY NAME]*, CRIMINAL *[PART/DIVISION]*

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

*[CLIENT NAME]*,

Defendant/Appellant.

**ORDER GRANTING  
DEFENDANT WAIVER  
OF COSTS, FEES, AND  
EXPENSES ON APPEAL  
PURSUANT TO  
CPL § 380.55(1)**

Ind./SCI # \_\_\_\_\_

Honorable *[JUSTICE NAME]*, J.S.C.,

The court has exercised its discretion, pursuant to Criminal Procedure Law § 380.55(1), to entertain an application by assigned counsel for an order granting defendant waiver of costs, fees, and expenses on appeal.

In support of the application, assigned counsel represents that defendant wishes to appeal from the judgment of conviction and sentence and has requested that counsel file a Notice of Appeal on his or her behalf. Counsel further represents that defendant continues to be eligible for assignment of counsel and that granting the application will expedite the appeal.

Having heard the application, defendant's application for waiver of costs, fees, and expenses on appeal is hereby granted.

The original of this Order shall be filed with the clerk of the court, who is directed to provide a copy of this order to the appropriate appellate court when the Notice of Appeal is provided to that court.

It is further ordered that defense counsel must file a copy of this order when filing the Notice of Appeal.

So ordered.

Dated \_\_\_\_\_

\_\_\_\_\_  
J.S.C

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

-v-

\_\_\_\_\_,  
**Appellant.**

**NOTICE OF MOTION  
FOR WAIVER OF  
COSTS, FEES AND  
EXPENSES AND  
ASSIGNMENT OF  
COUNSEL**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

PLEASE TAKE NOTICE that upon the annexed affirmation of \_\_\_\_\_  
[attorney name, or appellant name if filing pro se], dated \_\_\_\_\_ [date of  
affirmation], and on all the papers and proceedings had herein, the undersigned will move this  
Court at a Term to be held at the Supreme Court of the State of New York, Appellate Division,  
\_\_\_\_\_ [Department number – First, Second, Third, or Fourth] Department, located at  
\_\_\_\_\_ [address of the  
Court], on the \_\_\_\_\_ [day] of \_\_\_\_\_ [month], \_\_\_\_\_ [year], or as soon thereafter as the  
Affiant can be heard, for a waiver of costs, fees and expenses and assignment of counsel.

Dated: \_\_\_\_\_

\_\_\_\_\_  
[Attorney name, or appellant name  
if filing pro se]

To: \_\_\_\_\_  
[Name of District Attorney's Office]  
[Address]

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

-v-

\_\_\_\_\_,  
**Appellant.**

**APPLICATION FOR A  
WAIVER OF COSTS,  
FEES, AND EXPENSES  
AND ASSIGNMENT OF  
COUNSEL**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

\_\_\_\_\_  
**STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss:**

1. My name is \_\_\_\_\_.

2. My birth date is \_\_\_\_\_.

3. My address is

\_\_\_\_\_  
\_\_\_\_\_.

4. My DIN is (if assigned): \_\_\_\_\_.

5. I am appealing from a conviction and resulting sentence or resentence, having been  
convicted  after trial, or  after a plea of guilty.

a. I was convicted of the following crime(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

b. I was convicted in the following county: \_\_\_\_\_.

c. I was sentenced on this date: \_\_\_\_\_.

d. Name and address of trial counsel:

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e. Was that attorney assigned by the trial court?  Yes  No

f. If your attorney was not assigned, please state the amount of the fee paid, who paid the fee, and why similar funds are not available to retain appellate counsel:

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6. If you are not appealing from a conviction and sentence or resentencing, please state what you are appealing:

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7. Were you released on bail during the trial proceedings?  Yes  No

a. If yes, and you are currently in custody, please state why the funds used to post such bail are not available to retain appellate counsel:

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8. Were you released on bail after being sentenced?  Yes  No

a. If yes, please state the amount and give the name of the person who provided the money or collateral and who paid the premium on the bond:

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9. Do you receive financial support from anyone?  Yes  No

a. If yes, please provide the name, relationship, and address of this person or persons and the amount of support provided to you:

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10. Are you employed?  Yes  No

a. If yes, please state your weekly salary and provide the name and address of your employer, as well as a copy of a recent pay stub (if available):

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11. Do you provide financial support for anyone?  Yes  No

a. If yes, please provide the name, relationship, and address of the person or persons and the amount of support you provide:

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12. Do you own real estate either by yourself or with someone else?  Yes  No

a. If yes, please provide the following information:

i. Other owner(s) (if any): \_\_\_\_\_

ii. Location (street address; mailing address; Town; County; State):

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iii. Current value, including improvements: \_\_\_\_\_

iv. Existing mortgages and/or liens:

1. Name of bank, mortgage, or lien holder:

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2. Balance due: \_\_\_\_\_

13. List the location and amount of any savings or checking accounts held in your name or jointly with others:

<u>Location (Bank)</u>	<u>Type</u>	<u>Owner(s)</u>	<u>Balance</u>
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14. List any stocks, bonds, trusts, or cash on hand owned by you in which you have any benefit and give the type, location, and value of each:

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15. State the year, make, model, and value of any motor vehicle(s) owned by you and the amount of any existing loan(s):

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16. Do you own any other assets not listed above?       Yes       No

a. If yes, please describe the asset(s) and state the value:

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17. My monthly income and expenses are as follows:

INCOME:

My salary or wages: \_\_\_\_\_

My spouse's salary or wages (if applicable): \_\_\_\_\_

Other income: \_\_\_\_\_

**TOTAL:** \_\_\_\_\_

EXPENSES:

Rent or mortgage payment: \_\_\_\_\_

Food: \_\_\_\_\_

Utilities (heat, telephone, water, electric, cable): \_\_\_\_\_

Automobile expenses: \_\_\_\_\_

Premium on life or medical insurance policies: \_\_\_\_\_

Repayment of loans: \_\_\_\_\_

Other obligations, including maintenance and/or support: \_\_\_\_\_

**TOTAL:** \_\_\_\_\_

18. Do you authorize the Court to make any inquiries or investigation concerning the answers given by you in this affirmation?     Yes     No

19. Did someone else complete this form on your behalf?     Yes     No

a. If yes, were the questions and answers read to you and are your answers true?

Yes     No

I, \_\_\_\_\_ [*your name*], affirm this \_\_\_\_\_ [*date*] of  
\_\_\_\_\_ [*month*], \_\_\_\_\_ [*year*], under the penalties of perjury under the laws of New York,  
which may include a fine or imprisonment, that the foregoing is true, and I understand that this  
document may be filed in an action or proceeding in a court of law.

---

Signature

---

Printed Name

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DIN (if applicable)

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

**AFFIRMATION  
OF SERVICE**

-v-

\_\_\_\_\_,  
**Appellant.**

\_\_\_\_\_  
**STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss:**

On \_\_\_\_\_ [date], I served a true copy of the annexed notice of motion and supporting affirmation(s) by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official deposition of the U.S. Postal Service within the State of New York, addressed to the last known addressee(s) as indicated below:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Name and address of District Attorney's office]

I, \_\_\_\_\_ [attorney or appellant if filing pro se], affirm this \_\_\_\_\_ [date] of \_\_\_\_\_ [month], \_\_\_\_\_ [year], under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

# APPENDIX C

Motions to File Late Notices of Appeal



## CHECKLIST - Filing a CPL § 460.30 Motion

Requesting an Extension of Time to File a Notice of Appeal and  
Assignment of Counsel on Appeal

- Was a Notice of Appeal filed on time?** Confirm that no Notice of Appeal (“NOA”) was filed within 30 days of the sentencing date. You can do this by calling or sending a letter to the Appellate Division department that will hear the appeal. The appropriate court depends on the county of conviction. (See the attached list of counties under each appellate court, as well as court contact information.) If the Appellate Division has no record of the NOA being filed, double check with the clerk’s office and the Appeals Bureau of the sentencing court, in case the NOA was filed but mistakenly not sent to the Appellate Division.
  
- Is it too late to file this motion?** Confirm that it has been *more than 30 days but less than one year and 30 days from the sentencing date*.
  
- Fill out the required forms.** Complete the following forms, which are available on the ILS website in Word format and attached below:
  - **Notice of Motion Pursuant to CPL § 460.30** (1 page) (hereinafter referred to as “Notice of Motion”);
  - **Affirmation<sup>1</sup> in Support of Motion Pursuant to CPL § 460.30** (2 pages) (hereinafter referred to as “Appellant’s Affirmation”); and
  - *Either:*
    - **CPL § 380.55 Certification** [BY ASSIGNED TRIAL COUNSEL ONLY]

OR

    - **Application for a Waiver of Costs, Fees and Expenses and Assignment of Counsel** (5 pages) (hereinafter referred to as “Application for the Assignment of Counsel”) [BY APPELLANT OR TRIAL COUNSEL (retained or assigned)]

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<sup>1</sup> It used to be that only attorneys could submit affirmations, meaning a sworn document that did not need to be notarized. Other people submitting a sworn document to a court had to submit an affidavit, which needed to be notarized. A 2024 amendment to the Civil Law and Practice Rules (CPLR) section 2106 changed this rule: now any person can submit an affirmation without getting it notarized, as long as it contains the following language at the end, before the signature: “I affirm this \_\_\_ day of \_\_\_\_, \_\_\_\_, under penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.”



- Make copies.** Make two copies of all of these forms – one copy of each form to serve on the prosecutor’s office and one copy of each form for the Appellant’s records.
  
- Serve the prosecutor.** Make copies of the original Notice of Motion, Appellant’s Affirmation, and the documentation establishing entitlement to assigned appellate counsel to the court (i.e., the CPL § 380.55 Certification or the Application for a Waiver of Costs, Fees and Expenses and Assignment of Counsel), and mail them to the office of the District Attorney in the county of conviction. A list of addresses for all prosecutors’ offices in New York State is attached here.
  
- Complete the Affirmation of Service of Mailing form.** Once a copy of each of the documents has been mailed to the prosecutor’s office, an Affirmation of Service of Mailing form (1 page) must be completed. This form provides proof to the court that the District Attorney was served.
  
- Make a copy.** Make one copy of the completed Affirmation of Service of Mailing for the Appellant’s records.
  
- Mail to the court.** Finally, mail the original documents and the original Affirmation of Service of Mailing to the Appellate Division department that will hear the Appellant’s case.

