FROM THE GROUND UP: THE FUNDAMENTALS OF PRACTICE IN THE D.C. COURT OF APPEALS

Updated By Rosanna Mason[1]

I. Jurisdiction.

A. The Court has jurisdiction over "all final orders and judgments of the Superior Court," D.C. Code § 11-721 (a)(1) (2001), and any final "order or decision of the Mayor or an agency in a contested case." *Id.* § 2-510 (a) (2001).

1. Who may appeal?

a. Any person who is "aggrieved" by a final order or judgment of the Superior Court. *In re C.T.*, 724 A.2d 590, 595 (D.C. 1999).

b. Any person who has suffered a legal wrong or been adversely affected or "aggrieved" by an order or decision of an agency in a contested case. D.C. Code § 2-510 (a) (2001).

i. A person is "aggrieved," if his legal right or legally protected relationship has been injured or denied by the Superior Court's order, *Valentine v. Elliott*, 891 A.2d 698, 1003 (D.C. 2003); *In re C.T.*, 724 A.2d at 595, or "[if the person has] suffered or will sustain some actual or threatened 'injury in fact' from the challenged agency action," *District Intown Props., Ltd. v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 680 A.2d 1373, 1377 (D.C. 1996).

c. Anyone "who voted in an election" may petition the Court for review and ask that it "set aside the results . . . and declare the true results[,]" or that it void the election in whole or part. D.C. Code § 1-1001.11 (b) (2001).

i. But the petition must contain a concise statement of claims and must identify facts showing an entitlement

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to relief; general allegations of dissatisfaction with the results are not sufficient to involve the Court. *Jackson v. District of Columbia Bd. of Elections and Ethics*, 770 A.2d 79 (D.C. 2001); *accord*, *Scolaro v. District of Columbia Bd. of Elections and Ethics*, 717 A.2d 891, 893 (D.C. 1998).

d. Any qualified voter who challenged a nominating petition, or any person named in the challenged petition as a nominee, may appeal a Board of Elections decision with respect to the challenge. D.C. Code § 1-1001.08 (o)(2) (2001).

2. What is a "final" order?

a. "An order is final only if it disposes of the whole case on its merits, so that the [trial] court has nothing remaining to do but to execute the judgment or decree already rendered." *In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (en banc) (Internal quotation marks omitted) (quoting *McBryde v. Metropolitan Life Ins. Co.*, 221 A.2d 718, 720 (D.C. 1966)).

b. A final order is **NOT**:

i. A pretrial discovery order. *Crane v. Crane*, 657 A.2d 312, 315 (D.C. 1995); *Scott v. Jackson*, 596 A.2d 523, 527 (D.C. 1991); *Horton v. United States*, 591 A.2d 1280, 1282 (D.C. 1991); *United States v. Harrod*, 428 A.2d 30, 31 (D.C. 1981) (en banc). Unless, it is directed to a disinterested third party. *Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929 (D.C. 2004); *accord*, *Adams v. Franklin*, 924 A.2d 993, 995 n.2 (D.C. 2007).

ii. A contempt order <u>unless</u> sanctions have actually been imposed. *Crane v. Crane*, 614 A.2d 935, 939 (D.C. 1992); *Beckwith v. Beckwith*, 379 A.2d 955, 958 (D.C. 1977).

iii. A neglect finding alone; a disposition order must also be entered before the case is final. *In re A.B.*, 486 A.2d 1167 (D.C. 1984); *accord*, *In re Ak.V*, 747 A.2d 570 (D.C. 2000).

iv. An order that does anything less than completely terminate a parent's rights with respect to his or her children or forecloses all visitation between a parent and child. *In re K.M.T.*, 795 A.2d 688 (D.C. 2002); *In re S.J.*, 772 A.2d 247, 248 (D.C. 2001); *In re S.G.*, 663 A.2d 1215 (D.C. 1995); *In re A.H.*, 590 A.2d 123 (D.C. 1991); **but also *see*** *In re M.F.*, 55 A.3d 373 (D.C. 2012) (stating an order that completely cuts off visitation temporarily is not appealable as a final order due to its temporary nature where visitation could resume upon the meeting of specific conditions). **However,** the court recently held in an en banc petition that a change of permancy goal from reunification to adoption is immediately appealable and the court favors resolution on cross-motions for summary disposition. *In re Ta.L.*, 19 A.3d 1060 (D.C. 2016) (en banc).

v. An order that is issued before the prescribed administrative remedy has been exhausted. *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 20 (D.C. 1993); *Bender v. District of Columbia Dep't of Emp't Servs.*, 562 A.2d 1205, 1208 (D.C. 1989).

vi. An order that has been issued by a Magistrate Judge. D.C. Code § 11-1732 (k) (2001). These orders do not become final for the purposes of appeal until they have been reviewed by an Associate Judge of the Superior Court. Often neglect, initial detention hearings, and traffic cases are initially heard by a Magistrate Judge. *See* i*d; see also* Super. Ct. Civ. R. 73 (b); D.C. Fam. Ct. R. 10 (f); *Bratcher v. United States*, 604 A.2d 858 (D.C. 1992); *Arlt v. United States*, 562 A.2d 633 (D.C. 1989).

