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# FREESTYLE LAWYERING: TAKING AN EXPEDITED APPEAL IN THE NEW YORK STATE COURTS

Alicia R. Ouellette\*

## I. INTRODUCTION

New York's appellate courts normally hear cases on a first come, first served basis. Occasionally, however, when a party can show "urgency or good cause,"<sup>1</sup> a court will expedite the appeal process by granting a calendar preference and an expedited briefing schedule. Determining how to obtain that preference and expedited briefing schedule can often be difficult because New York's rules of civil procedure (the CPLR) provide only that "[p]references in the hearing of an appeal may be granted in the discretion of the court to which the appeal is taken."<sup>2</sup> The statutory rules provide no guidance about how to seek a preference or what an application for a preference must show to be successful. Virtually no case law exists on the subject, and even the bible used by New York practitioners, Siegel's *New York Practice*,<sup>3</sup> does not explain how to expedite an appeal. The sage advice of most experienced appellate attorneys is, then, the most helpful: "Call the clerk's office."

Calling the clerk makes sense because the procedures for expediting an appeal vary from court to court, and no single source systematically outlines the quirks of the procedure used

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1. *Schulz v. State*, 572 N.Y.S.2d 434, 435 (App. Div. 3d Dept. 1991). There are also certain categories of cases in which a preference is automatically granted. See Section III, *infra*.

2. N.Y. Civ. P.L. & R. § 5521 (Consol. 2001).

3. David D. Siegel, *New York Practice* (3d ed., West Group 2000).

by each court. There are some local court rules: The state's top court, the New York Court of Appeals, has an established procedure, as do two of the four intermediate appellate courts. The other two determine the procedure for dealing with emergency matters on an *ad hoc* basis that seems to follow unwritten rules that are known to, and understood by, a select few appellate experts.

In some cases, the preferred procedure is a formal motion to be decided by a full panel. Sometimes, a letter request to the clerk's office is sufficient. At other times, a lawyer must go to the home chambers of an individual judge and ask him or her to sign an order to show cause. Because the preferred procedure for expediting a particular appeal depends upon the court in which the appeal will be heard and the facts of a particular case, New York practitioners must rely on experience, their best guess, or the advice of the clerk's office when determining how to initiate an expedited appeal. Obviously, this situation is not ideal. In the most urgent and stressful cases, practitioners must search around for the appropriate procedure, relying at times on nothing more concrete than the voice at the other end of a telephone.

This article will attempt to provide some guidance to practitioners who wish to expedite an appeal in a New York court by first setting forth the existing rules for the court of appeals and each department of the Appellate Division. It will then set forth the preferred practices in those departments that lack published rules, as best those practices can be discerned from the experience of the author and members of the Appeals Bureau of the New York State Attorney General's Office.<sup>4</sup> It will further examine some instances in which New York appellate courts have granted preferences in order to illustrate the sorts of cases in which the effort to expedite an appeal is likely to be successful. Finally, the article will offer some practical tips for bringing an appeal on an expedited basis, including putting a record together and advising a client on when to expect a decision.

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4. Any errors or mistakes are the author's alone. The views expressed in this article do not represent the views of the New York State Attorney General's Office.

## II. HOW TO SEEK A PREFERENCE AND EXPEDITED BRIEFING SCHEDULE

### A. *The New York Court of Appeals*

The procedure for obtaining a preference from the court of appeals is simple: Write a letter to the clerk of the court with notice to all other counsel whose clients may be affected.<sup>5</sup> The letter must include “(1) a statement of the nature of the case; (2) the jurisdictional predicate for appeal to the Court of Appeals; (3) the state of readiness of the appeal; (4) all relevant dates, such as the dates of orders and judgments below, the notice of appeal or order granting leave, the dates of filing of briefs and papers on appeal; and (5) the reason why a calendar preference is needed and why it should be granted.”<sup>6</sup> To obtain the relief sought, the party seeking the preference must make “a written showing of urgency, or potential irreparable harm, or public necessity, and, in all instances, lack of an available alternative remedy.”<sup>7</sup>

Although the rules do not explicitly provide for it, practitioners may use the same procedure to obtain an expedited briefing schedule. Indeed, if a case satisfies the court’s requirements for obtaining a calendar preference, the normal lengthy briefing schedule<sup>8</sup> is unlikely to be satisfactory. Thus, the wise attorney includes in her letter to the clerk a request both for a calendar preference and an expedited briefing schedule.