## Appellate Division Contact Information

Appellate Division, First Department  
27 Madison Avenue  
New York, NY 10010  
Email: [AD1criminal@nycourts.gov](mailto:AD1criminal@nycourts.gov)  
Phone: (212) 340-0422

Appellate Division, Second Department  
45 Monroe Place  
Brooklyn, NY 11201  
Email: [AD2-ClerksOffice@nycourts.gov](mailto:AD2-ClerksOffice@nycourts.gov)  
Phone: (718) 722-6324

Appellate Division, Third Department  
P.O. Box 7288  
Capitol Station  
Albany, NY 12224  
Email: [AD3ClerksOffice@nycourts.gov](mailto:AD3ClerksOffice@nycourts.gov)  
Phone: (518) 471-4750

Appellate Division, Fourth Department\*  
50 East Avenue, Suite 200  
Rochester, NY 14601  
Phone: (585) 530-3021

*\*Note: AD4 does not list a public email address on its website. It is best to call the court with any questions.*

## APPELLATE COURTS

### APPELLATE DIVISIONS

There are four Appellate Divisions of the Supreme Court, one in each of the State's four Judicial Departments. These Courts resolve appeals from judgments or orders of the superior courts of original jurisdiction in civil and criminal cases, and review civil appeals taken from the Appellate Terms and the County Courts acting as appellate courts.

Find your county below in order to determine which Appellate Department has jurisdiction over your locality.

Judicial Departments			
First	Second	Third	Fourth
Bronx NY County	Dutchess Kings Nassau Orange Putnam Queens Richmond Rockland Suffolk Westchester	Albany Broome Chemung Chenango Clinton Columbia Cortland Delaware Essex Franklin Fulton Greene Hamilton Madison Montgomery Otsego Rensselaer St. Lawrence Saratoga Schenectady Schoharie Schuyler Sullivan Tioga Tompkins Ulster Warren Washington	Allegany Cattaraugus Cayuga Chautauqua Erie Genesee Herkimer Jefferson Lewis Livingston Monroe Niagara Oneida Onondaga Ontario Orleans Oswego Seneca Steuben Wayne Wyoming Yates

## New York State Prosecutors' Offices

County	Address 1	Address 2	Room / Suite / Floor	City/Town	State	Zip Code
Albany County District Attorney's Office	Albany County Judicial Center	6 Lodge Street		Albany	NY	12207-2111
Allegany County District Attorney's Office	7 Court Street		Room 333	Belmont	NY	14813-1044
Bronx County District Attorney's Office	198 E. 161st Street	Attn: Appeals Bureau	4th Floor	Bronx	NY	10451-3536
Broome County District Attorney's Office	George Harvey Justice Building	45 Hawley Street	4th Floor	Binghamton	NY	13902-3722
Cattaraugus County District Attorney's Office	Cattaraugus County Center	303 Court Street		Little Valley	NY	14755-1028
Cayuga County District Attorney's Office	95 Genesee Street			Auburn	NY	13021-3698
Chautauqua County District Attorney's Office	1 N. Erie Street			Mayville	NY	14757-1000
Chemung County District Attorney's Office	226 Lake Street	P.O. Box 588		Elmira	NY	14902-0588
Chenango County District Attorney's Office	26 Conkey Avenue	P.O. Box 126	2nd Floor	Norwich	NY	13815-0126
Clinton County District Attorney's Office	Clinton County Government Center	137 Margaret St.	Suite 201	Plattsburgh	NY	12901-0059
Columbia County District Attorney's Office	325 Columbia Street			Hudson	NY	12534-1902
Cortland County District Attorney's Office	Cortland County Courthouse	46 Greenbush St.	Suite 102	Cortland	NY	13045-2765
Delaware County District Attorney's Office	1 Courthouse Square		Suite 5	Delhi	NY	13753-1600
Dutchess County District Attorney's Office	236 Main Street			Poughkeepsie	NY	12601-3102
Erie County District Attorney's Office	25 Delaware Avenue			Buffalo	NY	14202-3926
Essex County District Attorney's Office	7559 Court Street	P.O. Box 217		Elizabethtown	NY	12932-0217
Franklin County District Attorney's Office	355 West Main Street		Suite 466	Malone	NY	12953-1855
Fulton County District Attorney's Office	County Office Building	223 West Main St.		Johnstown	NY	12095-2309
Genesee County District Attorney's Office	1 West Main Street			Batavia	NY	14020-2019
Greene County District Attorney's Office	411 Main Street			Catskill	NY	12414-1363
Hamilton County District Attorney's Office	P.O. Box 277	White Birch Lane		Indian Lake	NY	12842-0277
Herkimer County District Attorney's Office	301 N. Washington Street		Suite 2401	Herkimer	NY	13350-1299
Jefferson County District Attorney's Office	175 Arsenal Street			Watertown	NY	13601-2563
Kings County (Brooklyn) District Attorney's Office	350 Jay Street			Brooklyn	NY	11201-2900
Lewis County District Attorney's Office	7660 North State Street			Lowville	NY	13367-1562
Livingston County District Attorney's Office	Livingston County Courthouse	2 Court Street		Geneseo	NY	14454-1048
Madison County District Attorney's Office	Veteran's Memorial Building	P.O. Box 578		Wampsville	NY	13163-0578
Monroe County District Attorney's Office	47 S. Fitzhugh Street			Rochester	NY	14614-1414
Montgomery County District Attorney's Office	58 Broadway	P.O. Box 1500		Fonda	NY	12068-1500
Nassau County District Attorney's Office	262 Old Country Road		2nd Floor	Mineola	NY	11501-4251
New York County (Manhattan) District Attorney's Office	1 Hogan Place	Attn: Appeals Bureau		New York	NY	10013-4311
Niagara County District Attorney's Office	Niagara County Courthouse	175 Hawley Street	3rd Floor	Lockport	NY	14094-2740
Oneida County District Attorney's Office	235 Elizabeth Street			Utica	NY	13501-2201
Onondaga County District Attorney's Office	505 S. State Street		4th Floor	Syracuse	NY	13202-2183
Ontario County District Attorney's Office	Ontario County Courthouse	27 N. Main Street	3rd Floor	Canandaigua	NY	14424-1447
Orange County District Attorney's Office	255 Main Street			Goshen	NY	10924-1619
Orleans County District Attorney's Office	13925 State Route 31		Suite 300	Albion	NY	14411-9385
Oswego County District Attorney's Office	Public Safety Center	39 Churchill Road		Oswego	NY	13126-6671
Otsego County District Attorney's Office	197 Main Street			Cooperstown	NY	13326-1128
Putnam County District Attorney's Office	40 Gleneida Avenue			Carmel	NY	10512-1705
Queens County District Attorney's Office	125-01 Queens Boulevard		Suite 7	Kew Gardens	NY	11415-1514
Rensselaer County District Attorney's Office	Rensselaer County Courthouse	80 2nd Street		Troy	NY	12180-4098
Richmond County (Staten Island) District Attorney's Office	130 Stuyvesant Place		Suite 602	Staten Island	NY	10301-1900
Rockland County District Attorney's Office	1 South Main Street		Suite 500	New City	NY	10956-3539
Saratoga County District Attorney's Office	25 West High Street			Ballston Spa	NY	12020-1963
Schenectady County District Attorney's Office	Schenectady County Courthouse	612 State Street	3rd Floor	Schenectady	NY	12305-2112
Schoharie County District Attorney's Office	Public Safety Facility, 157 Steadman Way	P.O. Box 129		Howes Cave	NY	12092-0129

Schuyler County District Attorney's Office	105 9th Street			Watkins Glen	NY	14891-1435
Seneca County District Attorney's Office	44 West Williams Street			Waterloo	NY	13165-1338
St. Lawrence County District Attorney's Office	48 Court Street			Canton	NY	13617-1197
Steuben County District Attorney's Office	3 East Pulteney Square			Bath	NY	14810-1510
Suffolk County District Attorney's Office	William J. Lindsay County Complex	77 Veterans Memorial Highway		Hauppauge	NY	11788
Sullivan County District Attorney's Office	26 Hamilton Avenue			Monticello	NY	12701-1378
Tioga County District Attorney's Office	20 Court Street			Owego	NY	13827-1792
Tompkins County District Attorney's Office	320 North Tioga Street			Ithaca	NY	14850-4206
Ulster County District Attorney's Office	Ulster County Courthouse	275 Wall Street		Kingston	NY	12401-3817
Warren County District Attorney's Office	1340 State Route 9			Lake George	NY	12845-3434
Washington County District Attorney's Office	Municipal Center - Building B	383 Broadway		Fort Edward	NY	12828-1001
Wayne County District Attorney's Office	Hall of Justice	54 Broad Street		Lyons	NY	14489-1199
Westchester County District Attorney's Office	111 Dr. Martin Luther King Jr. Blvd.		3rd Floor	White Plains	NY	10601-2500
Wyoming County District Attorney's Office	Wyoming County Courthouse	147 North Main St.		Warsaw	NY	14569-1123
Yates County District Attorney's Office	415 Liberty Street			Penn Yan	NY	14527-1122
Office of the New York State Attorney General	Chief of Criminal Appeals & Habeas	28 Liberty Street		New York	NY	10005-1400

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

-v-

**NOTICE OF MOTION  
PURSUANT TO  
CPL § 460.30 AND FOR  
ASSIGNMENT OF  
APPELLATE COUNSEL**

\_\_\_\_\_,  
**Appellant.**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

PLEASE TAKE NOTICE that upon the annexed affirmation of \_\_\_\_\_  
[attorney name, or appellant name if filing pro se], dated \_\_\_\_\_ [date of  
affirmation], and on all the papers and proceedings had herein, the undersigned will move this  
Court at a Term to be held at the Supreme Court of the State of New York, Appellate Division,  
\_\_\_\_\_ [Department number – First, Second, Third, or Fourth] Department, located at  
\_\_\_\_\_ [address of the  
Court], on the \_\_\_\_\_ [day] of \_\_\_\_\_ [month], \_\_\_\_\_ [year], or as soon thereafter as the  
Affiant can be heard, for an order (1) deeming the Notice of Motion herein a timely-filed Notice  
of Appeal pursuant to Section 460.30 of the Criminal Procedure Law; (2) waiving the costs, fees,  
and expenses associated with the appeal; (3) assigning appellate counsel; and (4) granting such  
other and further relief as this Court deems just and proper.

