

1989

Remarks to Litigation Department, Cahill, Gordon & Reindel

Roger J. Miner '56

Follow this and additional works at: http://digitalcommons.nyls.edu/law_practice



Part of the [Courts Commons](#), [Judges Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Miner '56, Roger J., "Remarks to Litigation Department, Cahill, Gordon & Reindel" (1989). *Law Practice*. 1.
http://digitalcommons.nyls.edu/law_practice/1

This Article is brought to you for free and open access by the Speeches and Writings at DigitalCommons@NYLS. It has been accepted for inclusion in Law Practice by an authorized administrator of DigitalCommons@NYLS.

Cahill, Gordon & Reindel
80 Pine Street
New York, New York
Wednesday, January 18, 1989
12:30 P.M.

Remarks to Litigation Department

To get our discussion started, I shall answer three questions frequently asked by young litigators. The first question is: "Why are such a large proportion of appeals unsuccessful in the Second Circuit?" The second question is more related to technique: "How can briefwriting be improved?" The third question is prompted by the so-called "hardball" practices of some litigators: "What duties are owed to adversaries?" I shall then be happy to hear any questions or comments any of you may have.

First, some interesting statistics: During the twelve-month period ending July 30, 1987, the last available statistical period, 3,008 appeals were terminated in our court. Of those appeals, 1,218 were terminated on the merits. Of the appeals terminated on the merits, the reversal rate was 15% in private civil cases, 11.9% in civil cases involving the United States, 8.1% in criminal cases and 3% in bankruptcy cases. What accounts for such low rates of reversal? The answer has come to me gradually during my service as a member of the court, and I share it with you in the hope that it will inform the presentation of your appeals in the Second Circuit and in other appellate courts

as well: The constraints of appellate review account for the low rate of reversal.

Let's take a look at some of those constraints. One of the most important is the requirement that we accept the factual findings of the trial judge unless they are clearly erroneous. I have long held the belief that, in most cases, the facts as found dictate the final result, because the rules of law generally are well-established. I find it extremely difficult to say that factual findings are clearly erroneous, although it sometimes seems to me that the actual facts are different from those found by the trial judge. I have reviewed a number of cases in which I would have arrived at a different result, but was prevented from doing so by this rule.

Precedent and stare decisis also constrain the intellectual process of decisionmaking. If there is precedent in our circuit, only the court in banc can overrule it. In banc is reserved for cases of exceptional importance or when there is some conflict between panels of the court. If there is precedent in another circuit, we must distinguish it, agree with it or give a careful reason why we disagree. Always, we must make sure that our decisions are consistent with Supreme Court Doctrine.

In the interpretation of statutes, the various rules of construction establish the parameters of decisionmaking. Always, there is the temptation to apply judicial gloss and to fill in that which Congress has omitted, a temptation that I for one seek to avoid in the Frankfurter tradition. "Divining Congressional

intent" is the term that is used, because the skills of a fortune teller are called for. In connection with the interpretation of a criminal statute, I recently asked a class of my law students why it was necessary for the court to read into a statute something that Congress did not put there -- why the judiciary was any better equipped than the Congress to write the law? A student answered: "More able minds," an answer I found flattering but a very poor reason for judicial lawmaking. At any rate, my point is that, although the courts sometimes have gone afieled in statutory interpretation, they are constrained by many rules of limitation.

There are many other limits upon the decisionmaking process in the form of rules we must abide by:

A. That federalism counsels restraint when passing upon state action;

B. That evidence in a criminal case is viewed on appeal in the light most favorable to the government;

C. That admission or exclusion of evidence is not error unless a party's substantial rights are affected and (1) a specific objection is made in cases of admission or (2) an offer of proof is made in cases of exclusion;

D. That errors and defects appearing in the record must be disregarded if they do not affect the substantial rights of the parties (harmless error rule: courts must refuse to disturb orders and judgments unless such refusal is "inconsistent with substantial justice");

E. That giving or failing to give an instruction to a jury may not be assigned as error unless specific objection is made before the jury returns, except in the case of plain (substantial) error;

F. That matter cannot be raised for the first time on appeal;

G. That matters outside the record cannot be referred to;

H. That many trial court determinations such as decisions respecting relevance of evidence, dismissal for failure to prosecute, extension of time to file a notice of appeal, sanctions, substitution of alternate jurors and many, many more are reviewed on an abuse of discretion standard.