In some cases, practitioners use an alternative procedure that is not provided for in the court’s rules. Rather than address the request for a preference to the clerk, those practitioners include a request for a calendar preference and expedited

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5. 22 N.Y. Comp. Codes, R. & Regs. 500.8(b) (2002).

6. *Id.*

7. *Id.*

8. In an ordinary case, the appellant has sixty days from initiating the appeal in which to file an opening brief, the respondent’s brief is due forty-five days after appellant’s brief is filed, and the appellant’s reply brief is due ten days later. 22 N.Y. Comp. Codes, R. & Regs. 500.5(d), (f) (2002); N.Y. Comp. Codes, R. and Regs. 500.7(a) (2002); *see also* 22 N.Y. Comp. Codes, R. & Regs. 500.1(b)(5) (2002) (allowing additional time if the parties file CD-ROM briefs).

briefing schedule in their motions for leave to appeal. This method is useful when the motion for leave to appeal also includes a request that the motion for leave be decided on an expedited basis. The court considers these requests with the underlying motion and grants or denies them as is appropriate.<sup>9</sup>

### *B. The Appellate Division, First Department*

The preferred procedure for obtaining a discretionary calendar preference and expedited briefing schedule for a civil case are less clear in the First Department of the Appellate Division than in the New York Court of Appeals. The first department requires an "application" made on notice to the other parties.<sup>10</sup> There is no further description of what form the application should take, but the rules allow the application to be granted "on good cause shown."<sup>11</sup> In practice, lawyers making an application generally do so by filing a formal motion.<sup>12</sup> Court rules provide that motions shall be noticed in the time prescribed by CPLR 2214(b)<sup>13</sup> or as "directed by a justice of the court."<sup>14</sup> The rules do not prescribe a procedure for asking a justice of the court to speed up the motion process itself.

In practice, counsel seeking emergency review of an appeal in the first department short cut the time it takes for a motion by invoking the procedure for seeking an interim stay.<sup>15</sup> Under that procedure, the party seeking relief "must inform the clerk at the time of submission whether the opposing party has been notified of the application and whether such party opposes or consents to the granting of the relief sought."<sup>16</sup> The clerk will then assign

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9. See e.g. *Dist. Council 82, AFSCME v. Cuomo*, 472 N.E.2d 1038 (N.Y. 1984) (granting motion for preference); *In re Emanuel S.*, 571 N.E.2d 79 (N.Y. 1991) (granting motion for leave to appeal, motion for preference, and motion for waiver of filing fees).

10. 22 N.Y. Comp. Codes, R. & Regs. 600.12(a)(2) (2002).

11. *Id.*

12. The author is unaware of any case in which a letter or oral request for a preference was accepted by the clerk's office.

13. "A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard." N.Y. Civ. P. L. & R. § 2214(b) (Consol. 2001).

14. N.Y. Comp. Codes, R. & Regs. 600.2(a)(4)(ii) (2002); see also *id.* 600.2(a)(1).

15. N.Y. Comp. Codes, R. & Regs. 600.2(a)(7) (2002).

16. *Id.*

the application to a particular justice, who may hear the request and grant relief. On occasion the justice will order the appeal expedited on hearing the initial application for relief without requiring a formal motion, but will in other cases set a return date for the motion. Although the local rules provide that oral argument will not be heard on motions,<sup>17</sup> applications made directly to an individual justice for emergency relief are often made in person. The resulting in-chambers discussions can give the applicant's attorney an opportunity to make her case as she explains the grounds for the application.

The first department's rules spell out a different procedure for expediting a criminal appeal of an order reducing or dismissing an indictment.<sup>18</sup> In such a case, after the people file and serve a notice of appeal, either party may request, by letter or motion, that the court expedite the appeal. If a request is made, the court will hear the appeal on an expedited basis.<sup>19</sup>

### *C. The Appellate Division, Second Department*

The Appellate Division, Second Department requires the most formal procedure: A preference may be obtained only "upon good cause shown by a motion directed to the court on notice to the other parties to the appeal."<sup>20</sup> The rules make no special provision for shortening the time it takes to bring a motion for expediting an appeal.<sup>21</sup> The court will, however, hear motions commenced by order to show cause, which, if signed by a justice, can bring the motion for expedited review before the court in days.<sup>22</sup> To obtain the signature on an order to show

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17. 22 N.Y. Comp. Codes, R. & Regs. 600.2(d)(1) (2002).