Dated: \_\_\_\_\_

\_\_\_\_\_  
[Attorney name, or appellant name  
if filing pro se]

To: [Name of District Attorney's Office]  
[Address]

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,  
Respondent,

-v-

\_\_\_\_\_,  
Appellant.

AFFIRMATION IN  
SUPPORT OF MOTION  
PURSUANT TO  
CPL § 460.30 AND FOR  
ASSIGNMENT OF  
APPELLATE COUNSEL

Ind/SCI #: \_\_\_\_\_

Index #: \_\_\_\_\_

\_\_\_\_\_  
STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss:

\_\_\_\_\_, an attorney duly admitted to practice law before  
the Courts of the State of New York, affirms under penalty of perjury:

1. I represent [*client*] and am fully familiar with the facts and circumstances surrounding this action.
2. This affirmation is being made in support of a request for an order extending the time to take an appeal under CPL § 460.30.
3. On or about [*date of judgment*], [*client name*] was convicted in [*Supreme/County*] Court, [*County name*] County, of [*crime(s) of conviction*] and sentenced to [*term of sentence*].
4. [*Client*] desires to take an appeal to this Court from the judgment and sentence, but failed to file a Notice of Appeal with [*Supreme/County*] Court, [*County name*] County within the 30-day period prescribed by statute.
5. The 30-day period prescribed by statute for filing a Notice of Appeal expired on [*date of expiration*], and not more than one year has elapsed since that date.
6. This Court may grant an extension of time to file a Notice of Appeal if the failure to timely file was a result of “(a) improper conduct of ... the defendant’s attorney, or (b) (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 defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant.” CPL § 460.30.

7. In this case, failure to file a Notice of Appeal in a timely fashion resulted from [*state specific facts establishing grounds for the motions, as outlined in Paragraph 6; if available, substantiate facts with documentary proof, attached as exhibits.*]
8. Because [*client’s name*]’s failure to file a Notice of Appeal was a result of [*reiterate grounds for motion*], this motion for an extension of time to file a Notice of Appeal should be granted.
9. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request an Order deeming the Notice of Motion a timely-filed Notice of Appeal pursuant to Section 460.30 of the Criminal Procedure Law; waiving the costs, fees, and expenses associated with the appeal; assigning appellate counsel; and granting such other and further relief as this Court deems just and proper.

DATED: \_\_\_\_\_

\_\_\_\_\_  
[Attorney signature]

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,  
Respondent,

-v-

\_\_\_\_\_,  
Appellant.

APPELLANT'S  
AFFIRMATION IN  
SUPPORT OF MOTION  
PURSUANT TO  
CPL § 460.30

Ind/SCI #: \_\_\_\_\_

Index #: \_\_\_\_\_

STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss:

1. I, \_\_\_\_\_ [your name], am the appellant herein and submit this affirmation in support of my motion for permission to file a late Notice of Appeal and for the assignment of appellate counsel and waiver of costs, fees, and expenses associated with the appeal.

2. On \_\_\_\_\_ [date of sentence], I was convicted of \_\_\_\_\_ [crime(s) of conviction] by Judge \_\_\_\_\_ of the \_\_\_\_\_ [Supreme/County] Court, County of \_\_\_\_\_ under Indictment/SCI Number(s) \_\_\_\_\_.

3. I failed to file a Notice of Appeal within 30 days.

4. The failure to file a timely notice of appeal resulted from:

[Check applicable box(es)]

a) the improper conduct of my attorney:

[Explain in detail]

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b) the inability to communicate with my attorney, in person or by mail, concerning whether an appeal should be taken, within 30 days of my sentencing, due to my incarceration in an institution and through no lack of due diligence or fault on my part:

*[Explain in detail]*

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5. This motion is being made within the one-year grace period after the expiration of the original 30-day deadline for filing an appeal and is therefore timely. *See CPL § 460.30(1).*
6. I have made this motion as expeditiously as possible after learning of my right to appeal.
7. *[IF CURRENTLY INCARCERATED]* I am presently incarcerated at *[name of Correctional Facility]*.
8. I lack sufficient means to pay the costs, fees, and expenses necessary to prosecute my appeal. Please see attached Application for a Waiver of Costs, Fees, and Expenses and Assignment of Counsel.

WHEREFORE, I respectfully request that this Court issue an Order deeming the Notice of Motion herein a timely-filed Notice of Appeal of [*Insert trial court name*], case number [*insert Indictment/SCI number if applicable, otherwise provide docket number*] pursuant to CPL § 460.30; waiving the costs, fees, and expenses associated with the appeal; assigning appellate counsel; and granting such other and further relief as this Court deems just and proper.

DATED: \_\_\_\_\_

I, \_\_\_\_\_ [*your name*], affirm this \_\_\_\_\_ [*date*] of \_\_\_\_\_ [*month*], \_\_\_\_\_ [*year*], under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

\_\_\_\_\_  
Appellant (*your signature*)

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,**  
**Respondent,**

-v-

\_\_\_\_\_,  
**Appellant.**

**APPLICATION FOR A  
WAIVER OF COSTS,  
FEES, AND EXPENSES  
AND ASSIGNMENT OF  
COUNSEL**

**Ind/SCI #:** \_\_\_\_\_

**Index #:** \_\_\_\_\_

\_\_\_\_\_  
**STATE OF NEW YORK )**  
**COUNTY OF \_\_\_\_\_ ) ss:**

1. My name is \_\_\_\_\_.

2. My birth date is \_\_\_\_\_.

3. My address is

\_\_\_\_\_  
\_\_\_\_\_.

4. My DIN is (if assigned): \_\_\_\_\_.

5. I am appealing from a conviction and resulting sentence or resentence, having been  
convicted  after trial, or  after a plea of guilty.

a. I was convicted of the following crime(s):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

b. I was convicted in the following county: \_\_\_\_\_.

c. I was sentenced on this date: \_\_\_\_\_.

d. Name and address of trial counsel:

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e. Was that attorney assigned by the trial court?  Yes  No

f. If your attorney was not assigned, please state the amount of the fee paid, who paid the fee, and why similar funds are not available to retain appellate counsel:

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6. If you are not appealing from a conviction and sentence or resentencing, please state what you are appealing:

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7. Were you released on bail during the trial proceedings?  Yes  No

a. If yes, and you are currently in custody, please state why the funds used to post such bail are not available to retain appellate counsel:

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---

8. Were you released on bail after being sentenced?  Yes  No

a. If yes, please state the amount and give the name of the person who provided the money or collateral and who paid the premium on the bond:

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9. Do you receive financial support from anyone?       Yes       No

a. If yes, please provide the name, relationship, and address of this person or persons and the amount of support provided to you:

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10. Are you employed?       Yes       No

a. If yes, please state your weekly salary and provide the name and address of your employer, as well as a copy of a recent pay stub (if available):

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11. Do you provide financial support for anyone?       Yes       No

a. If yes, please provide the name, relationship, and address of the person or persons and the amount of support you provide:

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12. Do you own real estate either by yourself or with someone else?       Yes       No

a. If yes, please provide the following information:

i. Other owner(s) (if any): \_\_\_\_\_

ii. Location (street address; mailing address; Town; County; State):

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iii. Current value, including improvements: \_\_\_\_\_

iv. Existing mortgages and/or liens:

1. Name of bank, mortgage, or lien holder:

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2. Balance due: \_\_\_\_\_

13. List the location and amount of any savings or checking accounts held in your name or jointly with others:

<u>Location (Bank)</u>	<u>Type</u>	<u>Owner(s)</u>	<u>Balance</u>
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14. List any stocks, bonds, trusts, or cash on hand owned by you in which you have any benefit and give the type, location, and value of each:

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15. State the year, make, model, and value of any motor vehicle(s) owned by you and the amount of any existing loan(s):

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16. Do you own any other assets not listed above?       Yes       No

a. If yes, please describe the asset(s) and state the value:

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17. My monthly income and expenses are as follows:

INCOME:

My salary or wages: \_\_\_\_\_

My spouse's salary or wages (if applicable): \_\_\_\_\_

Other income: \_\_\_\_\_

**TOTAL:** \_\_\_\_\_

EXPENSES:

Rent or mortgage payment: \_\_\_\_\_

Food: \_\_\_\_\_

Utilities (heat, telephone, water, electric, cable): \_\_\_\_\_

Automobile expenses: \_\_\_\_\_

Premium on life or medical insurance policies: \_\_\_\_\_

Repayment of loans: \_\_\_\_\_

Other obligations, including maintenance and/or support: \_\_\_\_\_

**TOTAL:** \_\_\_\_\_

18. Do you authorize the Court to make any inquiries or investigation concerning the answers given by you in this affirmation?     Yes     No

19. Did someone else complete this form on your behalf?     Yes     No

a. If yes, were the questions and answers read to you and are your answers true?

Yes     No

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
DIN (if applicable)

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,**  
**Respondent,**

-v-

\_\_\_\_\_,  
**Appellant.**

**AFFIRMATION  
OF SERVICE**

**Ind./SCI #:** \_\_\_\_\_

**Index #:** \_\_\_\_\_

\_\_\_\_\_  
**STATE OF NEW YORK )**  
**COUNTY OF \_\_\_\_\_ ) ss:**

On \_\_\_\_\_ [date], I served a true copy of the annexed notice of motion and supporting affirmation(s) by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official deposition of the U.S. Postal Service within the State of New York, addressed to the last known addressee(s) as indicated below:

[Name and address of District Attorney's office]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I, \_\_\_\_\_ [attorney or appellant if filing pro se], affirm this \_\_\_\_\_ [date] of \_\_\_\_\_ [month], \_\_\_\_\_ [year], under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

# APPENDIX D

Coram Nobis Materials



## CORAM NOBIS CHECKLIST

### IAC for Failure to Protect Client's Right to Appeal

#### Attorney Affirmation Should Include:

- Basic information about conviction and sentencing (see [Template Coram Nobis Petition](#))
- Grounds for ineffective assistance of counsel:
  - (1) Failure to file notice of appeal; *and/or*
  - (2) Failure to properly advise client regarding their appellate rights.
- Prejudice caused by counsel's ineffectiveness:
  - Client did not have the opportunity to appeal.
  - Include preview of potential appeal issues, if known, such as:
    - Waiver of appeal issues (if known), e.g.:
      - Court errors on the record
      - Counsel errors on the record
      - Errors in the written waiver
    - Suppression issues
    - Involuntary plea
    - Youthful offender denial
    - Excessive sentence
- Client's efforts, if any, to secure the right to appeal:
  - For example, describe if the client filed a *pro se* notice of appeal or motion pursuant to CPL § 460.30, or if they corresponded with their attorney, the trial court, or the Appellate Division, regarding their desire to appeal. Attach any available documentation as exhibits (and cite the exhibits in your affirmation).
- Reasons for client's inability to discover attorney's errors/omissions within 1 year + 30 days of sentencing:
  - Describe why the client would not have been reasonably able to discover the trial attorney's omissions within the statutory timeframe for seeking an extension to file a late notice of appeal. For example:
    - The attorney indicated they would file NOA, and the client took no action to confirm, having heard that appeals take time;
    - The client was confused due to having received the assignment of appellate counsel on one pending appeal and assumed counsel was assigned to both matters;
    - The client has cognitive, educational, language, or age-related limitations that made the process more difficult to understand; or
    - The client's particular circumstances made it challenging to communicate while incarcerated or in a mental health treatment facility.