vii. An order that leaves any cause of action unresolved against any party or any claims in a consolidated matter unresolved. *West v. Morris*, 711 A.2d 1269, 1271 (D.C. 1998); *Paden v. Galloway*, 550 A.2d 1128 (D.C. 1988); *Dyhouse v. Baylor*, 455 A.2d 900 (D.C. 1983). However, *see* D.C. Super. Ct. Civ. R. 54 (b).

c. The Court has also long held that an order compelling arbitration or staying a case pending arbitration is not final or appealable. *See, e.g., Evans v. Dreyfuss Bros.*, 971 A.2d 179 (D.C. 2009) (citing *Judith v. Graphic Commc'ns Intl Union*, 727 A.2d 890 (D.C. 1999)); *Umana v. Swidler & Berlin*, 669 A.2d 717 (D.C. 1995); *Haynes v. Kuder*, 591 A.2d 1286 (D.C. 1991). The D.C. Council, however, has revised the statute to adopt the Uniform Arbitration Act, which makes these orders appealable. D.C. Code § 16-4427 (2009 Supp.). Because this arguably violates the Home Rule Act, which prohibits the Council from enacting legislation affecting the courts, s*ee* D.C. Code § 1-206.02 (a)(4) (2006 Repl.), the Court must address whether these revisions violate the Home Rule Act. This court has now held that certain orders granting arbitration are appealable, *Parker v. K&L Gates, LLP, 76 A.3d 859 (D.C. 2013)*; but see, *Andrew v. Am. Imp. Ctr.*, 110 A.3d 626, 636 (D.C. Feb. 26, 2015) (holding in the limited circumstance where a consumer claims that an arbitration clause in a contract of adhesion is unconscionable, the (alleged) injury (i.e. the unconscionability of the contract) is serious enough to give this court jurisdiction under D.C. Code § 11-721 (a)(2)(A) (2012 Repl.) but reserving "judgment as to whether an appeal of a ruling compelling arbitration that does not emanate from a challenge to an arbitration clause in a contract of adhesion might lie in some other circumstance or whether § 16-4427 as applied in other contexts might violate § 602(a)(4) of the Home Rule Act").

3. What is a "contested case?"

a. A contested case is a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a hearing. D.C.

Code § 2-502 (8) (2001); *Richard Milburn Pub. Charter Alt. High School v. Cafritz*, 798 A.2d 531 (D.C. 2002); *Singleton v. District of Columbia Dep't of Corr.*, 596 A.2d 56 (D.C. 1991); *Chevy Chase Citizen's Ass'n v. District of Columbia Council*, 327 A.2d 310 (D.C. 1974) (en banc). The hearing must be a "trial-type" adjudicative proceeding that affects the interests of specific parties, not a rule-making proceeding. **However**, the court has held that an administrative order terminating someone from the housing voucher program with Housing Authority is appealable to DCCA, *Mathis v. District of Columbia Housing Authority*, 124 A.3d 1089 (D.C. 2015).

b. A contested case does **NOT** include:

i. Any matter subject to a subsequent trial *de novo*. D.C. Code § 2-502 (8)(a) (2001).

ii. Any matter involving the selection or tenure of a District officer or employee. *Id.* § 2-502 (8)(b).

iii. Any proceeding in which decisions rest solely on inspections, tests, or elections. *Id.* § 2-502 (8)(c).

iv. Any case where the Mayor or an agency acts as an agent or court for the District. *Id.* § 2-502 (8)(d).

c. **NOTE** - Many administrative matters are now appealed to the Office of Administrative Hearings and appeals from these orders are generally taken to the Court of Appeals. However, you must check the statutes since some of these orders must be appealed to other agencies prior to the filing of an appeal with the Court of Appeals; e.g. some housing cases must be appealed first to the Rental Housing Commission and some licensing issues must first be appealed to the various licensing boards.

4. When do I appeal?

a. In civil or criminal proceedings the appeal must be taken within 30 days from the date the order or judgment is entered on the docket of the Superior Court unless a different time

frame is specified by the D.C. Code. *See* D.C. App. R. 4 (a)(1), (b)(1). If the order is entered outside the presence of the parties, the time for calculating the time for filing a notice of appeal does not start until after the fifth day the Clerk of Superior Court has made an entry on the docket. See D.C. App. R. 4 (a)(6), **but see,** *Clark v. Bridges*, No. 12-CV-49 (D.C. Aug. 22, 2013) (Because the Superior Court no longer requires mailing of its judgments or orders, D.C. App. R. 4 (a)(6), that provides for an additional five days to be added to the time for noting an appeal if the judgment was required to be mailed, no longer applies and a notice of appeal must be filed within 30 days from entry of the judgment or order on the docket).

b. In administrative proceedings the petition for review must be filed within 30 days after notice is given in conformance with the agency's rules. D.C. App. R. 15 (a)(2). **Exceptions:**

i. A contractor may appeal a decision of the Contract Appeals Board within 120 days, D.C. Code § 2-309.05 (a) (2001).

ii. Public Service Commission orders denying reconsideration may be appealed within 60 days. *Id.* § 34-605 (a).

