CIVIL APPEAL ROUTES [*add* "in ONTARIO"?]

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INTRODUCTION

This article is based on a presentation I gave to a Sudbury District Law Association Colloquium. The topic of civil appellate routes is complicated. While this paper provides a fairly comprehensive and concise summary, for more detailed information the reader may wish to consult the following texts:

1) Paul M. Perell and John W. Modern, *The Law of Civil Procedure in Ontario* (LexisNexis) (Much of the following discussion is taken from pp. 750-795 of this text.)
2) Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure Law* (LexisNexis)
3) Todd Archibald, Gordon Killeen, James C. Morton, *Ontario Superior Court Practice* (LexisNexis)
4) John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (Butterworths)
5) D.J.M. Brown, *Civil Appeals*, looseleaf (Toronto: Canvasback Publishing, 2010)

Statutory Structure

The general right to appeal and the structure of an appeal route can usually be determined using the following rules and statutes:[1]

1) *Courts of Justice Act*, R.S.O. 1990, c. C.43
2) Rule 61 – which covers the steps required in an appeal
3) Rule 62 – which deals with interlocutory orders (which do not dispose of the matter)
4) Rule 63 – Stay pending appeal
5) Practice Directions Concerning Civil Appeals in the Court of Appeal
6) *Supreme Court Act*, R.S.C. 1985, c. S-26

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1. Anthony L. Giannotti, "Appeals Maneuvering the Road Without Crashing", LSUC CLE: 6th Annual Civil Litigation for Law Clerks. See also "Motions in the Court of Appeal", a manual created by *Pro Bono Law Ontario* for the Amicus Curiae that assist unrepresented litigants.

7) Specific Tribunal Statute applicable

Issues

The following issues generally determine where the appeal lies:

1) Who made the order? (Deputy Judge of the Small Claims Court, Master, Costs Assessment Officer, Judge of the Ontario Court of Justice (OCJ), Judge of the Superior Court (SCJ)).
2) Is it a final or interlocutory order?
3) How much is the final order worth? (Two important thresholds are $2,500 and $50,000)
4) Is it an appeal from a question of fact or law, or both?
5) Is it an appeal of costs only?

GENERAL APPEAL RIGHTS

No Right of Appeal

In general, there is no right of appeal unless it is conferred by a statutory provision. Some decisions of judges and judicial officers are not subject to appeal.[2] The vast majority of business contracts we enter into every day are not subject to appeal based on their monetary value alone.

Even if there is a right to appeal, most appeals fail. According to former Justice John Morden, about two-thirds of appeals are unsuccessful.[3]

An appeal court always has inherent jurisdiction to dismiss appeals that are vexatious in nature or where the appellant is in willful breach of the order under appeal.[4]

Small Claims Court

An appeal from a final order of the Small Claims Court for an amount of more than the "prescribed amount" (currently $2,500) goes to a single judge of the Divisional Court[5] (*i.e.* a single judge of the SCJ sitting in the Divisional Court).

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2. Perell, p. 753; *Guardian Realty Co. v. Toronto*; [1934] O.J. No. 234 (ONCA) **[*** Is there another citation? We cannot locate this ***]**.
3. Perell, 753.
4. *CJA*, s. 140(5).
5. *CJA*, s. 31, and O. Reg. 244/10.

A "motion for a new trial" can be brought to a judge of the Small Claims Court after a final order is made,[6] either to correct an arithmetic error[7] or to adduce new evidence that was not reasonably available at the time of trial.[8]

There is no appeal from a Small Claims judgment of less than $2,500, excluding costs, or an interlocutory order[9] (except to the Supreme Court). However, an appeal is possible if the value of the property is more than $2,500.

If you think about it, the vast majority of business contracts you entered this week are transactions that you couldn't appeal from, if you decided to sue. Probably 95% of all business transactions we do are matters that would go before the small claims court without a right to appeal (such as purchasing your McCafe this morning or your Costco TV).