**Client Affirmation<sup>1</sup> Should Include:**

See [Template Coram Nobis Petition – Appellant Affirmation](#) for an example.

- Basic personal information
  - Name
  - DIN number
  - Current facility
- Information about the case
  - County of conviction
  - Indictment number
  - Date of conviction (same as date of sentencing)
- Grounds for ineffective assistance of counsel claim:
  - (1) Failure to file notice of appeal; and/or
  - (2) Failure to properly advise client regarding the scope of their appellate rights.
  - The client should provide as many specific facts as possible, based on their own first-hand experience, describing what happened regarding:
    - When and how the client told the lawyer they wanted to appeal;
    - What the lawyer told them about their right to appeal;
    - Whether they understood the information from their lawyer and/or the judge about the appeals process;
    - Any factors that may have affected their ability to understand (e.g., age, medication, language barriers, education level, stress of incarceration, limited prior experience with legal system etc.);
    - If they thought their lawyer would file the notice of appeal;
    - Any efforts they made to learn the status of their appeal;
    - When and how they learned the notice of appeal was not filed.
- Steps taken (if any) to protect their right to appeal:
  - The client should provide as many specific facts as possible, based on their own first-hand experience, describing any actions they or others on their behalf took to try to pursue an appeal once they learned the notice of appeal was not filed by their attorney, including:
    - Letters to family and friends;
    - Outreach to the trial attorney, other lawyers, the trial court, or the appeals court;
    - Conversations with people in the law library;
    - Outreach to legal organizations and/or government agencies;
    - *Pro se* motions;
    - Any other steps taken to try to gain information.

---

<sup>1</sup>Note: CPLR § 2106 was amended in January 2024 to allow any person to submit an affirmation (as opposed to an affidavit) without getting it notarized. To do so, the affirmation must include specific language. See CPLR § 2106; see *also* [Template Coram Nobis Petition—Appellant’s Affirmation in Support of Motion](#).



### Memorandum of Law Should Include (if filed):

- Intro/Summary of Argument
- Counsel's Duty to Protect the Fundamental Right to Appeal
- Coram Nobis Relief as a Remedy for Counsel's Failure to Protect Appellate Rights
- Counsel's Deficient Performance
  - This section of the memorandum of law will differ depending on the specific errors alleged in your case, as well as the attempts the client may have made to protect their appellate rights within the statutory timeframe under CPL § 460.30.
  - Marshalling the facts in the attorney affirmation and/or client affirmation, this section should argue that counsel's performance fell below acceptable standards of meaningful representation by failing to protect the client's appellate rights.
  - Identify your strongest facts and highlight them for the court:
    - Did your client state on the record (or to the media, or in another setting) that they wanted to appeal their conviction? Was there any other suggestion or reasonable inference that the client would have wanted to appeal?
    - Was the attorney subject to discipline or disbarment in the year following the client's sentencing?
    - Was the attorney sick or did they die shortly after representing the client?
    - Were multiple cases resolved simultaneously, and the client filed a notice of appeal on one case but not the other?
    - Would there be potentially strong issues on appeal?
  - Try to corroborate your claims, where possible (see examples below).
    - Under *People v Rosario*, 26 NY3d 597 (2015), litigants should attempt to corroborate claims that counsel failed to adequately advise them of their appellate rights, as well as allegations about steps clients took to protect their appellate rights.

### Examples of Exhibits

- CASE BACKGROUND/MERITS OF THE APPEAL
  - Plea and sentencing minutes (including waiver-of-appeal colloquy);
  - Pre-Sentence Report (send under separate cover to protect confidentiality);
  - Excerpts of transcripts from trial court proceedings discussing appellate rights;
  - Certificate of disposition;
  - Written waiver of appeal.
- CLIENT'S EFFORTS TO PROTECT THEIR APPELLATE RIGHTS
  - Correspondence to or from the client (subject to appropriate redactions for privileged information) re: inquiries about their appellate rights, e.g.:
    - A letter from the Appellate Division responding to the client's inquiry about their pending appeal, informing the client that a notice of appeal was never received;
    - A letter from a legal services agency responding to the client's request for information about appealing their conviction;



- Affirmation from family member or loved one regarding client's efforts to contact their trial attorney about pursuing an appeal.

ADMISSIONS BY TRIAL COUNSEL / EFFORTS TO CONTACT TRIAL COUNSEL

- An affirmation from the trial attorney can be helpful to confirm that they failed to properly advise the client of their appellate rights (or an affirmation from a friend of family member with knowledge of the attorney's advice could do the same).
- If you are unable to obtain an affirmation from trial counsel, consider attaching evidence that outreach efforts to the attorney were made, such as email or letter correspondence.

**DISCLAIMER:** ILS does not provide direct representation, and no attorney-client relationship is created based on information, resources, or consultations provided by the ILS Statewide Appellate Support Center ("SASC") to inquiring persons. The SASC makes every effort to provide up-to-date, accurate, and complete information and materials. However, ILS offers no express or implied guarantees regarding the accuracy or completeness of information, resources, or consultations provided by the SASC. No inquiring persons should act, or refrain from acting, based solely on communications with SASC staff. Instead, inquiring persons should use the information provided by ILS to inform their own factual investigations and legal research. While the SASC strives to maintain confidentiality as to consultations, communications with SASC staff are not privileged.

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

**NOTICE OF MOTION**

-v-

\_\_\_\_\_,  
**Appellant.**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

PLEASE TAKE NOTE, that, upon the attached affirmation of [*attorney*], its attached exhibits, and the accompanying Memorandum of Law, the undersigned will move this Court, at [*address*], on [*date*] at 10:00 a.m. or as soon thereafter as counsel can be heard, for an Order:

- (1) Granting petitioner a writ of error *coram nobis* based on ineffective assistance of counsel due to [his/her/their] trial attorney's failure to protect [his/her/their] appellate rights [by filing a notice of appeal] [*and/or*] [properly advising them of his/her/their right to appeal];
- (2) Deeming a Notice of Appeal to have been timely filed in the above-captioned matter; and
- (3) Granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to Civil Practice Law and Rules § 2214(b), answering papers, if any, shall be served at least seven days before the return date.

Dated: [City], New York  
[Date]

Respectfully Submitted,

[ATTORNEY]  
[Address and contact information]

To: [APPELLATE DIVISION CLERK]  
[DISTRICT ATTORNEY]  
[CLIENT]

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,**

**Respondent,**

**ATTORNEY  
AFFIRMATION IN  
SUPPORT OF MOTION**

**-v-**

\_\_\_\_\_,

**Appellant.**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

[*ATTORNEY*], an attorney admitted to practice in the courts of this State, hereby affirms under penalty of perjury that:

1. I am an attorney duly licensed in the State of New York. I represent [*client*] in the above-captioned matter, seeking a writ of error *coram nobis* and an order deeming a Notice of Appeal to have been timely filed regarding the [*date*] judgment of conviction under Indictment Number \_\_\_\_\_.
2. I make this application pursuant to *People v Syville* (15 NY3d 391 [2010]), as the result of [*client's*] trial attorney's failure to [comply with a timely request for the filing of a notice of appeal] [*and/or*] [properly advise [*client*] of [his/her/their] rights on appeal], and the inability of [*client*] to reasonably have discovered within a one-year period that [his/her/their] appellate rights were not protected.
3. Contrary to the constitutional requirements under the Sixth Amendment of the federal constitution and Article I, Section 6 of the New York State Constitution, as well as this Court's rules, [*client's*] attorney failed to file a notice of appeal on [his/her/their] behalf, [*and/or*] [*if applicable*] failed to advise [him/her/them] of the right to appeal, that [he/she/they] had the right to have an appellate court consider [his/her/their] case,

[*and/or*] that [he/she/they] could seek assignment of appellate counsel based on inability to afford counsel.

4. [***Merits of potential appeal***] As a result, [*client*] was unable to appeal [his/her/their] conviction and raise potentially meritorious issues: for instance, [*include summary of potential appellate issues on the case, if known*].
5. [***Conviction and sentence***: *include any compelling facts here that foreshadow potentially meritorious appellate issues, such as the voluntariness of a plea or harsh and excessive sentence (consider including exhibits).*]
6. [***Counsel's errors/omissions***: *describe the failure of client's attorney to properly advise re: appeal and/or failure to file NOA; include information from client (referencing attached affidavit) and former counsel, if possible.*]
7. [***Client's efforts***: *describe any efforts client may have made to secure the right to appeal on their own: for example, filing their own NOA or 460.30 motion, or outreach to their trial attorney and/or the trial court or Appellate Division.*]
8. [***Client's inability to discover errors/omissions within one year + 30 days of sentencing***: *describe why the client would not have been reasonably able to discover the trial attorney's omissions within the one-year + 30 day timeframe: for example, attorney indicated they would file NOA and client had heard appeals take time; confusion due to having received the assignment of appellate counsel on one pending appeal and assuming counsel was assigned to both matters; cognitive, educational, language, or age-related limitations that might have made the process more difficult to understand, or inability to communicate while incarcerated or in a mental health treatment facility.*]

9. As set forth more fully in the attached Memorandum of Law, trial counsel's failures in this case unjustly deprived [*client*] of the right to appeal. Under *Syville* (15 NY3d 391 [2010]), this motion is the sole method available to [*client*] to reinstate the right to appeal [his/her/their] conviction to this Court.

WHEREFORE, [*client*] requests that this Court grant the relief sought in the Notice of Motion attached hereto.