c. Any challenge to the results of an election must be brought within 7 days after the Board of Elections & Ethics certifies the results. *Id*. § 1-1001.11 (b). Any challenge to the Board's determination with respect to the validity of a nominating petition must be brought within 3 days after announcement of the determination. *Id*. § 1-1001.08 (o)(2).

d. Regardless of the type of proceeding, the time period is mandatory and the Court will not hear an appeal filed after it has expired. *See, e.g., Flores v. District of Columbia Rental Hous. Comm'n,* 547 A.2d 1000 (D.C. 1988) (agency proceedings); *United States v. Jones*, 423 A.2d 193, 196 (D.C. 1980) (criminal appeals); *In re C.I.T.*, 369 A.2d 171

(D.C. 1977) (civil appeals).

i. **Exceptions**: Certain post-trial motions will toll the time for noting an appeal until they have been acted upon. *See* D.C. App. R. 4 (a)(4), (b)(3). Take care, however, to see that the motion itself is timely or it may not toll the appeal time. *See Wilkins v. Bell*, 917 A.2d 1074 (D.C. 2007); *Vincent v. Anderson*, 621 A.2d 367, 370 (D.C. 1993). B*ut see Affordable Elegance Travel, Inc. v. Worldspan L.P.*, 774 A.2d 320, 330-32 (D.C. 2001) (discussing exceptions). Tolling motions include:

A. A motion for judgment notwithstanding the verdict, *a.k.a.* a motion for judgment as a matter of law, under Super. Ct. Civ. R. 50 (b).

B. A motion to amend or make additional findings of fact under Super. Ct. Civ. R. 52 (b).

C. A motion for "reconsideration," *a.k.a.* a motion to vacate, alter, or amend the judgment under Super. Ct. Civ. R. 59 (e).

D. A motion for new trial under Super. Ct. Civ. R. 59 (b).

E. A motion for relief from judgment under Super. Ct. Civ. R. 60 (b) or other basis so long as the motion is filed no later than 10 days after the judgment is entered. This type of motion was not always tolling. *See Nichols v. First Union Nat'l Bank*, 905 A.2d 268 (D.C. 2006).

F. A motion for judgment of acquittal under Super. Ct. Crim. R. 29.

G. A motion in arrest of judgment under Super. Ct. Crim. R. 34.

H. A motion for new trial on grounds other than

newly discovered evidence under Super. Ct. Crim. R. 33.

I. A motion for new trial based on newly discovered evidence under Super. Ct. Crim. R. 33, if filed within 30 days of the judgment.

B. In two situations the Court's review is discretionary and must be sought by filing an Application for Allowance of Appeal ("AAA"). They are: 1) judgments of the Small Claims Branch and 2) judgments in criminal cases where the potential penalty is up to 1 year of imprisonment, and/or a fine of up to $1,000, but where the defendant has actually been fined less than $50. D.C. Code §§ 11-721 (c), 17-301 (b) (2001); D.C. App. R. 6.

1. Since Small Claims proceedings are frequently heard by Magistrate Judges, it's important to remember the decision is not final until it has been reviewed by an Associate Judge. In civil cases, the time frame for doing this is very short – 10 days, *see* Super. Ct. Civ. R. 73 (b)-(c), but the period is longer in Family Court cases – 30 days (for child support issues and orders determining paternity), *see* D.C. Super. Ct. Fam. Ct. R. D (e).

2. The time frame for filing an AAA is very short; it must be filed within 3 days of the Superior Court's order. D.C. Code § 17-307 (b) (2001); D.C. App. R. 6 (a)(2). Parties have occasionally been misinstructed on this point and told they have 30 days. Also *Clark v Bridges*, No. 12-CV-49 (Aug. 22, 2013), impacts the time period for filing these applications; however, unlike D.C. App. R. 4, D.C. App. R. 6 does not provide for any extension of time to file the application.

3. An AAA will be granted if one judge of the Court believes that it should be; otherwise, it will be denied and the denial acts as an affirmance of the lower court's decision. D.C. Code § 17-301 (b) (2001).

4. The Court will not grant an AAA unless the applicant can demonstrate "apparent error or a question of law [that], has not been, but should be decided by th[e] court." *Karath v. Generalis*, 277 A.2d 650, 651 (D.C. 1971); *accord, K.C. Enter. v. Jennings*, 851 A.2d 426 (D.C. 2004); *W.H.H. Trice & Co. v. Faris*, 829 A.2d 189 (D.C.

2003).

C. The Court also has jurisdiction over certain interlocutory matters.

1. **By statute** it may review non-final orders of the Superior Court that:

a. Grant, continue, modify, refuse, or dissolve an injunction, or that refuse to dissolve or modify an injunction. D.C. Code § 11-721 (a)(2)(A) (2001).

b. Appoint receivers, guardians, or conservators, or that refuse to wind up receiverships, guardianships, or the administration of conservators or take steps to accomplish their purpose. *Id*. § 11-721 (a)(2)(B).

c. Change or affect the possession of property. *Id*. § 11-721 (a)(2)(C).

i. This does not apply to orders that involve the exchange of money. *See Dameron v. Capitol House Assocs., Ltd.*, 431 A.2d 580, 587 (D.C. 1981); *accord*, *Hagner Mgmt. Corp. v. Lawson*, 534 A.2d 343, 345 (D.C. 1987).