Ontario Court of Justice

An appeal from a judge of the OCJ lies to the Superior Court of Justice (SCJ), unless otherwise stipulated.[10]

The OCJ has jurisdiction for many criminal law matters as well as many family law matters. 1996 amendments to the *Courts of Justice Act* indicate that appeals for certain Family Court decisions under ss. 21.8 and 21.12 go to the Divisional Court of the SCJ.[11]

Costs Assessment Officer

An appeal from an assessment officer lies to the SCJ or one judge of the Ontario Court of Appeal:[12]

- An appeal goes to the SCJ from a certificate of assessment of costs in a proceeding of the SCJ on an issue in respect of which an objection was served (*CJA*, s. 17(b)).
- An appeal goes to the SCJ from a certificate of assessment of costs in the Court of Appeal in respect of which an objection was served under the rules of court to the Court of Appeal to be heard by one judge (*CJA*, s. 6(1)(c) and s. 7(2)).

6. Rule 17.04.
7. Rule 17.04(5)1.
8. Rule 17.04(5)2.
9. O. Reg. 244/10 and O. Reg. 317/11, s. 31.
10. *CJA*, s. 40.
11. See the section on special appeal routes *infra*.
12. Perell, 754.

- An appeal goes to the SCJ from a certificate of assessment of costs for a proceeding in a tribunal in an objection was served (*CJA*, s. 90(4)(b)).
- An appeal goes to a single judge of the Ont. C.A. from a certificate of assessment of costs for a proceeding in the Ont. C.A., if an objection was served (*CJA*, s. 6(1)(c)).

Master (Superior Court)

An appeal from an Order of a Master lies to either the SCJ or to the Divisional Court:

- An appeal from an interlocutory Order of a master goes to a single judge of the SCJ (*CJA*, s. 16 and s. 17(a)).
- An appeal from a final Order of a master goes to a single judge of the Divisional Court (*CJA*, s. 19(1)(c) and s. 21(1)).

Superior Court

An appeal from an order of a judge of the SCJ lies to the Div. Court or ONCA:

- An appeal from an interlocutory Order of the SCJ lies to the Divisional Court, with leave required (*CJA*, s. 19(1)(b)).
- An appeal from a final Order of the SCJ for less than $50,000, including prejudgment interest, goes to the Divisional Court (*CJA*, s. 6(1)(b) and s. 19(1)(a): *Canady v. Tucci*, 2009 ONCA 554).
- An appeal from a final Order of the SCJ for more than $50,000, including PJI, goes to the Ont. C.A. (unless a specific statute states it should go to the Divisional Court. These statutes are often tribunals, such as the *Landlord and Tenant Act*) (*CJA*, s. 19(1)(a), (1.1.), (1.2)).
- There is no appeal from an interlocutory order of a Superior Court judge that dismisses an appeal from an interlocutory order of an Ontario Court judge (*CJA*, s. 19(4)).
- The appeal from a final order of Superior Court judge lies to the Court of Appeal, unless it falls within s. 19(1)(a) of the *Courts of Justice Act* (*CJA*, s. 6(1)(b)).

During a trial, there is a longstanding principle that appeals cannot be taken from mid-trial decisions. An appeal from a mid-trial decision is theoretically possible if it can be called an order, but the

normal course of action is to delay any appeal until after the trial is **[word missing?].**

If the plaintiff obtains an order for return of specific property, the appeal lies to the Court of Appeal, even if the property is worth less than $50,000.[13]

If the plaintiff sues for $100,000 and the claim is entirely dismissed, the appeal lies to the Court of Appeal. But if the claim is entirely dismissed and the judge indicates that value awarded would have been $20,000 had it not been dismissed, then it lies to Divisional Court.[14] The same is true if the damages are reduced solely by an assessment of contributory negligence.

Divisional Court

An appeal from an order of a single judge of the Divisional Court lies to a panel of the Divisional Court, not the Court of Appeal.[15] (Technically, this is a motion to vary or set aside, not an appeal.)

An appeal from a panel of the Divisional Court lies to the Court of Appeal on a question of law or mixed fact and law, with leave required.[16] But no appeal is possible from the Divisional Court to the Court of Appeal on a question of fact alone.[17]

No distinction is made between final and interlocutory orders for appeals from the Divisional Court to the Court of Appeal.[18]

Court of Appeal

The Court of Appeal has jurisdiction to hear appeals from final orders of a Superior Court judge, unless the Divisional Court takes jurisdiction (either because it is less than $50,000, or because a tribunal statute stipulates it).