---

[*Attorney signature*]

DATED: \_\_\_\_\_

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,**

**Respondent,**

**APPELLANT'S  
AFFIRMATION IN  
SUPPORT OF MOTION**

**-v-**

\_\_\_\_\_,  
**Appellant.**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

\_\_\_\_\_  
**STATE OF NEW YORK )  
COUNTY OF \_\_\_\_\_ ) ss:**

1. I am the appellant in the above-captioned matter, and I submit this affidavit in support of my application for a writ of error *coram nobis*.
2. This affidavit is being made in support of the request for an Order reinstating the time for taking an appeal from a judgment of the [County/Supreme] Court, \_\_\_\_\_ County [court where client was convicted] dated \_\_\_\_\_ [date of sentencing].
3. This application for *coram nobis* relief is made pursuant to *People v Syville* (15 NY3d 391 [2010]).
4. I was represented in this case by [attorney's or attorneys' name(s)]. [He/She/They] [was/were] [appointed by the court] OR [retained] to represent me.
5. As set forth below, the failure to file a timely notice of appeal in the above-captioned matter was the result of: [check all applicable box(es)]:
  - My trial attorney's failure to comply with my timely request to file a notice of appeal, and my inability to have reasonably discovered within a one-year plus 30-day period that my appellate rights were not protected with respect to the \_\_\_\_\_ [date of sentencing] judgment of conviction.

My trial attorney's failure to properly advise me about my right to appeal and/or the process for seeking to exercise that right, and my inability to have reasonably discovered within a one-year period that I had received inaccurate advice with respect to the \_\_\_\_\_ [date of sentencing] judgment of conviction.

6. Upon information and belief, the details of my conviction are the following:

Date of conviction: \_\_\_\_\_ [Indicate date of sentencing.]

Crime(s) of conviction: \_\_\_\_\_

Term(s) of imprisonment (if applicable): \_\_\_\_\_

Term(s) of post-release supervision (if applicable): \_\_\_\_\_

If convicted of multiple charges, circle one: Concurrent OR Consecutive

Probationary or split sentence (if applicable): \_\_\_\_\_

7. On or about \_\_\_\_\_ [date], I informed my attorney that I wanted to appeal my conviction.

8. [Explain in detail how you communicated to attorney that you wished to appeal. For example, by telling attorney directly or via family/friends; by filling out a "Notice of Right to Appeal" form and checking off a box next to "I want to appeal," etc.]

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9. I was not aware that my attorney did not file the paperwork to start my appeal until on or about \_\_\_\_\_ [date]. [Explain how you learned this:]

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[OR]

Based on conversations with my attorney, I did not understand that I had the right to appeal. [Explain why:]

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[OR]

Based on conversations with my attorney, I did not understand the steps I needed to take to pursue an appeal. [Explain why:]

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10. [Include information about how you learned about your attorney's error and why you learned about it beyond the one-year period to file a late notice of appeal:]

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11. *[If applicable:]* Because of my attorney's error(s), I filed a pro se motion pursuant to CPL 460.30 on or about \_\_\_\_\_ *[date of motion]*. That motion, however, was denied/dismissed as untimely by this Court on \_\_\_\_\_ *[date of Appellate Division order of denial/dismissal]*.

12. Based on the circumstances described above, I respectfully request an extension of time to file a notice of appeal pursuant to *People v Syville*, 15 NY3d 391 [2010]. I was deprived of my constitutional rights to effective assistance of appellate counsel (US CONST AMEND XIV; *Evitts v Lucey*, 469 US 387 [1985]; *Douglas v California*, 372 US 353 [1963]), which deprivation is the basis for the granting of this motion for a writ of error *coram nobis*.

WHEREFORE, I respectfully request that this Court issue an Order granting the relief sought in the attached motion, and for such other and further relief as the Court deems just and proper.

I, \_\_\_\_\_ *[client name]*, affirm this \_\_\_\_\_ *[date]* of \_\_\_\_\_ *[month]*, \_\_\_\_\_ *[year]*, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law:

DATED: \_\_\_\_\_

\_\_\_\_\_  
Defendant/Appellant

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION \_\_\_\_\_ DEPARTMENT**

**PEOPLE OF THE STATE OF NEW YORK,  
Respondent,**

**MEMORANDUM  
OF LAW**

-v-

\_\_\_\_\_,  
**Appellant.**

**Ind/SCI #: \_\_\_\_\_**

**Index #: \_\_\_\_\_**

[Client] Should Be Granted *Coram Nobis* Relief Under *People v. Syville*, 15 NY3D 391 (2010), Due To [his/her/their] Trial Attorney's Ineffectiveness In Failing To File a Notice of Appeal on [his/her/their] Behalf [and/or] Adequately Advising [him/her/them] of [his/her/their] Right to Appeal.

This Memorandum of Law is submitted in support of [client's] petition for a writ of error *coram nobis*, seeking an order deeming a Notice of Appeal to have been timely filed regarding the [date] judgment of conviction in [County] under indictment number [#####]. This Court should grant petitioner's request because [his/her/their] trial counsel provided ineffective assistance of counsel by failing to fulfill [his/her/their] obligations with regard to [properly advising [client] regarding his/her/their appellate rights] [and/or] [failing the notice of appeal, despite [client's] expressed desire to pursue an appeal].

A. Counsel's Duty to Protect the Right to Appeal

The right to appeal from a criminal conviction is enshrined in the New York Constitution, Art. VI, § 5, as well as codified in CPL §450.10. "[E]very defendant has a fundamental right to appeal his conviction." *People v Montgomery*, 24 NY2d 130, 132 [1969] [superseded by statute on other grounds]. The right is "absolute," and its "invariable importance," along with "the distinct role assumed by the Appellate Divisions within New York's hierarchy of appellate review, makes access to intermediate appellate courts imperative." *People v Ventura*, 17 NY3d 675, 679, 680-681

[2011]. In *Montgomery*, the Court of Appeals expressed the “fundamental concern” that clients be properly informed about their appellate rights, saying, “there is no justification for making the defendant suffer” the loss of the right to appeal due to an “attorney’s failing,” and “basic fairness and due process require that the right not be dissipated . . . because the defendant was unaware of its existence . . . .” *Montgomery*, 24 NY2d at 132.

The decision whether to appeal belongs to the client, not the attorney. *Jones v Barnes*, 463 US 745, 751 [1983]; *see also McCoy v. Louisiana*, 584 US 414, 422 [2018] [decision whether to “forgo an appeal” belongs solely to the client in a criminal case]. Defense attorneys have a Sixth Amendment duty both to consult with the client whenever there is reason to think that a rational client would want to appeal, and to file a notice of appeal if the client so wishes. *Roe v Flores-Ortega*, 528 US 470, 480 [2000].

[*Add if applicable to a guilty plea case:*] Further, a client’s constitutional right to appeal exists for guilty pleas as well as trial convictions (*People v Pollenz*, 67 NY2d 264 [1986]), regardless of whether the client has executed a waiver of the right to appeal (*People v Callahan*, 80 NY2d 273, 284 [1992]). It is therefore improper for counsel to fail to protect a client’s right to appeal “even when the right to appeal has been waived.” *People v June*, 242 AD2d 977 [4th Dept 1997]; *see also Campusano v United States*, 442 F3d 770 [2d Cir 2006] [even after a valid appeal waiver, and even believing no non-frivolous appellate issues exist, counsel is constitutionally ineffective by declining to file a notice of appeal at the client’s request].

Finally, the right to appeal in criminal cases is also protected by this Court’s rules, under which counsel has an obligation to provide the client with written notice of their appellate rights:

*[Upon conviction in the trial court . . . it shall be the duty of counsel for the defendant, immediately after pronouncement of sentence . . . to give . . . written notice to his client*

*advising him of his right to appeal . . . ; and requesting his written instructions as to whether he desires to take an appeal.]*

[22 N.Y.C.R.R. 671.3(a): *quote and cite your Department's applicable rule.*] In sum, the right to appeal in New York is fundamental, and the failure to adequately safeguard that right raises serious concerns regarding counsel's performance.

B. Coram Nobis Relief as a Remedy for Counsel's Failure to Protect Appellate Rights

CPL 460.30 permits the Appellate Division to excuse the failure to file a timely notice of appeal from a criminal conviction if the application is made within one year of the date the notice was due (*see also People v Syville*, 15 NY3d 391, 394 [2010]). In *Syville*, the Court of Appeals held that the *coram nobis* procedure is available to afford further relief to litigants whose failure to move for an extension of time to file a notice of appeal pursuant to CPL 460.30 is attributable to their attorney's failure to comply with a timely request for the filing of a notice of appeal, where the omission could not reasonably have been discovered by the defendant within the one-year period (*id.* at 399-400).

The court in *Syville* further explained that “[w]hen defense counsel disregards a client’s timely request to file a notice of appeal, the attorney ‘acts in a manner that is professionally unreasonable.’” *Id.* at 397 [citing *Roe v Flores-Ortega*, 528 US 470, 477 (2000)]. “In such a situation, a defendant justifiably relies on the lawyer to carry out the purely ministerial task of taking the first step to preserve the right to appellate review . . . . When counsel’s omission causes a defendant to lose the right to perfect or obtain merits consideration of an appeal, the deficient performance amounts to ineffective assistance of counsel in violation of the Due Process Clause.” *Id.* [citing *Flores-Ortega*; *Evitts v Lucey*, 469 US 387 (1985)].

Under *Syville*, then, a *coram nobis* petition is the appropriate procedure—indeed, the only procedure—to seek a remedy for the violation of [*client's*] right to effective assistance of

counsel and the resultant denial of his “fundamental right to appeal.” *See Montgomery*, 24 NY2d at 132 [Because “every defendant has a fundamental right to appeal his conviction... basic fairness and due process require that the right not be dissipated either because the defendant was unaware of its existence or counsel failed to abide by a promise to either file or prosecute an appeal.”].

There is no time limit for bringing a *coram nobis* petition. *See, e.g., People v Kahley*, 60 AD3d 1438 [4th Dept 2009] [motion granted for writ of error *coram nobis* vacating a 13-year-old order affirming conviction]; *People v Lampkins*, 21 NY2d 138 [1967] [17-year-old conviction appeal remanded to the Supreme Court for a hearing after request for a writ of *coram nobis*]; *People v Rivera*, 39 NY2d 519 [1976] [23-year-old conviction vacated by *coram nobis*]; *People v De Renzzio*, 14 NY2d 732 [1964] [hearing ordered on motion for writ of *coram nobis* regarding 26-year-old dismissal].