18. *Id.* 600.8(e).

19. *Id.* 600.8(e)(2).

20. 22 N.Y. Comp. Codes, R. & Regs. 670.7(b)(2) (2002).

21. *Id.* 670.5(a) (providing that motions shall be made on the eight-day notice period set by CPLR 2214).

22. *Id.* 670.5(b) (providing that "[a]ll papers in opposition to any motion or proceeding initiated in the court by an order to show cause shall be filed with the clerk on or before 9:30 a.m. of the return date" and that "[o]n the return date, the motion or proceeding will be deemed submitted to the court"). An order to show cause is a substitute for a notice of motion, which shortens the notice time. *See* N.Y. Civ. P. L. & R. § 2214(d); *see also* Siegel, *supra* n. 3, at §§ 245, 248 ("With an order to show cause the hearing can be brought on at any time the court directs . . . as close as the next day. If the court is

cause, counsel will be directed by the clerk's office to an informal hearing in a justice's chambers. Opposing counsel will be notified and given an opportunity to attend. There, the parties will be asked to explain why the judge should or should not sign the order to show cause, which will usually involve some discussion of the merits of the underlying appeal. (This can obviously be disconcerting to the newly retained appellate lawyer who has not reviewed the file!) Appellate lawyers in the New York Attorney General's office will often bring the trial attorney to this informal show-cause hearing in order to have available someone capable of discussing the merits of the case if necessary. Private appellate practitioners might do well to consider this strategy.

Like the other departments, the second department has a specific rule for criminal cases. The requirements are straightforward:

Appeals by the people pursuant to CPL 450.20(1-a) shall be granted a preference upon the request of either the appellant or the respondent. The appellant's brief shall include an appendix containing a copy of the indictment, the order appealed from and the decision. The respondent's brief may also include an appendix, if necessary. The appellant shall file, separate from the record, one copy of the grand jury minutes.<sup>23</sup>

#### *D. The Appellate Division, Third Department*

The Appellate Division, Third Department has no set rules for obtaining a discretionary preference in a civil case. Thus, practitioners in the third department will often begin the process by contacting the clerk's office. In some cases, the clerk will accept a letter making the request for expedited briefing and argument.<sup>24</sup> The court treats those letters, although informal, as

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convinced there is a real emergency, it can schedule the hearing for a few hours later or in the direst case 'forthwith' the service of the order to show cause.").

23. 22 N.Y. Comp. Codes, R. & Regs. 670.12(e) (2002).

24. *E.g. Shulz v. People*, 585 N.Y.S.2d 801 (App. Div. 3d Dept. 1992) (granting the attorney general's letter request for a calendar preference and an expedited briefing schedule). The respondents used the same procedure to expedite the process in *McDermott v. Regan*, 599 N.Y.S.2d 718 (App. Div. 3d Dept. 1993) and *McCall v. People.*, 640 N.Y.S.2d 347 (App. Div. 3d Dept. 1996). Telephone Interview with Peter G. Crary,

motions, and decides them, without hearing, on the motion calendar.

In other cases, especially those in which the party seeking expedited review is also seeking a stay or to vacate a statutory stay, the clerk's office will direct the party to an individual judge. The party may then appear before the judge asking him or her to sign an order to show cause directing the interim relief and the expedition of the appeal.<sup>25</sup> As in the second department, counsel invoking this procedure in the third department should be prepared to discuss the merits of the case. In the author's experience, the in-chambers hearing on the order to show cause can often be much longer and more thorough than the formal oral argument on appeal.

