

## **Missed Deadlines for Filing a Notice of Appeal: Criminal Procedure Law § 460.30 to the Rescue**

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The rules of the Appellate Division require criminal defense attorneys to advise clients of their right to appeal, and to take steps to preserve that right when a client wishes to appeal.<sup>1</sup> The duty extends to all criminal convictions, including ones entered after guilty pleas, and where a client has purportedly waived the “right to appeal.” Certain issues are not forfeited by a guilty plea as a matter of law (*e.g.*, facial sufficiency of an indictment), and a waiver of the right to appeal is not always enforceable (*see e.g.*, *People v. Callahan*, 80 N.Y.2d 273 (1992)). Even when a waiver of the right to appeal is valid, the Court of Appeals has recognized a few core issues that are not subject to a general waiver of the right to appeal (*e.g.*, illegal sentences, constitutional speedy trial claims, and competency to stand trial). *See* Al O’Connor, *Nobody Gets to See the Wizard: Perfecting Appeals When Your Client Has Waived the Right to Appeal*, Public Defense Backup Center Report, Nov. 1995.

### ***“What we have here is failure to communicate”***

While counsel has a clear duty to advise a client about the right to appeal, inquire about the client’s wishes, and file a notice of appeal within 30 days of sentencing when the client so directs, the process occasionally breaks down. Sometimes lawyers simply forget to inform a client about the right to appeal, especially in negotiated plea cases where trial counsel may not be primarily focused on appellate remedies. Sometimes, lawyers wrongly conclude that a waiver of the right to appeal renders a notice of appeal legally ineffective, and so fail to discuss the issue with a client. Occasionally, a client’s written communication with counsel is delayed in the prison mail system, and counsel is not apprised of the client’s wishes within the normal time frame for filing a notice of appeal.

### **CPL § 460.30 – Extension of Time for Taking Appeal**

Fortunately, the Criminal Procedure Law (CPL) anticipates that mistakes sometimes happen, and provides a statutory mechanism for filing late notices of appeal: CPL § 460.30. The statute requires that a defendant seeking an extension of time to appeal demonstrate that the failure to timely file was the result of "(a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken." N.Y. Crim Proc. Law § 460.30(1) (McKinney 2005). The statute further requires that the motion be made with “due

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<sup>1</sup> *See* 22 NYCRR § 606.5(b) (First Department); 22 NYCRR § 671.3 (Second Department); 22 NYCRR § 821.2(a) (Third Department); 22 NYCRR § 1022.11(a) (Fourth Department). *See also* *People v. Kieffer*, 191 A.D.2d 1050, 595 N.Y.S.2d 708 (4<sup>th</sup> Dep’t 1993) (requiring that defense counsel notify the defendant in writing even if the defendant has waived his right to appeal).

diligence” after the time for the taking of such appeal has expired, and in any case, not more than one year thereafter. N.Y. Crim Proc. Law § 460.30(1) (McKinney 2005).

If either factor (a) or (b) is "conclusively substantiated by unquestionable documentary proof or are conceded by the people to be true," and the petition has been brought with due diligence, then the court must grant the extension of time. N.Y. Crim Proc. Law § 460.30(3) (McKinney 2005). If neither is shown, the court may deny the extension. N.Y. Crim Proc. Law § 460.30(4) (McKinney 2005). The court has the option of requesting a fact-finding hearing in the criminal trial court to determine whether these factors have been demonstrated. N.Y. Crim Proc. Law § 460.30(5) (McKinney 2005). However, such hearings are rarely, if ever, invoked. An order granting or denying the extension of time is appealable only if the order states that it was made “upon the law alone,” which, as illustrated below, in practice rarely occurs. Consequently, appeals to the Court of Appeals from such orders are almost unknown. N.Y. Crim Proc. Law § 460.30(6) (McKinney 2005).