An appeal from an interlocutory motion before the Court of Appeal lies to a panel of the Court of Appeal.[19] (Technically, this is a motion to vary or set aside, not an appeal.)

If one action produces two orders that are appealable to different appellate courts, the Court of Appeal has jurisdiction to hear both.[20]

13. Perell, 784; *CJA*, s. 19(1).
14. Perell, 785.
15. *CJA*, s. 21(5), and *Coote v. Ontario (Human Rights Commission)*, 2010 ONCA 580, 2010 CarswellOnt 6452 (Ont. C.A.).
16. *CJA*, s. 6(1)(a).
17. Sopinka, 28.
18. *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185, 54 D.L.R. (3d) 641, [1975] O.J. No. 2201 (Ont. C.A.).
19. *CJA*, s. 7(5).
20. *CJA*, s. 6(2).

A previous decision (not appeal) of a three-member panel of the Court of Appeal can be directly overruled by a five-member panel of the Court of Appeal.[21] Requests for five-judge courts should be made to the Chief Justice of Ontario through the registrar.

i) Interlocutory Motions During the Ont. C.A. Appeal Itself

Motions in the Court of Appeal are generally heard by one judge.[22] Single judges can adjourn the motion to a panel.[23]

Motions for leave to appeal and to quash an appeal are heard by a panel.[24] Other specific motions, such as to receive fresh evidence or to finally determine an appeal, should be heard by a panel.[25]

A panel hearing a motion or the full appeal may also decide a motion that should be before a single judge.[26]

Supreme Court of Canada

An appeal from a panel of the Court of Appeal lies to the Supreme Court, with leave.[27] Section 40(1) of the Act explains the test for leave to appeal to the Supreme Court:[28]

> . . . where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

In 1904, the Supreme Court laid out the following test for granting leave to appeal in *Lake Erie & Detroit River Railway v. Marsh*.[29] The court stated that leave to appeal would be granted where:

i) the matter was of public interest;
ii) there was an important question of law;
iii) the matter involved the construction of federal statutes;

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21. Perell, 790.
22. *CJA*, s. 7(2).
23. *CJA*, s. 7(4).
24. *CJA*, s. 7(3).
25. Rule 61.16(2).
26. Rule 61.16(2.1): *Schmidt v. Toronto Dominion Bank* (1995), 24 O.R. (3d) 1, 37 C.P.C. (3d) 383, 82 O.A.C. 233 (Ont. C.A.).
27. *Supreme Court of Canada Act*, s. 40.
28. Hossein Moghtaderi and Anna Du Vent, "Application for Leave to Appeal to the Supreme Court of Canada: A Practical Guide", July 2013 (online).
29. (1904), 35 S.C.R. 197, 1904 CarswellOnt 798 (S.C.C.).

iv) there was a conflict between federal and provincial statutes; or
v) where the provincial legislation may be of general interest across the country.

In general, the Supreme Court looks for a "matter of public importance; an issue which goes beyond the interests of the immediate litigants, of interest to Canadians generally". In 1997, Justice Sopinka suggested **[where?]** the following factors were important:

i) Is the question germane to the disposition of the case?
ii) Is the law unsettled or are the courts below misinterpreting or misapplying a decision of the court?
iii) Is there a constitutional or Aboriginal issue?
iv) Is there a novel point of law?

Most appeals fail the at the leave stage. Of the approximately 600 leave applications brought to the Supreme Court every year, only between 50 and 100 cases are issued in a given year.[30]

Interestingly, you can appeal directly to the Supreme Court of Canada, with leave, from a final judge in any Court of Ontario, if leave is granted by the Supreme Court of Canada.[31] Skipping the intermediate steps in the appeal is called *per saltum*.

