

INTERLOCUTORY APPEALS
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It is possible to seek review from the Appellate Division or the Supreme Court of a *pendente lite* or interim order. These orders are referred to as 'interlocutory.' In appropriate instances, the Appellate Division will grant leave to appeal when the matter is urgent, cannot be repaired in a later appeal, or the issue addresses the jurisdiction of the court.

The review process is much quicker than filing an appeal at the conclusion of the case, but the legal standard is much higher. Generally speaking, from start to finish a 'motion for leave to appeal' or an 'interlocutory appeal' (these terms will be used interchangeably) will generally be decided within 45 days of the entry of the order of the trial court. On the other hand, a notice of appeal need not be filed until 45 days after the entry of an order.

The Appellate Division does not obtain jurisdiction to entertain an issue until either a notice of appeal (*Rule 2:2-3, Rule 2:5-1*) or a motion for leave to appeal (*Rule 2:2-4, Rule 2:5-6*) has been filed. If an order does not finally determine the entire case or does not finally determine all issues raised in a post-judgment motion, and there are further steps necessary before the court to fully adjudicate the matter, the order is interlocutory. (See generally, *Rule 2:2-4, Moon v. Warren Haven Nursing Home*, 182 N.J. 507 (2005)). The Supreme Court will also entertain motions in matters pending before it and to review interlocutory decisions of the Appellate Division.

The trial court may certify as final an otherwise interlocutory determination under *Rule 4:42-2*. However, the Appellate Division is not bound by this determination and a motion for leave to appeal should still be filed. The trial court has no authority to grant leave to appeal. This determination rests solely in the Appellate Division. See generally, *Vitanza v. James*, 397 N.J.Super. 516 (App.Div.2008); *Janicky v. Point Bay Fuel Inc.*, 396 N.J.Super. 545 (App.Div.1007)

If you are not sure, whether the order is final or interlocutory then both a motion for leave to appeal and a notice of appeal can and should be filed. The motion for leave to appeal must be filed within 20 days following the date of service of the order. *Rule 2:5-6(a)*. Your motion and appendix pursuant to *Rule 2:8-1* must be filed with the Appellate or Supreme Court within 20 days

of the date that you receive the order that you want to appeal. However, a notice of appeal need not be filed until 45 days after the receipt of the order.

The formal requirements of Rule 2:8-1 apply to motions for leave to appeal. Every motion must be accompanied by a brief, whether one submits a letter brief or a formal brief. An appendix containing the judgment or order and any opinion or statement of findings and conclusions from the lower court, as well as other parts of the record upon which the movant may rely. See Rule 2:6-10 and Rule 2:8-1. A Civil Case Information Statement and Notice of Appeal are not required. However, the other requirements of service on all parties, the filing of an affidavit of service, and other formatting requirements of the Part 2 Rules must be adhered to. A copy of the motion must be sent to the trial judge, and if seeking leave from the Supreme Court, then the appellate division clerk must be served.

Although a motion brief may not exceed twenty-five pages, the brief must contain argument on both why leave to appeal should be granted and the merits of the issues sought to be appealed. The court may elect to decide the merits of the appeal and the request for leave to appeal simultaneously. See, Rule 2:11-2. Therefore, do not assume that a request for leave to appeal will be granted and then a briefing schedule will be sent to the parties. Likewise, if you are the respondent - file a respondent's brief. Even if you do not address the appellant's request for leave to appeal, deal with the substantive issues to protect your client's interests.

The Appellate Division grants leave to appeal in the interest of justice. Rule 2:2-4. The Supreme Court will grant leave to prevent irreparable injury. Rule 2:2-2(b). So what is in the interest of justice or irreparable injury in a Family Part case? In *Fischer v. Fischer*, 375 N.J. Super. 278 (App.Div.2005), the Court granted leave to appeal to determine whether a Family Part Judge could direct the return of a retainer when permitting an attorney's withdrawal from a matrimonial action. The Appellate Division has granted leave to appeal to consider the following questions: 1) whether the trial court erred in changing custody without the benefit of a trial or plenary hearing; 2) whether the court had the authority under Rule 2:9-1 to enter an order. *Entress v. Entress*, 376 N.J. Super. 125, 132 (App.Div.2005). In *Maragliano v. Maragliano*, 321 N.J. Super. 78 (App.Div.1999) the Appellate Division granted leave to appeal an interlocutory order, which denied the husband's request to have a previously court appointed receiver removed. In *A v. B*, 158 N.J. 51

(1999), leave to appeal was granted to determine whether a law firm may disclose confidential information of one co-client to another co-client.

Leave to appeal is reserved for the immediate determine of trial court errors that cannot be corrected after a trial or hearing. Do not seek leave to appeal a *pendente lite* order granting the parties joint legal custody with the mother being designated as the custodial parent. Do appeal a *pendente lite* order permitting the custodial parent to remove a child from the county of venue (or state, or country). These are just a few examples and certainly should not be used as a guide as to what will be successful as an interlocutory appeal. Just remember that the issue must reek of a legal injustice such that the court will want to immediately intervene.

Since there is no oral argument on motions at the Appellate Division, a powerful written argument must be set forth in the brief. Do not hold back anything for later, as this may be your last chance to speak to the court on the issues presented.

In the Supreme Court, one should also address the merits of the case, not just why the motion should be granted. The briefs submitted to the Appellate Division in applying for leave to appeal may also be relied on in the Supreme Court. A new motion must be prepared appropriately captioning the matter for the Supreme Court and a new affidavit setting for the updated procedural history should be submitted, as well as an updated appendix. One need not use "Supreme Court Covers" unless the briefs have been rewritten.

Finally, obtain a copy of the transcript on an expedited basis. If you cannot obtain the transcript within the time limitation, an affidavit in lieu thereof, setting forth the substance of the testimony/proceeding/decision, may be filed. See Rule 2:8-1(a) However, there are few (if any) situations where the transcript cannot be obtained within the 20 days. It costs the client more money, but is well worth the result. Additionally, if you cannot obtain the transcript order the audio tape of the proceeding and have it converted to a digital format. Again, this process may be costly to complete in a short period of time, but it is certainly manageable if one plans accordingly. Some of the appellate division judges will review the audio recording, some will not. Contact the chambers to determine the preference of the judges after the motion is filed.

Only 17% of civil motions for leave to appeal are granted. Therefore, the chances are that your application will not be successful. Thus, one should critically consider the cost benefit analysis and discuss this with the client.

In preparing for a possibility interlocutory appeal, try to identify the legal issue ripe for such an application before it is even presented to the trial court. When there is a case with an unusual legal question, or a strange fact pattern, be prepared to follow through with a motion for leave to appeal. If an issue is raised before the trial court, that the court could enter an order that would be highly prejudicial to the final determination of the case, file a brief or memorandum of law before the motion is heard. Discuss the issue with your client and explain to her that if the Judge decides against you, then the matter can be taken to the Appellate Division. Explain the process and that a quick decision needs to be made. Have their authority to prepare the motion for leave to appeal and get a babysitter for the weekend.

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