Appellate courts decide CPL section 460.30 motions in summary orders that typically do not include a statement of the court’s rationale for granting or denying the motion. Consequently, there is little or no case law to guide the practitioner who wishes to file such a motion. However, recent interviews with experts, legal service provider organizations specializing in the field of appellate criminal defense – the Legal Aid Society's Criminal Appeals Unit (LAS), the Center for Appellate Litigation (CAL), and Appellate Advocates (AA), provide some helpful guidance.<sup>2</sup>

The appellate experts observed that the most commonly stated ground for a CPL § 460.30 motion is that the defendant orally requested that his counsel file a notice of appeal, but counsel failed to do so. The Legal Aid Society noted that many plea bargains include a waiver of the right to appeal, and many trial lawyers fail to recognize that some appellate claims are non-waivable. As a result, they sometimes fail to heed a client’s request to file a notice of appeal.

Several appellate providers suggested that attorney-client miscommunication concerning appellate remedies occurs because responsibility for filing a notice of appeal typically vests with a lawyer who, in most instances, has nothing further to do with the

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<sup>2</sup> The **Legal Aid Society's Criminal Practice** is the largest public defender program in the country and serves as the primary provider of indigent defense services in New York City. Its Criminal Appeals Bureau handles direct appeals of New York state court convictions to the Appellate Division and Appellate Term of the New York Supreme Court and to the New York Court of Appeals. The **Center for Appellate Litigation** is a New York not-for-profit law firm that handles appeals and post-conviction proceedings on behalf of criminal defendants in the First Department. **Appellate Advocates** is a not-for-profit public defender organization that provides representation for indigent defendants who are appealing criminal convictions in the Second Department and before the Court of Appeals. All three organizations have contracts with the state requiring them to accept several hundred assigned appeals in the First or Second Departments per year. The interviews were conducted with Cynthia Wolpert, Robert Dean, and Lynn Fahey at the Legal Aid Society, Center for Appellate Litigation, and Appellate Advocates, respectively.

case – and who often would need to track down a client in prison to notify him of his right to appeal.

The providers also noted that because appellate courts do not assign clients to them until a notice of appeal has been filed, many defendants whose trial lawyers failed to file a notice of appeal are required to navigate the CPL § 460.30 motion process *pro se*. This may explain the technical errors sometimes observed in applications, and it underscores a potentially significant gap in defense coverage, whereby defendants who may have received ineffective assistance of counsel in the trial court are left on their own to rectify counsel's shortcomings. The lesson is clear: whenever possible the CPL § 460.30 motion should be filed by counsel, and, where relevant, the “misconduct” of failing to file a timely notice of appeal for the client should be candidly admitted in the motion papers.

Providers noted that district attorneys in the First Department typically do not oppose CPL § 460.30 relief, but that district attorneys in the Second Department sometimes do. As a result, the Second Department denies a higher percentage of these motions. Even when the district attorney opposes, the court invariably decides the motion without a hearing, so all relevant facts must be pleaded in the motion papers.

How long does it typically take from the filing date to the court’s decision on a CPL § 460.30 motion? This is obviously a critical issue for clients who are serving relatively short sentences (e.g., 1 – 2 years) because a long delay would render it impossible to secure meaningful appellate review before the sentence is fully served. The good news is that all the experts agreed that New York appellate courts tend to adjudicate CPL section 460.30 motions speedily – usually in less than two months (estimates ran from 4 to 6 weeks) from the filing of the motion to its determination. Longer time frames are usually the result of a technical filing mistake in by a *pro se* defendant, which again underscores the importance of having counsel file the CPL §460.30 motion.<sup>3</sup>

One legal service provider interviewed observed that, in their experience, defendants tend to file motions for late appeal relatively soon after the 30-day regular appeal period has expired – generally within a few months – rather than waiting for the full 365-day period allowed under the statute. However, even appeals filed late in the one year period may be granted if the court finds, for example, that the defendant's counsel was negligent in failing to file an appeal at the defendant's request. None of the providers interviewed could recall any time in recent memory where an application brought outside of the one-year window was approved.