> **38.** Subject to sections 39 and 42, an appeal to the Supreme Court lies on a question of law alone with leave of that Court, from a final judgment of the Federal Court or of a court of a province other than the highest court of final resort therein, the judges of which are appointed by the Governor General, pronounced in a judicial proceeding where an appeal lies to the Federal Court of Appeal or to that highest court of final resort, if the consent in writing of the parties or their solicitors, verified by affidavit, is filed with the Registrar of the Supreme Court and with the registrar, clerk or prothonotary of the court from which the appeal is to be taken.

Technically, the Ont. C.A. can grant leave to appeal to the SCC under *SCCA* s. 37, but this is not done.

SPECIAL RIGHTS OF APPEAL

There are some Acts which specifically enumerate the rights of appeal applicable within. For instance, appeals lie from the OCJ to the SCJ under the:

30. Abrams, 1512.
31. *Supreme Court of Canada Act*, s. 38.

i) *Family Law Act*, s. 48;
ii) *Children's Law Reform Act*, s. 73;
iii) *Child and Family Services Act*, s. 69 and 156; and
iv) *Interjurisdictional Support Order Act, 2002*, s. 40.

There are also over 100 statutes that confer a specific right to appeal to the Divisional Court.

Typically these statutes are for administrative tribunals, stating that appeals go to the Divisional Court.

There are only a few specific statutes that confer a right of appeal directly to the Court of Appeal. These are:

i) *Courts of Justice Act*;
ii) *Judicial Review Produced Act*; and
iii) *Arbitration Act, 1991*.

The Government of Canada has also passed about 18 federal statutes that specifically confer a right of appeal to the local provincial Court of Appeal. Among them are:

i) *Divorce Act*;
ii) *Bankruptcy and Insolvency Act*; and
iii) *Companies' Creditors Arrangement Act*.

Problems can arise where a federal statute confers jurisdiction on the Superior Court to decide a matter, but is silent on the appeal route. But this issue is too complicated for this paper.[32]

DISCUSSION ON SPECIFIC ISSUES

Monetary Jurisdiction

As stated above, there is no right to appeal from an award of less than $2,500 in Small Claims Court.

Further, appeals from the Superior Court for less than $50,000 in damages including PJI (or costs alone) go to the Divisional Court, while appeals from orders of more than $50,000 including PJI go to the Court of Appeal.

The Divisional Court has held that the $50,000 jurisdiction under *CJA* s. 19(1) is not dependent on the amount at issue in the proceedings, but rather on the amount of the payment ordered.[33]

32. See Perell, p. 757, 788.
33. Sopinka, 24.

Final or Interlocutory Order

Final Orders – are judgments or orders that "finally dispose of a substantive right in the litigation".[34]

Interlocutory Orders – are every other type of judgment or order. *Black's Law Dictionary* defines interlocutory order as "deciding not the cause but only settles some intervening matter to it".

The main practical difference is that final orders of a Superior Court judge are appealed to the Court of Appeal with no leave required, while interlocutory orders of a Superior Court judge require leave to be appealed to the Divisional Court. Because leave is difficult to obtain from the Divisional Court, classifying the appeal as interlocutory is an easy way to defeat it.[35]

The difference is often resolved on the "proportionality principle". Unimportant matters are more likely to be deemed interlocutory, with the leave requirement greatly restricting the right to appeal.

With regard to the case law, everyone starts with *Hendrickson v. Kallio*.[36] The matter gets very complicated and cannot be fully canvassed here.

Leave to Appeal

Leave requirements are implemented:

i) by the Divisional Court for interlocutory orders of the Superior Court and from tribunal decisions,
ii) by the Court of Appeal for decisions from the Divisional Court,
iii) by the Court of Appeal for many specific federal statutes, and
iv) from costs orders.[37]

Rule 62.02 of the *Rules of Civil Procedure* sets out the test for the Divisional Court to grant leave to appeal an interlocutory Order from the SCJ. It is not an easy matter to pass the test.

> **62.02**(4) Leave to appeal shall not be granted unless,
> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

34. Sopinka, *The Conduct of An Appeal*, p. 5.
35. Perell, 763.
36. [1932] O.R. 675, [1932] 4 D.L.R. 580, 1932 CarswellOnt 148 (Ont. C.A.).
37. *CJA*, s. 133(b).

> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

The test for leave to appeal to the Court of Appeal is not the same and is not succinctly stated anywhere. However, in *Sault Dock Co. v. Sault Ste. Marie (City)*,[38] the court enumerated a few relevant factors of the same gist as rule 62.02.[39]

Where leave to appeal is required by statute, there is no automatic right to appeal unless it is granted by the court. In *R. v. Paul*,[40] the Supreme Court explained that a refusal to grant leave to appeal is not the same thing as a dismissal of an appeal, but rather "it simply meant the right of appeal which does not exists as a right, but only by leave, never came into being".[41]

The general rule is that there is no right of appeal from an order granting or refusing leave to appeal.[42] However, the Supreme Court always has the right to review any exercise of discretion, including a refusal to grant leave by the Court of Appeal, although this would almost never happen.[43]

Costs Orders

A cost order on a final order is final. A costs order on an interlocutory order is interlocutory.

Appeals on costs orders only proceed according to the general rules above on this basis, *i.e.* where the costs order is less than $50,000 it goes to Divisional Court and more than $50,000 to the Court of Appeal.[44]

Costs will always piggyback on the substantive appeal and be heard together, unless the main appeal fails before the costs appeal is heard. The main appeal cannot piggyback on the jurisdiction of costs, *i.e.* where damages are $10,000, but costs are $100,000 it goes to the Divisional Court.

No appeal on costs orders only is permissible without leave of the appellate court that will hear the appeal.[45]

38. [1973] 2 O.R. 479, 34 D.L.R. (3d) 327, [1972] O.J. No. 2069 (Ont. C.A.).
39. Perell and Sopinka.
40. [1960] S.C.R. 452, 127 C.C.C. 129, [1960] S.C.J. No. 22 (S.C.C.).
41. Perell, p. 760.
42. Perell, p. 775.
43. Abrams 1513, ***R. v. Chaisson*, [1995] S.C.J. No. 49 [*** please confirm this cite ***].**
44. *CJA*, s. 6(1)(b) and s. 19(1)(a).
45. *CJA*, s. 133(b).

Wrong Court

If you have filed the appeal in the wrong court, the appeal may be transferred or adjourned to the proper court if the proceeding in both the sending and receiving court are identical in nature and will continue as if it had been commenced in that court.[46]

In the case of interlocutory orders, if an appeal from an interlocutory order is commenced erroneously in the Court of Appeal, it cannot be transferred to the Divisional Court. This is because appeals from interlocutory orders require leave to appeal. The first step required is to bring a motion for leave to appeal in the Divisional Court.[47]

A respondent may move to quash an appeal filed in the wrong court.[48]

Courts have dismissed appeals filed in the wrong court before, but this raises the question: if the court cannot hear the appeal, how could they dismiss it?[49]

Very occasionally, a panel of the Court of Appeal has been retroactively designated as a panel of the Divisional Court to save a decision they have already made. But this raises the spectre of another panel of the Court of Appeal overturning the decision.[50]

Both the Divisional Court and the Court of Appeal have jurisdiction to entertain appeals that lie in lower courts, provided that another appeal lies and has been taken in the higher court.[51]

Filing Fresh Evidence on Appeal

The Court of Appeal may receive fresh evidence on an appeal.[52] The test to admit is discretionary. The party seeking to admit must show that the evidence could not have been obtained by reasonable diligence prior to trial and that it is relevant, credible, and will affect the result.[53]

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46. *CJA*, s. 110.
47. *Dunnington v. 656956 Ontario Ltd.* (1991), 9 O.R. (3d) 124, 6 C.P.C. (3d) 298, 89 D.L.R. (4th) 607 (Ont. Div. Ct.).
48. *CJA*, s. 134(3).
49. Perell, 794.
50. Perell, 795, *CJA*, s. 13.
51. *CJA*, ss. 6(2), 19(2), 19(3), and Sopinka 30.
52. Rule 61.16(2).
53. *Davis v. Crawford*, 2011 ONCA 294, 106 O.R. (3d) 221, 332 D.L.R. (4th) 508 (Ont. C.A.), additional reasons 2011 ONCA 423, 2011 CarswellOnt 4562, [2011] O.J. No. 2637; *R. v. Palmer*, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22 (S.C.C.).

