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Proper Use of the Transcript and Appendices

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funds may be able to take advantage of the liberal provisions of the CPLR regarding the papers on an appeal,[252] or, in a proper case, of the provisions regarding pauper status.[253]

In the earlier cases[254] the usual procedure had been for the court to grant a dismissal conditioned on the delinquent party's failure to perfect the appeal within a stated period of time thereafter. The holding in the *Tonkonogy* case is an indication that the courts will construe the time provisions more strictly than the earlier cases had, and it serves as a warning to the Bar that the time limitations for perfecting appeals must not be casually treated. A party opposing the motion to dismiss must show that the appeal has merit *and* that there is a valid excuse for failing to perfect the appeal. What an adequate excuse will be in a given case will depend on its own peculiar facts. The *Sortino* case should be consulted for guidelines.

CPLR 5530(a) and (b) set out the time requirements for the filing of records and briefs, and when they should be served. But subdivision (c) states that the

> appellate division in each department may by rule applicable in the department prescribe other limitations of time different from those prescribed in subdivisions (a) and (b) for filing and serving records on appeal. . . .

As a result of subdivision (c), subdivisions (a) and (b) have been virtually superseded by the rules of the appellate division in each of the four departments. The attorney should be mindful to consult the time requirements contained in the rules of the individual departments which, to the extent inconsistent with CPLR 5530(a) and (b), supersede the latter.

If a party has a legitimate reason for not being able to comply with the time requirements set out in CPLR 5530(a) and (b) or the applicable appellate division rules, he would be best advised to apply for additional time, perhaps by motion under CPLR 2004, or, if possible, by stipulation with the respondent.[255]

Proper use of the transcript and appendices; Settlement of the transcript — Rule 5525; Use of the appendix — Rule 5528(a)(5).

In *Perry v. Tauro*,[256] the plaintiffs appealed from an order of the supreme court which denied their application to eliminate

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[252] CPLR 5529.
[253] CPLR Art. 11.
[254] *E.g.*, U.S. Hat Co. v. Title Guar. Trust Co., 273 N.Y. 586, 7 N.E.2d 705 (1937); Maronet v. 1010 Rogers, Inc., 17 App. Div. 2d 793, 232 N.Y.S.2d 757 (1st Dep't 1962); Eagle Contractors of Utica, Inc. v. Black, 5 App. Div. 2d 954, 171 N.Y.S.2d 380 (4th Dep't 1958).
[255] *E.g.*, N.Y. App. Div. Rr. XI (6) & XII (5), pt. 1 (1st Dep't 1963).
[256] 21 App. Div. 2d 804, 250 N.Y.S.2d 898 (2d Dep't 1964).

from the transcript of the stenographic minutes certain matter which they deemed immaterial to their appeal. The appellate division, second department, affirmed, holding that the motion to settle an abridged typewritten transcript was properly denied on the ground that, in the absence of the parties' stipulation, the court *could not* settle anything less than a complete transcript under CPLR 5525(b).

The holding is a literal reading of CPLR 5525(b),[257] and appears to be an effort to coordinate 5525(b) with CPLR 5528 (a)(5), which permits the use of the appendix method.

The appendix method was adopted to cut down the extremely high printing costs of an appeal.[258] It permits extracts from the record, included as appendices in the briefs, to substitute for printing of the entire record. The appendix need contain "only such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent. . . ." [259] It was apparently felt that since each judge will have before him only such extracts of the transcript as the briefs' appendices contain, it is best—absent the parties' stipulation to the contrary—that a complete transcript at least be available to the court.

Though the transcript (if the parties cannot stipulate) may have to be submitted to the court for approval,[260] the appendix is devised as the party himself determines; but he must, to avoid unfavorable consequences later on, reasonably carry out the intent of CPLR 5528(a)(5) in putting the appendix together. The *Reynolds* case, to be treated in a moment, illustrates the consequences of a deficient appendix.

The court in the *Perry* case [261] pointed out that under the former Civil Practice Act [262] and Rules of Civil Procedure,[263] the trial judge was empowered to settle an abridged printed record. Today, however, the equivalent of abridgment is accomplished by properly utilizing the appendix method. The appendix now affording the parties the "abridgement," the transcript itself, in the diminished number of copies now required by 5525(a), must, absent the parties' stipulation, be a complete one.

An attorney endeavoring to use the appendix method should make sure that the appendix contains all of the pertinent proof that is required for a determination of the questions presented on

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[257] See 7B McKINNEY's CPLR 5225(b), commentary 467-68.
[258] See 11 N.Y. JUD. COUNCIL REP. 425 (1945).
[259] CPLR 5528(a)(5).
[260] Employers Mut. Liab. Ins. Co. v. Insurance Co. of North America, 40 Misc. 2d 946, 244 N.Y.S.2d 534 (Sup. Ct. 1963).
[261] *Supra* note 256.
[262] CPA § 576.
[263] RCP RR. 232, 234.

the appeal. The supreme court, appellate division, in a recent case [264] held that an appendix containing only 13 pages of excerpts of testimony taken from a stenographic transcript of 950 pages did not permit a review of the weight of the evidence. It was impossible, said the court, to render a decision on questions of law presented where the facts (primarily meaning testimony, in this context) upon which the legal conclusions depended were not contained in the appendix. The court pointed out that it was "under no obligation to examine the original record where the appendix clearly is insufficient. . . ." [265]

The appendix in the *Reynolds* case was *clearly* insufficient, not merely deficient in some minor details. On the basis of the above decision, it would appear safe to assume that the court would examine the original record only when the appendix is deficient in a comparatively minor particular. The question of what would be considered a minor omission as against what would constitute a clearly insufficient appendix will naturally depend on the matter sought to be reviewed.

In the *Reynolds* case, appellant was seeking reversal based on the weight of the evidence. In such context, it is patently absurd to offer the appellate court only 13 of the 950 pages of transcript. If all that was sought was review of alleged errors, *e.g.*, the exclusion of certain tendered evidence, the colloquy surrounding which appeared on the 13 pages, such appendix would have sufficed. The scope of the appendix should be coordinated with the scope of review sought.

One further counseling point evolves. The mere presence of a complete transcript in the appellate court must not be taken as an invitation to the formulation of sketchy appendices. The transcript is present for the court's convenience (and the respondent's [266]), not the appellant's; as far as the appellant is concerned, the assumption should be that all that the judges have available is the appendix contained in the brief.

ARTICLE 57—APPEALS TO THE APPELLATE DIVISION

Appellate Division exercises its power to vacate or modify ex parte orders of the supreme court only in "unusual circumstances."

In the case of *In re Willmark Serv. Sys., Inc.*,[267] the New York Supreme Court, special term, granted an order, pursuant to

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[264] E.P. Reynolds, Inc. v. Noger Elec. Co., 21 App. Div. 2d 306, 250 N.Y.S.2d 487 (2d Dep't 1964).
[265] *Id.* at —, 250 N.Y.S.2d at 489.
[266] See the last sentence of CPLR 5525(a).
[267] 21 App. Div. 2d 478, 251 N.Y.S.2d 267 (1st Dep't 1964).