Further, a litigant need not “identify potentially meritorious issues that would be raised on appeal” to prevail on a *coram nobis* petition. *Syville*, 15 NY3d at 398; *see also Roe v Flores-Ortega*, 528 US at 485 [rejecting “any requirement that the would-be appellant ‘specify the points he would raise’” on appeal]. Rather, there is a “presumption of prejudice” when “counsel’s deficient performance has deprived [a litigant] of more than a fair judicial proceeding; that deficiency has deprived [them] of the appellate proceeding altogether.” *Roe v Flores-Ortega*, 528 US at 483.

### C. Counsel’s Deficient Performance in this Case

***[Where attorney failed to file notice of appeal:]***

[*Client’s*] appellate rights with respect to the [*date*] judgment of conviction were violated solely because of [*his/her/their*] attorney’s failure to file a notice of appeal from that

judgment and to later inform [*client*] in a timely manner that [his/her/their] appellate rights with respect to that judgment had not been protected.

*[Trial attorney's errors and/or omissions: reference facts in affirmation/affidavit re: attorney's deficient performance regarding failure to file the notice of appeal, including discussion of client's expressed interest in pursuing an appeal.]*

*[What client did in response: reference facts in affirmation/affidavit re: any attempts to communicate desire to appeal and preserve appellate rights.]*

***[Where attorney also failed to adequately advise about appellate rights, add this paragraph:]***

[*Client's*] appellate rights with respect to the [*date*] judgment of conviction were also violated because of [his/her/their] attorney's failure to properly advise [*client*] regarding [his/her/their] right to appeal.

*[Trial attorney's errors and/or omissions: reference facts in affirmation/affidavit re: attorney's deficient performance regarding advice about the scope of the right to appeal and/or the process for pursuing an appeal. Note that under People v. Rosario, 26 NY3d 597 (2015), litigants should attempt to corroborate a claim that counsel failed to adequately advise them of their appellate rights. For example, the trial attorney could submit an affirmation confirming that they failed to properly advise the client of their appellate rights, or a friend or family member with knowledge of the attorney's advice at the time could submit an affidavit.]*

*[What client did in response: reference facts in affirmation/affidavit re: any attempts to communicate desire to appeal and preserve appellate rights. Litigants must demonstrate that they exercised "due diligence". See People v. Rosario, 26 NY3d 597, 604-605 [2015] (affirming*

*denial of coram nobis petitions where litigants failed to show that they “took steps toward discovering the omission or explain why years passed before they sought coram nobis relief”).]*

And while [client] need not demonstrate the existence of meritorious appellate issues to prevail on [his/her/their] request, such issues exist in this case. For example, [summary of any potential issues set forth in affirmation/affidavit].

Under these circumstances, [client] should not be punished for the inaction of counsel who failed to represent [his/her/their] legal interest. Rather, due process and the constitutional right to counsel require that [client] not be deprived of [his/her/their] only opportunity to present [his/her/their] legal arguments to this Court on appeal. [Client] simply seeks and is entitled to nothing more than what [he/she/they] had before counsel compromised [his/her/their] legal interests: a single opportunity to present [his/her/their] meritorious claims to this Court and obtain a decision on those claims.

### **Conclusion**

For the Reasons Stated, this Court Should Grant a Writ of Error *Coram Nobis* and Deem [client] to have Filed a Timely Notice of Appeal; Grant [client] Poor Person’s Relief; Assign Counsel on Appeal; and Grant Such Further Relief as the Court Deems Appropriate.

Respectfully submitted,

---

[Attorney signature]

# APPENDIX E

Additional Resources

## **A TRIAL LAWYER'S ETHICAL OBLIGATION TO SMOOTH THE PATH TO A CLIENT'S APPEAL**

This CLE program contains 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.

### **PART 1: WHAT COUNSEL NEEDS TO DO**

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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 Sixth Amendment claims.

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

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, 584 U.S. \_\_\_, 138 S.Ct. 1500 (2018) (decision whether to “forgo an appeal” belongs solely to the criminal defendant).

Thus, 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.

##### **A. The Department Rules**

The statutorily-proscribed “duties of criminal defense counsel” in all four Departments set this out clearly:

Where there has been a conviction after trial ... 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 ..., in the manner of instituting an appeal and of obtaining a transcript of the testimony, and

... 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 from a judgment of conviction ....

22 N.Y.C.R.R. § 606.5(b)(1) (First Dept.) (emphasis added).

Upon conviction in the trial court ... it shall be the duty of the counsel for the defendant, immediately after the pronouncement of sentence ..., to give, either by mail or personally, written notice to his client advising him of his right to appeal ...; and requesting his written instructions as to whether he desires to take an appeal .... Thereafter, if the client gives to counsel timely written notice of his desire to appeal ... counsel shall promptly serve and file the necessary formal notice of appeal.

Id. at § 671.3(a) (Second Dept.); id. at § 821.2(a) (Third Dept.); id. at § 1015.7(a) (Fourth Dept.).

The rule is not dependent upon whether our client purportedly waived his right to appeal. 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 (4<sup>th</sup> Dept. 1997). Under Standard 9.2n of the ILS Standards for Establishing and Administering Assigned Counsel Programs, assigned counsel plan attorneys must consult with their trial-level client about whether they wish to appeal, regardless of whether there has been an appeal waiver. See id. Commentary (“This duty [to effectuate an appeal] applies with equal force in criminal cases in which the judgment of conviction was based on a plea of guilty and there was a purported waiver of the right to appeal, and in criminal cases where the judgment followed a trial.”). In short, “[i]f the client decides to appeal, trial counsel must file a notice of appeal.” Id.

#### B. The Bar Association Standards

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 should put this to rest.

The American Bar Association standards (§§ 4-8-2, 21-2.2) provide:

(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.

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(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... 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.

The National Legal Aid & Defender Association's standards setting forth performance guidelines for criminal defense representation (Guideline 9.2) similarly provide:

(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.

And the New York State Bar Associations Revised Standards for Providing Mandated Representation (§ I-7(j)(i)) provides that defense representation “means, at a minimum” that:

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;....”

### C. The Constitutional Requirement

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, regardless of an appeal waiver. Garza v. Idaho, 586 U.S. \_\_\_, 139 S.Ct. 738 (2019); Rojas-Medina v. United States, 924 F.3d 9 (1<sup>st</sup> Cir. 2019); see also 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. Garza v. Idaho, 586 U.S. \_\_\_, 139 S.Ct. 738 (2019); People v. Syville, 15 N.Y.3d 391, 397-98 (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 Sixth Amendment).

In sum, the Appellate Department rules, the ethical rules, the standards of professional practice, and the constitution itself, as interpreted by the Supreme Court, require that counsel advise each client of their right to appeal and effectuate their decision to appeal by filing a notice of appeal, regardless of the whether the client purported to waive his right to appeal.

## **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, ILS rules governing assigned counsel plans require assigned counsel to do so. And 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 2021 Revised Standards for Providing Mandated Representation. I-7(j)(iv).

According to the American Bar Association, “[c]ounsel, 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). Similarly, 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 assignment 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. Assigned Counsel Plan Rules

Under Standard 9.2n of the ILS Standards for Establishing and Administering Assigned Counsel Programs, if the client wishes to appeal, trial counsel must not only file a timely notice of appeal, but if the client is indigent, counsel must take affirmative steps to see that the appellate court grants poor person relief on appeal and assigns appellate counsel. Once a notice of appeal is filed, trial counsel must stay on the case until relieved by the court.

D. C.P.L. § 380.55

Recent legislative reforms have made assignment of counsel on appeal much easier. Specifically, in two separate reforms in 2021 and 2022, Criminal Procedure Law § 380.55 was amended to streamline the process for obtaining assigned counsel on appeal. Now trial counsel need only affirm that their client remains indigent for appellate counsel to be assigned.

More specifically, the statute provides that:

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. C.P.L. § 380.55(2) (emphasis added).

Note that the statute draws no distinction between guilty pleas and trials; it covers all “criminal action[s].” Note also that the statute requires no evaluation of merit or consideration of whether a defendant has purportedly waived his right to appeal.

The statute has a second, alternative way, to effectuate the assignment of appellate counsel: Make an application before the sentencing judge for a finding of continued indigency:

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 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. C.P.L. § 380.55(1).

All that counsel need to do is attach their affidavit or the sentencing court's 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).

Absent a C.P.L. § 380.55 application, the appellate court will assign counsel to represent a defendant on appeal only upon defendant's submission of a detailed notarized affidavit, pursuant to C.P.L.R. § 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. 22 N.Y.C.R.R. 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.*

### **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 resentencing. 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 at the same time and in the same part, you can 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 or file two separate notices of appeal (one from the judgment of conviction and one from the SORA order).

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. In some departments, 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). In other departments, the court is more strict.

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 purportedly 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.

Because 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.

Relatedly, if your client was under 19 at the time of the incident and the sentencing court neglected to rule on YO, assuming the client was eligible and even if the offense was an armed felony, the failure to do so is error, regardless of preservation. See People v. Rudolph, 21 N.Y.3d 497 (2013).

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.

The failure to grant a suppression hearing when warranted also presents an appealable issue even after a guilty plea. See People v. Ramos, 130 A.D.2d 439 (1<sup>st</sup> Dept. 1987).

f) 30.30 Dismissal Issues

Provided you get a decision denying the 30.30 dismissal motion, it survives a guilty plea, under the 2019 revisions. Appeal waivers may not even be effective against such claims.

g) 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.

#### h) Fee Issues

Under recently-enacted C.P.L. § 420.35(2-a), any client under the age of 21 years at the time of the offense is eligible to have his otherwise mandatory fees and surcharges waived in the interest of justice. The Appellate Divisions retain that same broad authority and have not been shy about using it, with over 100 waivers granted in the past 18 months. Relatedly, fees are no longer permissible for youthful offenders (or JOs) and sex offender fees are not proper for sexually motivated felonies. None of these issues require preservation and all may survive appeal waivers.

A notice of appeal should be filed anytime the client was under 21 years of age at the time of the offense.

#### i) Bruen Issues

With six cases currently pending before the New York Court of Appeals and a Supreme Court again examining the scope of the Second Amendment, who can predict what will eventually emerge. Bruen potentially applies to not only any cases involving guns but also other types of weapons.

Given the current state of flux, notices of appeals should be filed in all cases involving weapons charges.