Timeline to File Appeal

Rules are made to be broken. The timelines in this section are stipulated Rules so they must be adhered to, but remember rule 3.02(1) specifically states that all timelines, including appeals to the Court of Appeal, can be abridged or extended. Consent to extend should usually be granted by the opposing party unless there are compelling reasons not to. As *pro bono amicus curiae* to self-represented litigations, I frequently argue procedural motions to extend the time to file. Judges are typically fairly lenient in granting these motions so long as:

1) the party seeking the extension formed the intention to appeal within the period for commencing the appeal;
2) there is a reasonable explanation for failing to do so;
3) there is no prejudice,
4) the appeal has some merit; and
5) it is fair in the circumstances and the "justice of the case" requires it.[54]

a) Appellant[55]

Step Required	Rule	Deadline
Serve Notice of Appeal & Certificate Respecting Evidence	61.04(1); 61.05(1); Form 61A and 61C	30 days from judgment, not order despite the wording of the rule! *Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc.* (2003), 62 O.R. (3d) 647, 28 C.P.C. (5th) 258, 167 O.A.C. 159, 2003 CarswellOnt 18 (Ont. C.A.)
File Notice of Appeal	61.04(4)	Within 10 days of service
File Proof of Transcripts Being Ordered (if required)	61.05(5)	Within 30 days of filing Notice of Appeal
Order the Trial Record and Exhibits (only those that are necessary, not everything)	61.09(1); 61.09(2)	Within 30 days of Notice of Appeal if transcripts not required. Or within 60 days of receiving transcripts.
Serve and File Appeal	61.09(3)(a); 61.09(3)(b)	Within 30 days of Notice of

54. *Kefeli v. Centennial College of Applied Arts & Technology*, 23 C.P.C. (5th) 35, 2002 CarswellOnt 2539, [2002] O.J. No. 3023 (Ont. C.A. [In Chambers]), additional reasons 20 C.P.C. (6th) 25, 2002 CarswellOnt 6212.
55. *Ibid.* The table is from Watson and McGowan, *Ontario Civil Practice, 2018*.

Step Required	Rule	Deadline
Book and Compendium, Exhibit Book, Transcripts, and Factum		Appeal if transcripts not required. Or within 60 days of receiving transcripts.

b) Respondent

Serve the Respondents Certificate Respecting Evidence	61.05(2); 61.05(4) if on consent; Form 61D	Within 15 days of receiving Appellant's Notice of Appeal and Certificate Respecting Evidence
Serve Notice of Cross Appeal (if required)	61.07(1); Form 61E	Within 15 days of receiving Appellant's Notice of Appeal
File Notice of Cross Appeal with Registrar (if required)	61.07(2)	Within 10 days of Service
Serve and File Respondent's Factum	61.12(1)	Within 60 days of receiving Appellant's Factum, Appeal Book and Compendium, Exhibit Book, and Transcripts
Serve and File Factum in Cross-Appeal	61.12(4)(a)	At same time as Appellant's Factum. They should typically be combined.

c) Appellant / Respondent to Cross-Appeal

Serve and File Reply Factum and Compendium	61.12.(6)(b)	Within 10 days of receiving Respondents Factum

Registrar's Office of the Court of Appeal

The court staff at the Court of Appeal (and Supreme Court) are very friendly and extremely knowledgeable on appellate routes. If you get stuck, give them a call and they will set you straight.

However, you should be aware that filing appeal materials is an extraordinarily technical task. The court staff are very well trained and will inspect your documents thoroughly. It is not unheard of to have materials rejected three times for technical breaches before you

finally get it right. This can cause for some embarrassment if you have to keep re-serving your opponent with slightly revised materials. It may be prudent to bring your stack of materials to the court staff first, for their review, before you serve the opponent with materials that will be rejected and need to be re-served.

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If none of the above works, please feel free to contact me for some friendly suggestions. I'm more than happy to help. We also take appellate referrals.