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<sup>3</sup> The Center for Appellate Litigation stated in regard to such delays: "The unusual circumstance that would make it take longer is that it was not submitted in affidavit form, or some other technical reason." Appellate Advocates stated that delays in adjudication time are sometimes also caused by the district attorneys offices' failure to timely supply the court with the necessary paperwork. The providers noted that such mistakes might increase the time for final adjudication of a CPL § 460.30 petition up to a few months."

Additionally, although the statute provides appellate courts with authority to remand for a fact-finding hearing on the motion, none of the providers interviewed have ever seen this done in practice. Nor were they aware of any case in which an application for leave to appeal to the Court of Appeals was made from a decision on a CPL § 460.30 motion.

### **Survey of First and Second Department Motions and Orders**

The opinions of the experts were borne out in our review of CPL § 460.30 motions and decisions over a six-month period (Jan. – July 2009) in the First and Second Departments.<sup>4</sup> This review revealed that the adjudication of section 460.30 motions occurs on the papers alone and on average a little over two months after filing; that the average time between the deadline to file a timely appeal and the actual filing of a successful motion to extend time is approximately four months; and that all motions brought outside of the one-year filing deadline were summarily rejected. These findings are set forth in the table below:

Department	Timing calculation	Result (days)
First Department	Average time between end of period to file notice of appeal and filing of motion	68
	Average time between filing of motion and decision on motion	83
Second Department	Average time between end of period to file notice of appeal and filing of motion	183
	Average time between filing of motion and decision on motion	56
Average of both Departments	<b>Average time between end of period to file notice of appeal and filing of motion</b>	<b>114</b>
	<b>Average time between filing of motion and decision on motion</b>	<b>72</b>

**Grounds for Relief:** In almost every case we reviewed, the defendant argued he had been unable to communicate with counsel, or that his counsel had been instructed to file an appeal but failed to do so.

<sup>4</sup> Each late appeal order between January of 2009 and July of 2009 for the Second Department was examined in hard copy in the Brooklyn Second Department courthouse. An electronic review of all First Department late appeals orders was conducted for the same time period. Through electronic review, we were able to determine dates in which underlying judgments and sentences were entered, the dates on which CPL § 460.30 applications were made, whether the DA opposed the motion, and the timing and outcome of the First Departments CPL § 460.30 adjudications. For verification of these electronic results, and to better understand the grounds being asserted in the CPL § 460.30 applications and relied upon in courts' decisions, we also conducted a hard copy review in the First Department's Manhattan courthouse of all CPL § 460.30 denials as well as a sampling of granted 460.30 motions.

For example, in *People v. Lahoz*, Ind. No. 06-00283, motion decided 6/17/2009, defense counsel declared that he had not timely received notice of appointment as appellate defense counsel due to a change in address. In other cases, lockdowns at prisons impeded the ability of counsel to consult with a client, and made it difficult for the defendant to consult the prison law library or send mail to meet the initial 30-day deadline. See *People v. England*, Ind. No. 10428/07, motion decided 3/24/2009; *People v. Negrón*, Indictment No. 275/08, motion decided 6/5/2009. In another granted motion, the defendant claimed that the district attorney threatened that he would increase the sentence if the defendant appealed. *People v. Arasena*, Indictment No. 3144/96, 7093/96, motion decided 4/14/2009. Several movants claimed that their filings were lost or misdirected. *People v. Gonzalez*, Ind. No. 10122/05, motion decided 2/26/2009.

Troublingly, by far the most common ground for relief was that counsel had failed to file a notice of appeal, despite an explicit instruction from the defendant to do so. See, e.g., *People v. Maldonado*, Ind. No. 10310/07, motion decided 3/30/2009. But as this review makes clear, section 460.30 provides an effective remedy for this error that counsel can and should employ.

**Grounds for DA's Objection.** Where CPL § 460.30 motions were contested in the Second Department, in most cases the DA's office (wrongly) insisted that a guilty plea had waived the right to appeal, and argued the motion was therefore moot. In some cases the DA argued too much time had elapsed since judgment, and cited the requirement of due diligence in the statute as a basis for opposing the application. In a few instances, the DA supported the motion. These were generally granted. District attorneys in the First Department did not object to any of the CPL § 460.30 motions in the files we reviewed.