Like the other intermediate appellate courts, the third department has special provisions for expediting a criminal appeal. In cases involving orders of a "court reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information, . . . either party may request that the court expedite the appeal."<sup>26</sup> If a request is made, the court must hear the appeal on an expedited basis.<sup>27</sup>

The third department also has a special provision for expediting appeals in election cases.<sup>28</sup> They are given preference and "shall be brought on for argument on such terms and conditions as the presiding justice may direct upon application of any party to the proceeding."<sup>29</sup> Appeals in proceedings brought pursuant to any provision of the election law may be prosecuted upon a single-copy record and seven copies of a brief and appendix.<sup>30</sup>

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Assistant Solicitor General, N.Y. State Atty. Gen. Off. (Feb. 14, 2002) (notes on file with author); e-mail from Peter G. Crary to Alicia R. Ouellette, *Re: Expedited Appeals* (Feb. 14, 2002) (copy on file with author). Mr. Crary handled both *McDermott* and *McCall* for the New York State Attorney General's Office.

25. Petitioners successfully used this procedure in *Bd. of Educ. of Roosevelt C. Sch. Dist. v. Trustees of SUNY*, 723 N.Y.S.2d 262 (App. Div. 3d Dept. 2001), a case handled by the author. There, Justice Spain denied the request to vacate the stay, but expedited the appeal by setting down a very short briefing schedule and setting argument for two weeks from the date of the informal hearing.

26. 22 N.Y. Comp. Codes, R. & Regs. 800.14(h)(2) (2002).

27. *Id.*

28. *Id.* 800.16.

29. *Id.*

30. *Id.*



*E. The Appellate Division, Fourth Department*

The Appellate Division, Fourth Department rules require that a party file and serve a motion to expedite an appeal or proceeding within fifteen days of the date on which the scheduling order is mailed. The motion must be supported by an affidavit “setting forth with particularity the compelling circumstances requiring that the appeal or proceeding be scheduled at the earliest available date.”<sup>31</sup>

In practice, the fourth department’s published procedure is inadequate. Even in the case of an emergency appeal, the parties must wait until the clerk issues a scheduling order to file a motion. Thus, as in the third department, appellate lawyers often invoke the help of the clerk’s office to obtain the fastest possible briefing schedule. In at least one case handled by the author, the clerk sent the Attorney General’s office, which was seeking to expedite an appeal, directly to a judge’s chambers to prevail upon the judge to sign an order to show cause to bring the motion for a preference before the court.<sup>32</sup>

The fourth department rules also expressly provide a preference in election cases, indicating that they “shall be prosecuted upon one original record that has been stipulated to by all counsel or settled by the court from which the appeal is taken, and the original exhibits.”<sup>33</sup> Upon learning “that an appeal pursuant to the Election Law is to be perfected, the clerk shall expeditiously calendar the appeal and issue a schedule for the filing and service of the record and briefs.”<sup>34</sup>

Like the other departments, the fourth department provides a special procedure for expediting the people’s appeals in criminal cases:

The request to expedite the appeal may be made after the people file and serve the notice of appeal. . . . [A]n order

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31. 22 N.Y. Comp. Codes, R. & Regs. 1000.10(d) (2002).

32. The case was *Pouliot v. Marzella*, which involved a dying woman who did in fact die before the appeal was heard. Because the case was then moot, the Attorney General’s office withdrew the appeal. The case is discussed at <<http://www.familydecisions.org/pouliot.html>> (accessed April 29, 2002; copy on file with Journal of Appellate Practice and Process). Its procedural history is set forth in the Attorney General’s brief, a copy of which is on file with The Journal of Appellate Practice and Process.

33. 22 N.Y. Comp. Codes, R. & Regs. 1000.5(a) (2002).

34. *Id.* 1000.5(b).

shall be issued establishing an expedited briefing schedule and designating a term of court for argument of the appeal, giving a preference to the appeal. The appeal shall be expeditiously determined.<sup>35</sup>