ii. The key question is whether the order changes the *status quo* with respect to the property. *See Bowie v. Nicholson*, 705 A.2d 290 (D.C. 1998); *Williams v. Dudley Trust Found.*, 675 A.2d 45, 51 (D.C. 1996).

iii. Appeals from these interlocutory orders (and presumably from any interlocutory order) are not mandatory, and a party adversely affected by such an order may await the final judgment before noting an appeal. *Estate of Patterson v. Sharek*, 924 A.2d 1005 (D.C. 2007).

d. Detain an individual pending trial or appeal in criminal cases. *See* D.C. Code § 23-1324 (2001). In addition, the Court has held that, unlike a typical motion to reconsider, an order denying a motion to reconsider a pre-trial detention order is appealable even if no timely appeal was taken from the

original detention order itself. *Blackson v. United States*, 897 A.2d 187, 192-93 (D.C. 2006).

e. Detain or place a child in shelter care, or transfer a child for criminal prosecution. D.C. Code §16-2328 (a) (2001).

   i. As with AAAs, the time for bringing an appeal from these juvenile detention or transfer orders is shortened. The notice must be filed within 2 days of the date of entry. *Id.* But once the notice is timely filed, the Court must expedite the case and hear argument within three days of the notice (Sundays excluded). *Id.* § 16-2328 (b).

   ii. If the notice is not filed within 2 days, but is filed within 30 days, no hearing is required. However, the Court will expedite resolution of the matter and prefers to address these cases on cross-motions for summary disposition.

f. Direct the United States or the District of Columbia to return seized property, suppress evidence, or otherwise deny the prosecutor the use of evidence at trial. *Id.* § 23-104.

g. Direct that someone be extradited. *Id.* § 23-704 (e).

   i. Again, the time frame is shortened. This order must be appealed within 24 hours. *Id.* (And move for an immediate stay).

h. Dismiss an indictment or information, or otherwise terminate prosecution in favor of the defendant (short of acquittal). *Id.* §§ 23-104 (c), 11-721 (a)(3).

i. Determine that a person is not subject to penalty enhancements. *Id.* §§ 23-111 (d)(2), 11-721 (a)(3).

j. Determine any appeal or decision of the Public Service Commission. *Id.* § 34-605 (a).

   i. Here, as noted, the time for taking an appeal is

expanded to 60 days.

k. The trial court has certified as presenting a controlling question of law as to which there is a substantial ground for a difference of opinion, and for which an immediate appeal may materially advance the ultimate termination of the litigation or case. *Id.* § 11-721 (d) (2001). *See* D.C. App. R. 5.

i. Review under this section is reserved for exceptional cases and the statute is not "intended merely to provide (interlocutory) review of difficult rulings in hard cases." *Plunkett v. Gill*, 287 A.2d 543, 545 (D.C. 1972) (quoting *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1996)); *accord*, *Medlantic Health Care Grp., Inc. v. Cunningham*, 755 A.2d 1032 (D.C. 2000).

ii. The trial court's certification does not guarantee review and the Court will deny the application – an AAA is the means for seeking review – if it concludes the case was improvidently certified. *In re: J.A.P.*, 749 A.2d 715, 716 (D.C. 2000).

iii. The Court has never specifically required the trial court to articulate detailed reasons for certifying an order under this section, but it has intimated that something more than a bare quotation of the statutory language is required. *Id.* at 717.

iv. The time for filing an application for permission to appeal is shortened to 10 days after the issuance or entry of the ruling or order that contains the certification.

2. The only **non-statutory exception** to the finality rule "unequivocally recognized" by the Court is the **collateral order doctrine**. *Meyers v. United States*, 730 A.2d 155, 156 (D.C. 1999). This very narrow exception applies to interlocutory orders that have

a final and irreparable effect on an important right of the parties. *Bible Way Church v. Beard*, 680 A.2d 419, 425 (D.C. 1996).

a. To be collaterally appealable, an order must 1) conclusively resolve an important and disputed question, 2) that is completely separate from the merits of the action, and 3) is effectively unreviewable on appeal from a final judgment. *Id.* at 425-26. **All parts** of this test must be met, before the Court will take jurisdiction.

b. Orders most typically deemed appealable under the collateral order doctrine are those denying claims of complete immunity, *see District of Columbia v. Pizzulli*, 917 A.2d 620, 623-34 (D.C. 2007); *Bible Way, supra*; *United Methodist Church v. White*, 571 A.2d 790 (D.C. 1990), others include denials of motions to dismiss an indictment based on double jeopardy grounds, *Young v. United States*, 745 A.2d 943, 945 (D.C. 2000), and denials of motions to intervene as of right, *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 798 (D.C. 1975); *see also In re Gordon*, 59 A.3d 497 (D.C. 2013) (dismissing an appeal from the denial of counsel's motion to withdraw finding that appellant must appeal after the denial of the motion, not after the entry of final judgment).

i. Denials of motions to dismiss based on *forum non conveniens* were once included in this category, s*ee Frost v. Peoples Drug Store*, 327 A.2d 810, 812 (D.C. 1974), but the Court has since overruled *Frost*, *see Rolinski v. Lewis*, 828 A.2d 739 (D.C. 2003) (en banc).

c. It also appears that an order which completely denies a parent's right to visitation is interlocutorily appealable; however, the Court has not directly held that the collateral order doctrine applies. *See, e.g., In re D.M.*, 771 A.2d 360 (D.C. 2001).