### **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.

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

In recent years, the legislature has decriminalized some conduct – e.g. possession of gravity knives and marijuana – and eliminated or provided relief from certain fees – e.g. for YOs and anyone under 21. Meanwhile, the courts continue to reexamine what seemed like settled issues – e.g. Rudolph and Bruen. Trying to predict where and when such relief could impact your client is difficult.

As we have seen in the People v. Peque, 22 N.Y.3d 168 (2013), 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.

Filing a notice of appeal potentially preserves your clients' eligibility for the ameliorative change to be applied 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.

Consider filing a notice of appeal whenever your client is not a citizen.

#### D. Appellate Counsel Can Assist Your Client

The four appellate indigent defense providers in New York City (Appellate Advocates, Center for Appellate Litigation, The Legal Aid Society's Criminal Appeals Bureau, and the Office of the Appellate Defender) offer a wealth of services to their clients. All of the offices assist with parole hearings for any clients serving indeterminate prison sentences. The offices also assist clients with conditions of confinements issues, including jail time certificate questions, facility transfers, and medical requests. The

offices are staffed with social workers and client advocates who can provide support in moments of crisis or change. And, they all offer re-entry services. They will also send books and reading materials, free of charge, to any clients. For your clients who were convicted of a felony and are serving state prison time, having an advocate from one of the appellate offices could be a tremendous benefit.

## **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. Garza v. Idaho, 586 U.S. \_\_\_\_ (2019) (“Where, as here, a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the defendant’s instructions.... That Garza surrendered many claims by signing his appeal waivers does not change things.”); see also Rojas-Medina v. United States, 924 F.3d 9 (1<sup>st</sup> Cir. 2019); People v. June, 242 A.D.2d 977 (4th Dept. 1997); 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. People v. Thomas, 34 N.Y.3d 545 (2019); 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 or if the waiver itself is valid. 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.

The upshot is that purported appeal waivers do not cause informed appellate counsel to forgo raising many – if any – claims. Thus, the existence of a purported appeal waiver should not factor into the decision as to whether to file a notice of appeal.

## 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, (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, (3) that the fees were improper or should be waived, and (4) retroactive changes that decriminalize or otherwise render lawful certain conduct (e.g. gravity knives, marijuana, weapon possession?).

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.

Relatedly, make sure that any PPI or mitigation letter is made part of the record on appeal.

### **B. 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.

### **C. 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 been 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.

D. 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, for example, has a policy of not signing, and that can be helpful when appellate counsel is challenging a waiver on appeal.

E. 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. Using C.P.L. § 380.55 is simple and doing so 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. Indeed, the NYSBA Revised Standards for Providing Mandated Representation, I-7(k), seemingly require that:

[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.

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 decision/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.

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.

**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); see also NLADA Performance Guidelines for Criminal Defense Representation, Guideline 9.2(c) ("Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in trial court.").

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).

## PART 2: HOW TO DO IT

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This outline covers the practical steps of how to file notices of appeal, late notices of appeal, and how to effectuate the assignment of appellate counsel.<sup>1</sup>

### I. Notices of Appeal

#### A. Creating the Notice of Appeal

The notice of appeal must contain the following information:

- Client's name: if the client has an aka, be sure to include it. In the First Department, if the client was adjudicated a youth offender, their full name should not be listed on the notice of appeal, instead list the first letter of their first name, followed by their full last name, ex. "J. Doe."
- Docket or indictment number: if a client has multiple cases that were disposed of at once, you can file a single notice of appeal for multiple cases – so long as they all have the same sentence date. Include all the indictment or SCI numbers to the right of the caption.
- Date of sentence: it is important to note that the relevant date is the date of sentence – not the date of plea, verdict, or execution of sentence. If the sentence date is incorrect, the notice of appeal will be rejected by the Appeals Bureau. Additionally, if a client is resentenced, a new notice of appeal must be filed for the resentencing date. See pg. 10.

Included in these materials is a department and county neutral notice of appeal template. See FORM 1 (Notice of Appeal Template). The Appellate Division, Second Department's '[Forms and Practice Aids](#)' page also has a fillable notice of appeal template available to download.

Important note: in the Second Department, a notice of appeal must also be filed with an 'informational statement'. A criminal informational statement template is available on the Appellate Division, Second Department's '[Forms and Practice Aids](#)' webpage.

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<sup>1</sup> The filing information in these materials focuses on supreme criminal cases (felonies) – not misdemeanor cases – although the process is very similar. However, A2A's 'NYC EDDS NOA Filing Guide' provides instructions for filing both felony and misdemeanor notices of appeal in New York City.

Finally, if the client receives a SORA adjudication at sentencing, the notice of appeal should specify that the appeal is for both a) the judgment and sentence and b) the SORA adjudication, or file two separate notices of appeal (one for the judgment of conviction and one from the SORA order). In the First Department, when filing a notice of appeal for a SORA adjudication, a copy of the order must be included when filing the notice of appeal.

#### B. Serving the Notice of Appeal

The notice of appeal must be served on the district attorney. Contact the district attorney in your county to confirm the best method of service for notices of appeal. However, in all five New York City boroughs, service can be done electronically via email. If service is done electronically, be sure to include an affirmation of service when filing the notice of appeal with the court (listing the email address service was made to).

The 'NYC EDDS NOA Filing Guide' provides service emails for all five New York City district attorney offices. If you prefer in person service, bring three copies of the notice of appeal (one for the district attorney's office, one for your records, and one for the court) and have all three stamped.

#### C. Filing the Notice of Appeal

A notice of appeal must be filed within 30 days of the sentence being imposed. C.P.L. § 460.10(1)(a).

Within New York City, notices of appeal for supreme cases (felonies) are filed with the supreme court - criminal term of each county. Each New York City County has its own appeals bureau except Richmond County, where notices of appeal go to their general supreme criminal term. In New York City, all criminal notices of appeal (for misdemeanors/violations), regardless of county, go to the Criminal Appeals Bureau.

All five New York City boroughs now accept electronic notice of appeal filings – via the Electronic Document Delivery System (EDDS). See 'NYC EDDS NOA Filing Guide' for step-by-step instructions.

Outside of New York City, notices of appeal for felony cases are filed with the county clerk's office. Some counties permit electronic filing via email or EDDS, while other counties require hardcopy filing. If outside of New York City, contact the county clerk's office to confirm the correct method of filing.

For help locating the correct clerk's office, use the "Court Locator" tool on the NY Courts website - [Starting an Appeal | NY CourtHelp \(nycourts.gov\)](https://www.nycourts.gov/starting-an-appeal). For felony cases, select the county where the case was disposed of; then select 'Supreme Court' if the case was disposed of inside New York City; or select 'County Court' if the case was disposed of outside New York City.

Once the notice of appeal is filed with the court, it is forwarded it to the appropriate Appellate Division.

## **II. Late Notices of Appeal**

What if the 30-day deadline passes? A late notice of appeal can be filed within one year and 30 days of the date of sentence and must be filed directly with the Appellate Division pursuant to C.P.L. § 460.30, based upon counsel's "improper conduct" or a lapse in communication with the defendant. In the First and Second Department, the following language is typically sufficient: "through inadvertence, my office failed to file a timely notice of appeal." See FORM 2 (Late Notice of Appeal Template).

The motion must be signed and dated. In the Second Department, a late notice of appeal must also be filed with an 'informational statement.' An informational statement template is available on the Appellate Division, Second Department's [Forms and Practice Aids](#) webpage.

Once the district attorney has been served, you must file the late notice of appeal with the Appellate Division. Below is a chart with information on how to file late notices of appeal within each Department and what additional documents are required.

### LNOA Filing by Department

AD1	File LNOA via email at <a href="mailto:AD1criminal@nycourts.gov">AD1criminal@nycourts.gov</a> - <i>Attach: proof of service</i>
AD2	File LNOA via AD2's digital portal at: <a href="https://www.nycourts.gov/courts/ad2/Digital_Submission.shtml">https://www.nycourts.gov/courts/ad2/Digital_Submission.shtml</a> - <i>Attach: a) copy of sentence &amp; commitment sheet; b) informational statement<sup>2</sup>; c) proof of service</i>
AD3	File LNOA via AD3's digital portal at: <a href="https://www.nycourts.gov/ad3/Clerk/Index.html">https://www.nycourts.gov/ad3/Clerk/Index.html</a> ; AND file original hardcopy via mail. - <i>Attach: proof of service</i>
AD4	File LNOA via AD4's digital portal at: <a href="https://ad4.nycourts.gov/dcopy">https://ad4.nycourts.gov/dcopy</a> - <i>Attach: proof of service</i>

### **III. Effectuating the Assignment of Appellate Counsel**

If you were assigned to a client based on their indigency – the simplest way to effectuate the assignment of appellate counsel is to file a C.P.L. 380.55(2) attorney certification, also referred to as a certificate of continued indigency (details below).

A second option is to make an application before the sentencing judge for a finding of continued indigency pursuant to C.P.L. § 380.55(1). If granted, you can attach the order to the notice of appeal when filing and the appellate court may, upon receipt of those papers assign appellate counsel without the need for a further motion or application. 22 N.Y.C.R.R. § 1250.11 (a)(1).

If you are filing on behalf of a client you were retained to represent at the trial level, but whose financial situation has since changed, you will need to file a traditional poor person application (also referred to as a 'motion for assignment of counsel' or an 'IFP'). This type of motion requires a detailed notarized affidavit, pursuant to C.P.L.R. § 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

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<sup>2</sup> The Appellate Division, Second Department provides a criminal informational statement template on their website ([Forms & Practice Aids](#)).

listing his property with its value. 22 N.Y.C.R.R. 1250.4(d)(1)(4). If counsel was retained below or if bail was posted, the affidavit will need to lay out those details and explain why those funds are no longer available.

### C.P.L. 380.55(2) Attorney Certification/Affirmation

Since C.P.L. 380.55's amendment in November 2021, which took effect January 2022, assigned trial counsel can now attest to their client's continued indigency without the need for a notarized affidavit or other proof of indigency. C.P.L. 380.55(2) provides:

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.

All four departments provide templates for C.P.L. 380.55(2) affirmations on their websites:

- AD1: <https://nycourts.gov/courts/AD1/Practice&Procedures/index.shtml>
- AD2: <https://www.nycourts.gov/courts/ad2/formsandpracticeaids.shtml>
- AD3: <https://www.nycourts.gov/ad3/Forms/Forms.html>
- AD4: <https://www.nycourts.gov/courts/ad4/clerk/AssignCoun/assign-counsel-forms.shtm>

The C.P.L. 380.55(2) affirmation must be filed with the Appellate Division, along with a timely filed notice of appeal (or order granting late notice of appeal) and proof of service on the district attorney. For the Second Department, an 'informational statement' is also required.