### III. PARTICULAR CASES: WHEN A NEW YORK COURT MUST (OR IS LIKELY TO) EXPEDITE AN APPEAL

In most cases, New York courts have absolute discretion to grant or deny a preference intended to advance the hearing of an appeal. In certain cases, however, statutory rules require expedited treatment of a particular appeal. For example, a 1991 procedural statute requires that a preference be granted in certain family court proceedings that involve juvenile delinquency, persons in need of supervision (PINS), dependent children in foster care, child protective proceedings, and permanent neglect proceedings.<sup>36</sup> The Family Court Act provides for a preference in child-abuse proceedings.<sup>37</sup> The third and fourth departments of the appellate division explicitly recognize that election cases shall be given a preference.<sup>38</sup> All four departments of the appellate division give a preference to criminal appeals brought by the people.<sup>39</sup> If the appeal is entitled by law to a preference, any party can serve and file a demand for a statutory preference, setting forth the provision of law relied upon for the preference.<sup>40</sup>

Even in cases in which the appellate courts are not required to grant preferences, there is some predictability as to when courts will grant them. Not surprisingly, the courts appear to be more inclined to grant preferences in cases in which irreparable harm will result if the question at issue is not promptly resolved. Indeed, all the courts seem to have implicitly adopted the standards set forth by the court of appeals: To obtain the relief

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35. *Id.* 1000.7(a), (b).

36. N.Y. Civ. P.L. & R. § 5521(b) (Consol. 2001).

37. N. Y. Fam. Ct. Act § 1112 (Consol. 2001).

38. *See* 22 N.Y. Comp. Codes, R. & Regs. 800.16 (2002); 22 N.Y. Comp. Codes, R. & Regs. 1000.5 (2002).

39. *See supra* nn. 18-19, 23, 26-27, 35 and accompanying text.

40. *See* 22 N.Y. Comp. Codes, R. & Regs. 600.12(a)(1) (2002); 22 N.Y. Comp. Codes, R. & Regs. 670.7(b)(1) (2002).

sought, the party seeking the preference must make “a written showing of urgency, or potential irreparable harm, or public necessity, and, in all instances, lack of an available alternative remedy.”<sup>41</sup> Thus, for example, New York courts have granted preferences where the appellant alleged that children’s education would suffer during the appeal process,<sup>42</sup> where the appellant alleged that the State would illegally spend millions of dollars belonging to New York pensioners before the appeal could be decided,<sup>43</sup> where a juvenile alleged an ongoing violation of his right to due process,<sup>44</sup> and where the appellants alleged harm to children would occur.<sup>45</sup>

#### IV. AFTER THE COURT SPEEDS THINGS UP: PERFECTING THE APPEAL

None of New York’s appellate courts provide a special procedure for hastening the process of perfecting the appeal. The regular rules for filing a record, including the transcript of any hearing or trial, apply. Thus, the party seeking to expedite the appeal, usually the appellant, must scramble to put together the record and obtain transcripts of the trial quickly enough to move the case along without undue delay. As preparing to proceed on a fully reproduced record takes valuable time, it often makes sense for the appellant in an expedited appeal to take advantage of the alternative appellate routes: the appendix system<sup>46</sup> or the “statement in lieu of record on appeal.”<sup>47</sup> A third option is to ask the court, when first applying to expedite the appeal, for permission to file the appeal on the original record. This

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41. 22 N.Y. Comp. Codes, R. & Regs. 500.8(b) (2002).

42. *Roosevelt C. Sch. Dist.*, 723 N.Y.S.2d at 262.

43. See *McDermott*, 599 N.Y.S. at 718; *McCall*, 640 N.Y.S.2d at 347.

44. *People ex rel. Kaufmann v. Davis*, 393 N.Y.S.2d 746 (App. Div. 2d Dept. 1977).

45. E.g. *In re Emanuel S.*, 571 N.E.2d at 79.

46. See N.Y. Civ. P.L. & R. § 5528(a)(5) (Consol. 2001) (providing that the appendix is to contain “only such parts of the record . . . as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent”).

47. See N.Y. Civ. P.L. & R. § 5527 (Consol. 2001) (indicating that the statement option is appropriate when “the questions presented by an appeal can be determined without an examination of all the pleadings and proceedings,” and describing the required contents); see also Siegel, *supra* n. 3, at § 539.

procedure eliminates the need to make multiple copies of a record, thereby speeding the process considerably. Indeed, the courts specifically provide that expedited criminal appeals should be heard on the original record.<sup>48</sup> In extreme cases, the court of appeals can allow an expedited appeal to be heard on the appellate division briefs and record.<sup>49</sup> By invoking a truncated procedure with which the courts are familiar, the harried practitioner who must comply with an expedited briefing schedule in an emergency matter can eliminate some of the work needed to perfect the appeal, and so get it before the court more quickly.