D. Extraordinary writs (mandamus or prohibition)

1. A petition for writ of mandamus may be filed in cases "where a trial court has refused to exercise or has exceeded its jurisdiction," or similarly, when a government official has refused to exercise or has

exceeded his or her authority. *See Banov v. Kennedy*, 694 A.2d 850, 857 (D.C. 1996); *United States v. Harrod*, 428 A.2d 30 (D.C. 1981) (en banc); *United States v. Braman*, 327 A.2d 530 (D.C. 1974).

a. It is questionable whether the Court may issue the writ to a federal official. *Compare M'Clung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821), *with Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838).

2. Mandamus is NOT a substitute for appeal. *Banov*, 694 A.2d at 857.

3. The petitioner must show that its right to the writ is clear and indisputable, and that it has no other adequate means of obtaining relief. *Id.*

4. If the Court is of the opinion that the writ should not be granted, it will deny the petition; otherwise, it will hold the petition in abeyance and order the respondent(s) to file an answer. D.C. App. R. 21 (b)(1). However, the Court is typically reluctant to issue the writ and if the respondent's answer is unsatisfactory, it usually issues an opinion or memorandum order (with a certified copy to the offending official or entity) explaining why mandamus is appropriate and expressing its confidence that the correct action will be taken. *See Anderson v. Sorrell*, 481 A.2d 766 (D.C. 1984); *Bowman v. United States*, 412 A.2d 10 (D.C. 1980).

II. Stays, Emergencies, and Expedited Matters.

A. Stays.

1. Noting an appeal does not mean that you've stopped any proceeding below or stayed enforcement of any order or judgment. You must seek a stay if you want to preserve the *status quo* pending appeal.

a. Juvenile interlocutory appeals under D.C. Code §16-2328 (2001) are the single exception to this rule and a notice filed under this rule will automatically stay criminal proceedings so that the child is not transferred. *Id.* § 16-2328 (c).

2. A stay must first be sought from the trial court or agency or the movant must show that seeking it from that entity is impracticable.

D.C. App. R. 8 (a), 18 (a). This rule is strictly construed. *See Horton v. United States*, 591 A.2d 1280 (D.C. 1991).

3. If the record has not been filed then attach a copy of the order to be stayed and any relevant record material. D.C. App. R. 8 (a)(2)(B).

4. To obtain a stay pending appeal the movant must show: 1) a likelihood of success on the merits, 2) that irreparable harm will result if a stay is not entered, 3) that the nonmoving party will not be harmed (or will suffer less harm), and 4) that the public interest favors granting the stay. *See Barry v. Washington Post Co*., 529 A.2d 319, 321 (D.C. 1987). When the last three factors have been met, only a "substantial" showing of likelihood of success on the merits is necessary for the Court to grant a stay. *Id*. The required degree of possible or likely success will vary according to the Court's assessment of the other stay factors, and an order maintaining the *status quo* may be appropriate where a serious legal question is presented, the movant will otherwise suffer irreparable injury, and there is little risk of harm to the other parties or to the public interest. *See Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929 (D.C. 2004).

5. A stay may be conditioned on the posting of a supersedeas bond. D.C. App. R. 8 (b), 18 (b).

6. **Tips:**

   a. File sooner rather than later: don't wait until the marshals are on their way to evict your client, the foreclosure sale is about to occur, or it's the day the action that you want stopped is to occur.

   b. Contact the Clerk's office and ask to speak with Staff Counsel or an attorney on the legal staff to alert the Court of a pending emergency or expedited request to stay. You should also identify for the Court the date the action you seek to stay will occur and whether a transcript is needed and the date ordered.

   c. Address the legal standard, explicitly. Broad complaints about the grievous injustice done to your client by the trial

judge or the other side are not persuasive.

d. Economic loss is not irreparable harm unless it threatens the very existence of the movant's business, *see District of Columbia v. Grp. Ins. Admin.*, 633 A.2d 2, 23 (D.C. 1993), nor are the ordinary incidents of litigation, *i.e.*, time and money, s*ee Hercules & Co., Ltd. v. Shama Rest. Corp.*, 566 A.2d 31, 37-38 (D.C. 1989). Moreover, the possibility that compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003).

e. If you want the Court to expedite consideration of your motion then **serve your opponent personally**. D.C. App. R. 8 (a)(2)(C).

B. Release in criminal cases.

1. A person who has been detained pending trial or sentencing may take an immediate appeal from the detention order, D.C. Code §§ 23-1324, 23-1325 (b), 23-1325 (d) (2001), and the Court will generally resolve the appeal by cross-motions for summary disposition, *see Martin v. United States*, 614 A.2d 51, 53 (D.C. 1992); D.C. App. R. 9 (a). As noted above, the Court has also recently held that denials of motions to reconsider pretrial detention orders, unlike denials of most other motions to reconsider, are interlocutorily appealable.

