Pursuant to C.P.L.R. 5513, to preserve an appellant's right to appeal, a notice of appeal must served and filed within thirty days after service upon the appellant of a notice of entry. In the Federal Courts and many other states, the time for noticing an appeal begins the moment an order is entered. New York State Court, however, adds the twist that a "notice of entry" must be served.

"To be effective the 'Notice of Entry' must strictly comply with CPLR 5513 and state exactly when and with whom the order or judgment was entered, and if it describes the judgment or order, the description must be accurate." *Unique Marble & Granite Org. Corp. v. Hamil Stratten Props.*, LLC, 13 Misc. 3d 1239A, 831 N.Y.S.2d 357 (Queens County Sup. Ct. 2006) citing *Reynolds v. Dustman*, 1 N.Y.3d 559, 772 N.Y.S.2d 247 (2003)(service of an unstamped copy of the order, with a cover letter saying it had been filed with the clerk, did not constitute proper notice of entry).

Although modern litigation practice is often forgiving of minor mistakes, "strict practice must be pursued to limit the time to appeal," and thus a notice of entry must be accurate. *Falker v. New York, W. S. & B. R. Co*., 100 N.Y. 86, 2 N.E. 628 (1885). An incorrect date of entry is a material defect that renders a notice of entry void. *Nagin v. Long Island Savings Bank*, 94 A.D.2d 710, 462 N.Y.S.2d 69 (2d Dept 1983); *Ping Lum v. YWCA*, 136 A.D.2d 972, 525 N.Y.S.2d 82 (4th Dept. 1988).

There is, however, no formal requirement for how a notice of entry is formatted. A party can, for example, provide a stamped copy of the order and rely on the clerk's stamp to provide the material elements of "date of entry and the name of the clerk of the court where the order was entered." *Norstar Bank v. Office Control Sys*., 78 N.Y.2d 1110 (1991). *See* also *Deygoo v. Eastern Abstract Corp*., 204 A.D.2d 596; 612 N.Y.S.2d 415 (2d Dept. 1994) (the absence of an index number is not a material defect in a notice of entry).

This system of entering orders and noticing entry appears to have originated in the 1840's and 1850's, when the Field Code and New York's first Code of Procedure was drafted. (Google Books has a good selection of old civil procedure treatises). At common law, there were no interlocutory appeals. After a judgment was entered, the losing party could submit a "writ of error" to the appellate court, and had the opportunity to include "appeals" regarding interim orders (such as discovery orders) only when they filed their write of error. With the enactment of the Code of Procedure in 1849, the term "appeal" was used for both final and interlocutory orders. For lawsuits that were pending in 1849, they were given two years from entry of judgment within which to file their appeal.

For new lawsuits after 1849, the parties were given "thirty days from after written notice of the judgment or order shall have been given to the party appealing." In the commetary, the drafters explain that the time for appealing does not begin to run until after the order or judgment is entered. The language was somewhat ambiguous, but there were a few early cases that clarified the practice.

The procedure today is substantially the same as it was in the nineteenth century. (*See Falker, Supra*). The one notable exception is that the Code's language indicates that only the successful

party could serve notice of entry, not the prospective appellant. Thus, someone who won summary judgment, for example, could delay an appeal by not serving notice of entry. In his 1899 Encyclopedia of Pleadings and Practice, William McKinney suggests that the proper procedure in such a situation is to move the lower court to compel the successful party to serve notice of entry. The C.P.L.R. corrected this problem, and allows for either party to serve notice of entry.

Note: The motion that precipitated this post was: Barbera v. Summit School, 2008 NYSlipOp 71932U (2d Dept., May 14, 2008)("motion... to dismiss the appeal as untimely taken is denied on the ground that the notice of entry was defected and the entry date of the order was incomplete"). I did not want to mention the case in the original post until the motion was finally decided.