

§4.A.00 | CONCLUSION

Motion practice in appellate courts requires a different approach from that customarily taken in trial courts. There are fewer case-management issues on appeal, there are rarely facts to determine, and usually there is no need to test the viability of an argument before it is presented to the court. Most of the advocacy is contained in the briefs, and it is necessarily limited to matters of record. Because motion practice serves a more limited purpose on review, appellate lawyers should be selective in filing motions in an appellate court. The opportunity to present an issue by motion should not be viewed as a routine step in the appellate process, but rather as a chance to resolve a matter that will not be addressed when the court considers the merits of the case.

Nevertheless, a party may need to file a motion in an appellate court to resolve a procedural problem or to obtain relief on issues not addressed in the briefs. The most common issues arising before the case is considered on the merits relate to the enforcement of the order in question; that is, whether it should be stayed pending the outcome of the case in the appellate court, and whether the appellate court has jurisdiction. After the case has been decided, it may be necessary to file a motion for rehearing, a motion for certification, or a motion for clarification. In more limited circumstances, a party properly may file a motion for rehearing en banc. As with other motions in appellate courts, these motions should be filed only when necessary, and not as a matter of course.

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