2. Persons who are detained pending appeal may also seek review of the detention order, D.C. Code §§ 23-1324, 23-1325 (c)-(d) (2001), but should do so by motion in their existing appeal rather than by filing a separate appeal, D.C. App. R. 9 (b). Moreover, the request should first be made in the Superior Court.

3. Detention matters are expedited. D.C. Code § 23-1324 (b) (2001); D.C. App. R. 4 (c), 9.

4. The order under review must be attached to the motion as well as an affidavit addressing all of the points enumerated in Form 6 of the Court's rules. D.C. App. R. 9. Your motion should also identify whether the 100 day rule is applicable and, if so, the 100th day of detention. D.C. Code § 23-1322 (h).

5. Have the transcript prepared and transmitted ASAP (especially if there's no written order). This means either ordering the transcript on an expedited basis or requesting that the voucher authorize expedited preparation in CJA cases.

6. **Tips**:

   a. There are several standards at play and, again, it is important to specifically and concisely address each one.

      i. A motion for summary disposition must show that the facts are uncomplicated and undisputed, and that the lower court's ruling rests on a narrow and clear-cut issue of law. *See Watson v. United States,* No. 12-CM-871 (D.C. Aug. 8, 2013); *Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979). The movant "has the heavy burden of demonstrating both that his remedy is proper and that the merits of his claim so clearly warrant relief as to justify expedited action." *Carr, supra*.

      ii. In the pretrial detention context, liberty is the norm unless the trial judge finds probable cause to believe that a person has committed a crime of violence or a dangerous crime, and finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure that person's appearance in court, or the safety of any other person or the community. D.C. Code § 23-1322 (b)(2) (2001). Certain offenses are presumed dangerous, *see* D.C. Code § 23-1331 (3) & (4); therefore, there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of a person or the community, *see* D.C. Code § 23-1322 (c). The judge must also take a laundry list of

other factors into consideration. *Id*. § 23-1322 (e).

iii. A person who has been convicted and is awaiting sentence, or whose appeal is pending, will be detained unless the trial judge "finds by clear and convincing evidence that he is not likely to flee or pose a danger to any other person or to the property of others." *Id.* § 23-1325. But since a finding of guilt has been made, detention is the norm unless the trial court finds, by clear and convincing evidence, that exceptional circumstances justify a departure from the norm. *See Ibn-Tamas v. United States*, 368 A.2d 520, 521 (D.C. 1977).

iv. But whatever the standard, the Court's review is deferential, particularly with respect to the trial court's factual findings, and it will not substitute its assessment of dangerousness or risk of flight. *Pope v. United States*, 739 A.2d 819, 824 (D.C. 1999).

III. Practice Pointers.

A. Filing a Notice of Appeal (civil and criminal cases) or a Petition for Review (agency cases).

1. A notice of appeal is filed with the Clerk of the Superior Court, D.C. App. R. 3 (a), 4 (a)(1), (b)(1), but petitions for review and applications for allowance of appeal are filed with the Court of Appeals. D.C. App. R. 6 (a), 15 (a).

2. Specify the party or parties taking the appeal and designate the judgment or order(s) to be reviewed. D.C. App. R. 3 (c), 15 (a)(3). *See Patterson v. District of Columbia*, 995 A.2d 167 (D.C. 2010); *Vines v. Mfrs. Traders Trust Co.*, 955 A.2d 1078, 1083 (D.C. 2007).

3. The notice or petition must be signed by the appellant or its counsel. D.C. App. R. 3 (c), 15 (a). If any party is not an individual person it must be represented by counsel.

4. The Clerk of the Superior Court serves the notice on the other parties, and the Clerk of the Court of Appeals serves the petition on

the respondent agency and the Office of the Attorney General, D.C. App. R. 3 (d), 15 (c); however, the petitioner must serve copies of the petition on any other party and must file a list of those served with the Clerk of the Court, *id*.

a. This does not apply to cases from the Office of Administrative Hearings, where the respondent is not the agency. In those cases, the Clerk serves the respondent employer or the claimant.

B. Record preparation.

1. The record consists of the original papers and exhibits filed in the Superior Court, any transcripts, and a certified copy of the docket entries which is prepared by the Clerk of that court. D.C. App. R. 10 (a).

2. Within 10 days after filing the notice of appeal, an appellant must either order the parts of the transcript it considers necessary or file a certificate stating that no transcript will be ordered. D.C. App. R.10 (b)(1).

a. Unless the entire transcript is ordered, the appellant must, within the same 10 days, file a statement of issues to be presented on appeal and serve a copy of that statement as well as a copy of the transcript order or certificate on all other parties. D.C. App. R. 10 (b)(3).

b. If another party considers additional transcript necessary, it may designate the additional parts to be ordered within 10 days after receiving the appellant's transcript order or certificate and statement of issues. *Id*.

c. If the appellant fails to order the additional transcript within 10 more days, the designating party may either order those parts or move the Superior Court for an order requiring the appellant to do so. *Id*.