This is merely a work in progress, and I do not believe that I yet have broken the surface of the constraints of appellate review. My thesis simply is that appellate judges work within a very narrow compass indeed. To serve your clients properly, you should keep that narrow compass in mind when prosecuting appeals in our court.

Now, for Briefwriting. I am a great believer in the value of oral argument. I am in favor of allowing more time for argument in our court. I think that argument is very important for any number of good reasons I shall not go into because the question is about Briefs. The Brief is the most important part of appellate advocacy, because we judges have it in hand both before and after oral argument. It is physically with us after the argument evaporates and is forgotten. The Briefs are the

first thing I look at, even before the decision of the trial court or any part of the Appendix or Record. The Briefs are what I refer to when writing an opinion or before signing off on a colleague's opinion. A good Brief is essential to effective appellate advocacy, but it is all too rare.

In the beginning of the Republic the Brief was merely an adjunct to unlimited oral argument. I was able to get some of the flavor of those times when I sat with a Court of Appeal in England. The Briefs there were not much more than a list of applicable precedents and authorities, but the oral argument proceeded at a leisurely pace, with many questions and answers. The sheer bulk of cases makes it impossible to proceed before our Court in this manner. The time for appellate argument is strictly limited, and it is important that the Brief be as persuasive as possible. It should never be forgotten that the purpose of all appellate advocacy is to persuade.

In the Summer 1988 issue of "Litigation," the journal of the section of litigation of the American Bar Association, you will find my list of twenty-five rules for oral argument. The article is entitled "The Don'ts of Oral Argument" and is reprinted in the coursebook published by the New York State Bar Association for the program on Appellate Practice in the Second Circuit held on November 18, 1988. I have prepared a companion piece, which I hope to publish shortly which lists twenty-five do's for briefwriting. I give you those rules now, in no particular order:

1. Review the Brief to correct inaccurate citations, typographical and grammatical errors or citations to outdated authority. We frequently see Briefs containing one or more of these deficiencies. What a loss of credibility that causes for the Brief writer! The clerks carry these Briefs about the chambers, holding them far away from their bodies, between thumb and forefinger, while holding their noses with the other hand. They are trying to give me a message, I think. [Example].

2. Adhere to the prescribed format; the standard format of a Brief is prescribed in our Court by the Federal Rules of Appellate Procedure and the rules of our Circuit, and we insist on strict adherence to the rules. Failure to adhere to the required format may be a cause for rejection of the Brief in the Clerk's office or by the staff attorneys. If a Brief in improper form gets past them, it certainly will lose you points with the panel. The simple format is prescribed by Rules 28 and 32 of the Federal Rules of Appellate Procedure, and by Rule 32 of the Rules of the Second Circuit.

3. Make certain that the Brief says what you want it to say. To accomplish this, you must go over what you have written a number of times and ask somebody else to look it over as well. Be careful in your use of language. When I was a district court judge, an appeal was taken from one of my decisions. The Brief to the Circuit opened this way: "This is an appeal from a decision by Judge Miner, and there are other grounds for reversal

as well." I don't think counsel intended to say that. (Maybe they did).

4. Be sure that your citations are in point. A few weeks ago, I read two Briefs that provided a study in contrasts. One Brief included six separate points, each point written on one page. There were no citations of authority in any one of the points. The other Brief was chockfull of citations -- citations to Supreme Court cases, Circuit Court cases and even to some State cases. Each and every one of the citations was totally unrelated to the case on appeal; try to give some authorities in the Brief, but make sure that they support your contention.

5. Deal with authority that contradicts, or seems to contradict, your position. First of all, it is the attorney's obligation to bring to the court's attention any pertinent authority, even, or especially, contradictory authority. An effective Brief will seek to distinguish unfavorable precedent or argue that it should be modified or overruled. Second, the Court will discover the unfavorable precedent anyway, so it is to your interest to deal with it in the Brief.