## V. WHEN TO EXPECT A DECISION

The grant of a preference does not ensure a speedy decision. In some cases, particularly election cases, the courts will hear and decide a case in a matter of days.<sup>50</sup> In other situations, though, the court might sit on appeal for months before issuing a decision in a particular case, despite having granted a preference in it.<sup>51</sup>

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48. For example, the first department's rules provide that

[t]he people shall file nine copies of a brief and an appendix, which shall include a copy of the indictment and the trial court's decision and order. The respondent shall file nine copies of a brief and, if necessary, an appendix. One copy of the brief and appendix shall be served on opposing counsel. . . . The appeal may be taken on one original record, which shall include copies of the indictment, the motion papers, the trial court's decision and order, and the notice of appeal.

22 N.Y. Comp. Codes, R. & Regs. 600.8(e)(3)(i), (ii) (2002). Similarly, the third department's rules for criminal appeals brought by the people provide that "[t]he appeal may be taken on one original record, which shall include copies of the indictment, the motion papers, the trial court's decision and order, and the notice of appeal." 22 N.Y. Comp. Codes, R. & Regs. 800.14(h)(3) (2002).

49. E-mail from Peter G. Crary to Alicia R. Ouellette, *Expedited Appeal Article* (May 3, 2002) (copy on file with author). Mr. Crary, who handled the case, noted that the Comptroller requested that relief in *McCall*, 640 N.Y.S.2d at 347. The Attorney General opposed the request, and it was denied. The case then settled.

50. See, for example, *Cipolia v. Golisano*, in which leave to appeal was granted on October 25, argument was held on October 26, and a decision was issued on October 28. See *Cipolia v. Golisano*, 645 N.E.2d 1215 (N.Y. 1994) (indicating that leave to appeal was granted on October 25); *Cipolia v. Golisano*, 643 N.E.2d 514 (N.Y. 1994) (indicating that argument was held on October 26, and that the decision was issued on October 28).

51. E.g. *In re Dana G.M.*, 651 N.E.2d 920 (N.Y. 1995). Although the court granted this case a calendar preference and heard argument less than a month after leave was granted on

The court of appeals decides very few cases in less than a month from the date of the argument. Under normal circumstances, the court hears an argument during one session of its argument calendar, which lasts for a week or two every month from September to June, and issues a decision during the next month's session. The same pertains to most appeals heard on an expedited basis. Thus, expediting the appeal shortens the lawyers' deadlines, but not those that apply to the judges. Although this means that the case may not progress as quickly as the parties would like, it can at least yield a faster decision than they would be likely to secure using the briefing schedule for ordinary cases.<sup>52</sup>

The appellate divisions are even less predictable. Although they sit more regularly than the court of appeals, these intermediate courts will only rarely decide a case in days or hours. More often it takes them weeks or months. The attorney anxiously waiting for a decision has no way to know when a case pending in one of the appellate divisions' departments will be decided. And calling the clerk's office will not help at this stage. Experience indicates that the clerk will simply direct the attorney to check the daily decision lists.

## VI. CONCLUSION

Expediting an appeal in the New York courts is something of an art. The rules provide direct guidance in relatively few situations, so the attorney pursuing an expedited appeal in New York should consult the clerk of the relevant court (and perhaps an experienced appellate attorney) for guidance. If the case falls into one of the categories in which courts are required to expedite appeals, the attorney should take full advantage of the procedures sanctioned by the rules. In other cases, she should make every effort to characterize the case as one in which irreparable harm will result if the court fails promptly to hear and decide the appeal. Once a request for expedited treatment is granted, the attorney should consider submitting the case on less than a full appellate record, so that she can get it before the court

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May 9, 1995, it did not hand down a decision until November 1995. *In re Dana G.M.*, 660 N.E.2d 397 (N.Y. 1995).

52. *See supra* n. 8.

as quickly as possible. Because the courts may not issue their decisions quickly even after granting a calendar preference and an expedited briefing schedule, every day the lawyer saves in preparing the case is a day that may shorten the time her client spends waiting for a final decision.