d. Exceptions: In criminal and juvenile cases, in which counsel has been appointed under the Criminal Justice Act, the transcripts are prepared automatically and no order is required. D.C. App. R. 10 (b)(5)(B). But if pretrial proceeding transcripts (other than hearings on motions to suppress) or sentencing transcripts are needed, a motion for their preparation must be approved by the trial judge. *Id*. *See also Gaskins v. United States*, 265 A.2d 589 (D.C. 1970). A party proceeding *in forma pauperis* in a civil case must also file a motion in the Superior Court for the preparation of transcripts without costs. D.C. App. R. 10 (b)(5)(A); *Hancock v. Mutual of Omaha Insur. Co.*, 472 A.2d 867 (D.C. 1984). In CCAN cases, counsel must secure vouchers from the finance office, complete then, along with a motion to unseal, and submit them to the trial judge for approval. D.C. App. R. 10(b)(5)(C). If you have been appointed to represent an appellant under CJA or CCAN, you will be notified that the transcript is complete via the web voucher system and you will receive your copy of the transcript electronically.

e. Subject to the exceptions above, the appellant must make the arrangements for payment for the transcripts at the time the transcripts are ordered. D.C. App. R. 10 (b)(4).

3. "While it is primarily appellant's burden to provide an adequate record, our appellate rules explicitly impose upon appellees the duty of designating additional portions of the transcript which they deem necessary . . . . [A]n appellee's duty [is] to assure that information helpful to his or her cause is not omitted." *Sterling Mirror, Inc. v. Gordon*, 619 A.2d 64, 69 (D.C. 1993).

C. Motions.

1. The parties must seek each other's consent before filing **non-dispositive** procedural motions. D.C. App. R. 27 (b)(4).

2. A response to a motion may be filed within 7 calendar days of service, and a reply 3 days thereafter. D.C. App. R. 27 (a)(4)-(5). A cross-motion for summary disposition may be filed in lieu of a response.

D.C. App. R. 27 (c). A reply may not present matters that do not relate to the response. D.C. App. R. 27 (a)(5).

3. Motions for summary affirmance or reversal will automatically stay the briefing schedule unless otherwise ordered by the Court. D.C. App. R. 27 (c). If counsel deems it appropriate, a statement may be included in either the motion or responsive pleading indicating that it may be treated as the party's brief on the merits if the Court denies the motion or defers consideration on the merits. *Id*.

4. A motion or response may not exceed 20 pages, and a reply may not exceed 10 pages. D.C. App. R. 27 (d)(2).

D. Computing time.

1. In computing time under the Court's rules or the applicable statutes, do not include the day of the triggering event or act. Start counting from the next day and do not include intervening weekends and legal holidays when the relevant time period is less than 11days. D.C. App. R. 26 (a). Intervening weekend and legal holidays are included, however, if a statute or order expressly provides for their inclusion or when the relevant period is stated in *calendar* days. D.C. App. R. 26 (a)(2). If the last day of the relevant period is a Saturday, Sunday, a legal holiday, or a day on which the weather or other conditions cause the Clerk's office to be closed, the due date becomes the next business day. D.C. App. R. 26 (a)(3).

2. If a party is required or permitted to act with a certain time after a paper is served on them, 5 calendar days are added to the prescribed period unless the paper is delivered on the date stated in the proof of service. D.C. App. R. 26 (c). This provision does not apply to orders of the Court that prescribe a period of time for a party to act. This provision does not apply to the filing of notices of appeal, *see Clark v Bridges*, No. 12-CV-49 (D.C. Aug. 29, 2013).

E. Briefs.

1. The appellant's brief is due 40 days after the Clerk notifies the parties that the record has been filed or, after such notice, the Court has denied a motion for summary disposition. The appellee's brief is due 30 days after service of the appellant's brief and any reply is

due within 21 days after the appellee's brief has been served. D.C. App. R. 31 (a)(1).

2. Opening briefs by appellant and appellee may not exceed 50 pages and a reply brief may not exceed 20 pages. D.C. App. R. 32 (a)(6).

3. D.C. App. R. 28 (a) requires a brief to contain:

   a. A title page with the appeal number, the name of the court, the title of the case as it appears on the appellate docket, the nature of the proceeding, the name of the lower court, agency or board, the title of the brief (identifying the party or parties on whose behalf it is filed), and the name, address and phone number of counsel filing the brief. Counsel who will argue the matter must be denoted with an asterisk if more than one counsel is listed.

   b. A certificate of counsel which will enable judges of the Court to consider disqualification or recusal.

   c. A table of contents with page references.

   d. A table of cases and other authorities with an asterisk next to those chiefly relied upon.

   e. A statement of the issues.

   f. A statement of the case.

   g. A statement of the relevant facts with appropriate references to the record.

   h. An argument with citations to supporting authorities and the record.

   i. A short conclusion specifying the precise relief sought.

4. An *amicus* brief may not be filed without the consent of all parties or leave of the Court, unless it is filed by the United States, the District of Columbia, or another state. It may not exceed 25 pages. D.C. App. R. 29.