The First, Second and Fourth Departments all accept electronic filings of C.P.L. 380.55(2) affirmations (see chart below), while the Third Department requires original hardcopy filing by mail.

AD1	File 380.55(2) via email at <a href="mailto:AD1criminal@nycourts.gov">AD1criminal@nycourts.gov</a>
AD2	File 380.55(2) via AD2's digital portal at: <a href="https://www.nycourts.gov/courts/ad2/Digital_Submission.shtml">https://www.nycourts.gov/courts/ad2/Digital_Submission.shtml</a>
AD3	File 380.55(2) via mail (hardcopy original) to: <i>Criminal Assigned Counsel Office Supreme Court, Appellate Division, Third Judicial Department P.O. Box 7288, Capitol Station Albany, NY 12224-0288</i>
AD4	File 380.55(2) via AD4's digital portal at: <a href="https://ad4.nycourts.gov/dcopy">https://ad4.nycourts.gov/dcopy</a>

David Klem, Lena Janoda  
November 2023

# Attorney Resource: Filing Direct Appeals of New York City Criminal Convictions and Assignment of Appellate Counsel

Everyone convicted of a crime in New York State, whether by trial or plea, has the right to appeal their conviction regardless of their immigration status. The first step to appealing a conviction is filing a Notice of Appeal within 30 days after sentencing. This FAQ addresses common questions that defense counsel may have about appeals and their non-citizen clients.

Appellate review of criminal convictions is critical for non-citizen clients. Appellate counsel will review the record to make sure no mistakes were made by the judge or any party. An appeal will also ensure that your client is able to benefit from any non-retroactive change in the law. Critically, immigration agencies cannot use your client's conviction to deport them unless the conviction is affirmed or the appeal is dismissed or withdrawn. Lastly, appellate counsel can help your client with tertiary matters related to their detention. **For these reasons, you should file a notice of appeal in every non-citizen case.**

## Notice of Appeal FAQ

### **What is the time period in which a Notice of Appeal must be filed?**

The Notice of Appeal must be filed within 30 days of the sentencing date, regardless of whether the conviction was by plea or by trial. (*See* CPL 460.10(1)-(3)). At the conclusion of the criminal case, defense counsel **must** inform their client of the right to file a Notice of Appeal and follow directions from their client on whether they would like the conviction to be appealed.

### **ATTORNEY NOTE**

Under the rules of the Appellate Division, a defense attorney is required, upon conviction, to advise her/his client of the right to appeal. See 22 N.Y.C.R.R. §§ 606.5(b) (First Department), 671.3(a) (Second Department), 821.2(a) (Third Department), & 1015.7(a) (Fourth Department). Each Department has different requirements for the exact contents of the advisal, but the advisal cannot be written and must include a discussion of the benefits and risks of filing an appeal for the specific defendant. Because an appeal makes the conviction non-final, this should be a benefit that you discuss with your client. You cannot rely on the appeal waiver or the judge's colloquy to substitute for this mandatory legal advice.

### **Can a Notice of Appeal be filed if the defendant's appellate rights were waived as part of a plea agreement?**

Yes. Even if the plea agreement included a waiver of appellate rights, some appellate rights cannot be waived (e.g. voluntariness of the plea, competency to stand trial, speedy trial, etc.). A Notice of Appeal can still be filed where an appeal waiver has been signed. *People v. Thomas*, 34 N.Y.3d 1019 (2019) (“[A]n appeal waiver entered as part of the plea-bargaining process does not serve as an absolute bar to the taking of a first-tier direct appeal.”)

## Who files the Notice of Appeal?

The criminal defense attorney must file the Notice of Appeal if the defendant requests it. The attorney who files a Notice of Appeal is not assigned to represent the defendant on appeal. The filing of the Notice simply informs the Appellate Division that the defendant intends to appeal their conviction, and the attorney should either file the certification or help their client file a Motion for Poor Person's Relief.

### ATTORNEY NOTE

If a defendant requests that their defense counsel file a Notice of Appeal, counsel's subsequent failure to file the notice constitutes per se ineffective assistance of counsel and violates the Due Process Clause. *People v. Syville*, 15 N.Y.3d 391, 397 (2010) (citing *Roe v Flores-Ortega*, 528 U.S. 470, 477 (2000)). Prejudice is also assumed. *Flores-Ortega* at 484, even if the defendant signed a valid appeal waiver. *Garza v. Idaho*, 139 S. Ct. 738, 749 (2019) (“[T]he presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether a defendant has signed an appeal waiver.”)

## What information must be included in a Notice of Appeal?

The Notice of Appeal must include the defendant's name, the name of the convicting court, indictment number, and the date of the conviction. There is no requirement that the Notice of Appeal identify the appellate issues to be raised. *See* CPL § 460.10. If counsel has not been retained on the appeal, the notice should also contain a short statement that the notice is being served and filed on appellant's behalf.

## Where is a Notice of Appeal filed?

Two copies of the Notice of Appeal must be filed with the Clerk of Court where the conviction was entered with proof of service that one copy was also filed with the District Attorney's office that prosecuted the case. Defense counsel should either serve the notice of appeal on the DA by certified mail and retain a copy of the certificate of service in the client's file, or hand-deliver a copy and have it time-stamped.

For more information on direct appeals, see IDP's [FAQ: Filing Direct Appeals of New York City Criminal Conviction and Getting Counsel Assigned, March 2021](#).

## What happens after a Notice of Appeal is filed?

Once the Notice of Appeal is filed, appointed trial counsel should submit a certification form to the Appellate Division affirming client remains indigent pursuant to CPL § 380.55(2). If defendant did not have appointed counsel, defense counsel should assist the client to prepare a Motion for Poor Person's Relief. Only then will the appellate division assign counsel for the appeal. Without assigned appellate counsel, the defendant's appeal may be dismissed.

**Appellate Attorney Assignment FAQ:**  
**Certification of Continued Eligibility for Poor Person Relief**  
**or Motion for Poor Person’s Relief**

Unlike in criminal court, attorneys are not automatically assigned to represent indigent clients on appellate cases. In order to vindicate your client’s rights on appeal, you must take additional steps to ensure that they are appointed appellate counsel.

If you were appointed trial counsel, you can submit a simple certification to the Appellate Division that will result in client obtaining assigned appellate counsel.

If you were retained but your client is now indigent, you can assist your client with a Motion for Poor Person’s Relief, and if granted, the Appellate Division will assign appellate counsel.

**What is Certification of Continued Eligibility for Poor Person Relief?**

**ATTORNEY NOTE**

Since January 14, 2022, indigent clients no longer need to submit a motion for poor person relief if their assigned trial counsel submits an affirmation stating that client remains indigent to the Appellate Division. This process streamlines and simplifies the process of assigning counsel to indigent defendants, and defense counsel should make use of this process whenever possible. A sample is attached.

**What is a Motion for Poor Person’s Relief?**

In cases where trial counsel does not file a certification, a Motion for Poor Person’s Relief indicates to the Appellate Division that the client cannot afford appellate counsel and that they are asking for one to be assigned. If no Motion for Poor Person’s Relief is filled, no attorney will be assigned to the appeal.

**Who files the Motion for Poor Person’s Relief?**

Defense counsel should prepare and file the Motion for Poor Person’s Relief with their client’s input. Ideally, it should be filed after confirming with the Appellate Division that it received the appeal. You can email the clerk’s office to confirm. Counsel who files the Motion for Poor Person’s Relief is not assigned to the appeal.

**What Information must be included in a Motion for Poor Person’s Relief?**

The Motion for Poor Person’s Relief is a notarized affidavit signed by the client asking for the court to assign appellate counsel and cover the fees of the appeal (including the transcript fees). The affidavit must lay out more information about the client’s financial situation.

### **Where is a Poor Person Certification or Motion for Poor Person's Relief filed?**

The Motion for Poor Person's Relief is filed with the Appellate Division where the appeal will be pending. Supreme Court cases from Bronx and New York County are filed at the First Appellate Division and Kings, Queens, and Richmond County Supreme Court cases are filed at the Second Appellate Division. Criminal court cases are filed with the relevant Appellate Term.

Best practices are to also keep a copy of what was filed for your own files and give your client as copy as well.

### **What happens after a Motion for Poor Person's Relief is filed?**

The Appellate Division will review the Motion and, if granted, assign appellate counsel to work on the appeal.

For more information on Motions for Poor Person's Relief, see IDP's [FAQ: Filing a Late Notice of Appeal of New York City Criminal Conviction, November 2023](#).

Supreme Court of the State of New York  
Appellate Division, \_\_\_\_\_ Judicial Department

\_\_\_\_\_  
The People of the State of New York,

Respondent,

against

Certification of Continued  
Eligibility For Poor Person  
Relief and Assignment of  
Counsel on Appeal Pursuant  
to CPL § 380.55(2)

Ind/SCI No. \_\_\_\_\_

\_\_\_\_\_,

Defendant-Appellant.

\_\_\_\_\_, an attorney duly admitted to practice law in the State of New York,  
and not a party to the above-entitled action, affirms the following to be true under penalty of  
perjury, or if made on information and belief, believes them to be true:

1. I was assigned to represent defendant in the above-referenced criminal action, pursuant to  
Section 722 of the County Law, in Supreme Court, County of \_\_\_\_\_.
2. A notice of appeal was timely filed and served on the District Attorney from a  
\_\_\_\_\_ (insert judgment/sentence/order) dated \_\_\_\_\_.  
A copy of the notice of appeal is attached hereto.
3. Upon information and belief, defendant continues to be indigent and eligible for poor  
person relief and assignment of counsel on appeal pursuant to CPL § 380.55(2).
4. Defendant has indicated an intention to pursue the appeal and requests that counsel be  
assigned for that purpose.

5. A copy of this certification has been served upon the District Attorney and provided to defendant.

Wherefore, it is respectfully requested that the Court issue an order assigning counsel on appeal and grant such other relief the Court deems just and proper.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Attorney's Signature

\_\_\_\_\_  
Printed Name

Address \_\_\_\_\_  
\_\_\_\_\_

Telephone No. \_\_\_\_\_

Email Address \_\_\_\_\_