6. Eliminate adverbs such as "clearly" and "obviously." If things are so damn clear or obvious, how come you lost in the trial court? The use of such words does not improve the quality of the Brief or add to its persuasiveness, in any event. And persuasion, of course, is the name of the game.

7. Write in concise, unambiguous and understandable language. When I practiced law, I always submitted a draft of

the Brief to the client. Who knows more about the case than the client? If he or she understood what I wrote, then I felt the judges would understand it as well. You can get some good suggestions that way also. Long, rambling, convoluted sentences and ten dollar words should be avoided. Nobody can understand them.

8. Restrict the Brief to issues raised in the trial court. Many times we find a well-briefed argument, supported by law and logic, that we can't consider because it was not raised below. No matter how good a point is, don't include it in the Brief unless it pertains to an issue properly before the Appellate Court.

9. Carefully prepare the statement of facts. It is a very critical part of the Brief. It should not be incomplete. Neither should it be too lengthy. It should cover only those facts necessary to the development of the legal issues in the case. A bad habit of some lawyers is to present the facts by summarizing the testimony of each witness. We much prefer a narrative of the facts.

10. Make sure that the testimony and exhibits referred to in the Brief are included in the Appendix, and that you cite to the Appendix in the Brief. There is nothing quite so frustrating to me as to find some reference in the Brief to a piece of evidence not included in the Appendix. I must then go to the original record in our clerk's office or possibly back to the district court clerk's office to find what I am looking for. Equally as

frustrating is a reference in the Brief to evidence included in the Appendix without any indication in the Brief as to where it is located.

11. Choose three or four or five strong points, preface them with concise point headings and proceed to argue how the trial court erred or didn't err. Support your conclusions with appropriate authorities and reasoned arguments. Meet your adversary's arguments head-on, describe where you agree and where you differ, and if you are short on authority for some point you are making, say so. Weave the facts of your case into the law cited in your points, using sentences having subjects and verbs, and you'll have the making of a winning Brief. The inclusion of a great number of points may suggest to us that none of the points is any good.

12. Remember that a Brief is different from most other forms of writing in that it has as its only purpose the persuasion of the reader. It is not written to amuse or entertain or even to edify. We don't look for a prize-winning literary style in a Brief. We do expect clarity, well-organized argument and understandable sentence structure. All too often, we find rambling narratives, repetitive discussions, and conclusions unsupported by law or logic. A Brief that does not persuade is ineffective.

13. Remove from the Brief any long quotations of testimony or precedent. Short quotations are acceptable, but remember that we can find the full text of the precedent in the library and the

full testimony in the record. I have seen page after page of quoted materials in some Briefs, and have thought: "What a waste of precious space!" Principal Briefs are limited to fifty pages in our court, and Reply Briefs cannot exceed twenty-five pages, all exclusive of the pages containing the tables and addenda containing statutes, rules and regulations. Excessive quotation leaves little space for persuasion. Paraphrase! And woe to the excessive quoter who moves for leave to file an oversized Brief! One other comment on this point -- it is not necessary to use all the pages allotted to you.

14. Edit the Brief with a view toward excising most or all of the footnotes you have inserted. We are well aware of efforts to increase the number of words in the Brief by extensive use of footnotes. We take a very dim view of such efforts. I have a colleague who refuses to read footnotes in a Brief. He abjures footnotes in opinions as well, and each year furnishes a report on judges who are the worst footnote offenders. Don't try to fool us with small print. Also, italics are unnecessary.

15. Restrain yourself from attempting to sneak matter outside the record into your Brief. Earlier, I spoke of an appellate court being constrained to consider only legal issues raised in the trial court. This applies to factual matters as well. From time to time, a Brief will draw to our attention a fact that cannot be found in the record before us. Opposing counsel will note the omission soon enough, but I have seen judges take counsel to task for this type of deficiency even

before opposing counsel became aware of it. In either event, the credibility of a Brief is seriously impaired by the inclusion of matters outside the record.

16. Bring to our attention pertinent authorities that come to your attention after the Brief is filed. The Federal Rules of Appellate Procedure allow you to do this. Rather than merely giving supplemental citations and the reasons for them, some lawyers improperly take advantage of the occasion by presenting further argument with their supplementary material.