5. The parties must file an appendix to their briefs containing the relevant docket entries, pleadings, charges, findings, or opinion; the judgment, order, or decision in question; and, any other parts of the record they wish to include. D.C. App. R. 30 (a)(1).

   a. The parties are to cooperate in the preparation of the appendix, and are not to include unnecessary materials unless they wish to face sanctions. D.C. App. R. 30 (b)(1).

   b. The appellant is to pay for preparing the appendix except for those parts requested by another party which the appellant considers to be unnecessary. For those parts, the requesting party is to pay the cost of inclusion. Appendix costs may be recovered by the prevailing party. D.C. App. R. 30 (b)(2).

   c. The parties may be excused from the appendix requirement upon a showing of "good cause." D.C. App. R. 30 (e). And, an appendix is not required in cases where a party is proceeding *in forma pauperis* or where counsel has been appointed to represent a party. D.C. App. R. 30 (f). There is, however, an abbreviated "appendix" requirement for such cases. *Id*.

6. In addition to filing an original and three copies of the brief and appendix, parties represented by counsel **must** email to the court, within 24 hours of filing the brief, a copy of the brief in PDF format to briefs@dcappeals.gov. *See* Admin Order 4-11 (November 30, 2011).

F. Calendaring and argument.

1. Cases on the Regular Calendar are scheduled for oral argument, and counsel is notified, about a month in advance. D.C. App. R. 33 (a). Cases on the Summary Calendar are not scheduled for argument; however, a party may file a motion for oral argument within 10 days after notice of calendaring. D.C. App. R. 33.

2. The appellant is entitled to open and conclude the oral argument. D.C. App. R. 34 (c). If there is a cross-appeal, D.C. App. R. 28 (i) determines which party is the appellant and which the appellee for

purposes of oral argument. D.C. App. R. 34 (d).

3. Subject to the Court's discretion, each side has 15 minutes for argument. If the Court hears a case en banc the Court will set the time for argument. *See* Misc. Order M0239-10 (Dec. 22, 2010).

4. An intervenor may not argue, except by permission of the Court, D.C. App. R. 29 (g), unless counsel on whose side the intervenor has intervened is willing to share its allotted time. D.C. App. R. 34 (g).

G. Judgments and opinions.

1. The Clerk prepares, signs, and enters the judgment after receipt of the Court's opinion or as otherwise instructed by the Court if no opinion is issued. D.C. App. R. 36 (a). The opinion or order is then mailed to each party. D.C. App. R. 36 (b).

2. Opinions may be published or unpublished. In the case of an unpublished opinion, any interested party may move for publication within 30 days after issuance. D.C. App. R. 36 (c).

H. Petitions for rehearing or for rehearing en banc.

1. May be filed within 14 days after entry of the judgment. D.C. App. R. 35 (c), 40 (a)(1).

2. Must state with particularity the points of law or fact which the petitioner believes the Court overlooked or misapprehended. It cannot exceed 10 pages. No oral argument is contemplated. D.C. App. R. 35 (b), 40 (a)(2), (b).

3. An answer to the petition may <u>not</u> be filed unless called for by the Court. D.C. App. R. 35, (e), 40 (a)(3).

4. En banc hearings or rehearings are not favored and will normally be ordered only when necessary to secure or maintain uniformity of the Court's decisions or when the case involves a question of exceptional importance. D.C. App. R. 35 (a).

I. Mandate.

1. The mandate issues 21 days after judgment unless either 1) the court directs it to be issued earlier, or 2) a timely petition for rehearing or rehearing en banc is filed. If a timely petition is filed, issuance is stayed until 7 days after the petition is resolved. D.C. App. R. 41 (b).

2. A party may move to stay issuance of the mandate pending the filing of a petition for *certiorari*. D.C. App. R. 41 (d)(2)(A). If granted, that stay is not to exceed 90 days unless good cause is shown or a *certiorari* petition is filed and a notice to that effect is received from the Clerk of the Supreme Court, D.C. App. R. 41 (d)(2)(B), in which case, the mandate will not issue until final disposition by the Supreme Court, *id*. Issuance will follow immediately on the denial of *certiorari*. D.C. App. R. 41 (d)(2)(D).

3. A motion to recall the mandate in a criminal case because of the alleged ineffectiveness of appellate counsel must be filed within 180 days after issuance. D.C. App. R. 41 (f).

J. Fees and costs.

1. The Court does not generally award attorney's fees except in frivolous cases when they may be assessed as a sanction, *see Slater v. Biehl*, 793 A.2d 1268, 1278 (D.C. 2002), when an appeal is taken for an improper purpose or when a party fails to comply with an order of the court. D.C. App. R. 38. Moreover, the Court has recently held that requests for fees, including those incurred on appeal, should be presented to the Superior Court or agency in the first instance. *See District of Columbia Metro. Police Dep't v. Stanley*, 951 A.2d 65 (D.C. 2008). The Court, however, specifically reserved the power to review fee petitions as it deems appropriate or when its authority is exclusive, as in Workers Compensation cases.

2. Costs, however, are assessed against the appellant if the appeal is dismissed or the judgment is affirmed. They are assessed against the appellee if the judgment is reversed. D.C. App. R. 39 (a). Costs are assessed against the United States only if authorized by law. D.C. App. R. 39 (b).

3. Costs must be requested within 14 days from the date of decision.

D.C. App. R. 39 (d).

4. Costs include filing fees, transcript costs, copying, postage, and messenger costs. D.C. App. R. 39 (d)(1).