**Grant Rate.** In the Second Department, on average, just over half of the CPL § 460.30 motions were granted (54%), whereas all of those CPL § 460.30 motions that were brought outside of the one year and thirty-day statutory deadline in the Second Department were categorically denied. In the First Department, every CPL § 460.30 motion that was timely filed within the one year and thirty day deadline was granted, and every motion filed after this statutory deadline was denied. Applicants in the First Department tended to bring their motions promptly, with an average delay of only 68 days between the deadline to file the initial notice of appeal and the time of filing a CPL § 460.30 motion. Thus, the First Department's universal grant rate was not only bolstered by a lack of DA opposition, but also by quick filings to comply with the statutory due diligence requirement. There was no record in any of the files reviewed of the court conducting a fact-finding hearing or remanding a section 460.30 application for further fact-finding. Rather, as the appellate defender interviews suggested, all 460.30 motions appear to have been decided purely on the written submissions.

**Appeal of Motion Order.** The First and Second Department files contained no record of any defendant seeking subsequent review of a CPL § 460.30 denial to the Court

of Appeals.<sup>5</sup> (We did find one motion for reconsideration - *See People v. Schaffer*, Ind. No. 939-07, motion filed 12/10/2008 that was subsequently denied.)

**Other Comments.** Each order granting additional time explicitly states with form language that the notice of appeal is deemed to have been timely filed – indicative of a *nunc pro tunc* procedure, in which a filing date is effectively applied retroactively. In addition, several motions were denied due to the defendant's having been deported (*see, e.g., People v. Fuentes*, Ind. No. 2140/05, motion decided 1/28/2009; *People v. Flores*, Ind. No. 05-00467, motion decided 1/28/2009; *People v. Peart*, Ind. No. 7577/05, motion decided 1/29/2009; *People v. Smith*, Ind. No. 293/08, motion decided 7/29/2009; *People v. Irizarry*, Ind. No. 10452/04, motion decided 5/22/2009). In each of these instances, the Appellate Division explicitly stated that it was denying these applications on the grounds that the deportation orders had mooted the defendants' state law appellate process. For this reason, failure to file a timely notice for a non-citizen defendant may be an especially grave error.

Once an appellate court grants a CPL § 460.30 application, the appeal proceeds in the normal course. Our experts appear to view late-filed appeals as indistinguishable from the direct appeal process and noted that New York appellate courts do not differentiate between an appeal timely filed pursuant to the initial deadline and one perfected after a CPL § 460.30 motion has been granted.

**Conclusion:** CPL § 460.30 is a statute the diligent attorney should strive to avoid ever having to utilize. In every criminal case resulting in a conviction, regardless of the circumstances, counsel should provide clients with written notice of the right to appeal, and should endeavor to carefully explain the process to clients who express any interest in pursuing appellate remedies. Of course, defense counsel must follow-up and file a timely notice of appeal whenever a client so requests.

However, in those rare cases where communication breaks down and a notice of appeal is not filed within 30 days of sentencing, CPL § 460.30 is available to set the client's case back on the right track. The keys to success are speed (bring the motion as soon as the default is brought to your attention) and candidness (admit your mistake if you have made one). No attorney has ever been disciplined for mistakes acknowledged in a CPL § 460.30 motion. As the above statistics make clear, timely-filed motions that set forth the necessary statutory criteria are generally granted in the First Department, and may also be granted in the Second Department, if counsel acts diligently.

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<sup>5</sup> As noted by one legal service provider interviewed, the Appellate Divisions would have to specify that its decision was based "on the law" alone in order to seek leave to appeal, an instance that the service provider could not recall previously occurring.

*\* Joanne Macri is the director of the New York State Defenders Association Criminal Defense Immigration Project. Special thanks to The Legal Aid Society Appeals Unit, Center for Appellate Litigation and Appellate Advocates as well as the Clerks Office of the Appellate Division, First and Second Departments for their assistance in researching this article.*