17. Pack the Brief with lively arguments, using your own voice and style of expression. We expect the Brief to be argumentative but not pompous, dull or bureaucratic. The active voice always is preferred.

18. Structure your Brief as you would desire the opinion to be structured. This is a real inside tip on how you can pique the interest of the judges. We are always interested in having some good help to do our job. You may even see your own deathless prose immortalized in one of our decisions.

19. Be truthful in exposing all the difficulties in your case. Tell us what they are and how you expect us to deal with them. Dissimulation in a Brief is to be avoided at all costs.

20. Solicit some sympathy for your cause in the Brief. Don't overdo it, but don't be afraid to show how an injustice may occur if we don't decide in your client's favor. Sometimes the law requires an unjust result, but we certainly try to avoid it.

21. Develop, if possible, a central theme leading to a sensible result in the case. This is especially important in a case of first impression. Where there is no precedent, try logic. The higher the court, the less interested it is in precedent anyway.

22. Refer to parties by name or description, rather than as "appellant" or "appellee." It is much easier for us to follow the Brief if this is done. Moreover, there is a rule that requires it.

23. Make every effort to provide appropriate citations without cluttering up the Brief with a mass of duplicative authorities. Where there is one authoritative case in point supporting your argument, there is no need to give us six. Save the space for persuasive argument. Avoid string citations!

24. Use the Reply Brief to reply. Most Reply Briefs merely repeat the arguments put forward in the appellant's original Brief. The opportunity should be used to answer the appellee's Brief by specific, rather than scattershot, responses. The Reply Brief presents the opportunity to have the last word in a very effective way. Most reply Briefs are worthless, in my opinion.

25. Omit: irrelevancies, slang, sarcasm, and personal attacks. These serve only to weaken the Brief. Ad Hominem attacks are particularly distasteful to appellate judges. Attacks in the Brief on brothers and sisters at the bar rarely bring you anything but condemnation by an appellate court. All

that scorched earth, take no prisoner, give no quarter, hardball stuff is out.

Finally, what duties do you owe your adversaries in the litigation process? I hope that you will all read my article, "The Duties that Lawyers Owe to One Another," in the December 19, 1988 issue of the National Law Journal. In that article I refer to the neglect of the duties lawyers owe to one another -- the duties of honesty, fair-dealing, cooperation and civility, duties that have been neglected in recent years. Litigators must understand that they have duties as lawyers other than duties to their clients. I think that lawyers are coming around to find that there is a line between zealous advocacy and unacceptable conduct in lawyer-to-lawyer relations. Reasonable accommodation of an adversary, in my opinion, is an ethical obligation. The duty of cooperation must be performed not to promote the collegiality of the bar but to advance the cause of justice through a legal system that functions efficiently and expeditiously. When lawyers cooperate, the client is better served and the justice system is better served. A lawyer is supposed to be a person with independent judgment. There are certain matter ethically within the discretion of the attorney. The model rules tell us that an attorney is invested with professional discretion in determining the means by which a matter should be pursued. That means that such matters as extensions of time, continuances, adjournments, waivers of various procedural formalities, admissions of fact and other

technical aspects of litigation not involving the merits are
confided to the sole discretion of the lawyer. To abuse that
discretion is, in my opinion, a serious breach of ethical duty.
Rambo litigation is out. Ethical advocacy is in.

I am ready for your questions and comments.

**B-5. U.S. COURTS OF APPEALS
APPEALS TERMINATED ON THE MERITS, BY CIRCUIT
DURING THE TWELVE MONTH PERIOD ENDED JUNE 30, 1987**

CIRCUIT AND NATURE OF PROCEEDING	TOTAL APPEALS TERMI- NATED	PERCENT OF TOTAL TERMI- NATIONS	TERMINATIONS ON THE MERITS					PERCENT REVERSED*
			TOTAL	AFFIRMED/ ENFORCED	DISMISSED	REVERSED	REMANDED	
SECOND CIRCUIT.....	3,008	40.5	1,218	999	64	173	22	11.9
CRIMINAL.....	525	51.8	272	239	8	22	3	8.1
U. S. PRISONER PETITIONS.....	115	39.1	45	43	2	-	-	-
OTHER U. S. CIVIL.....	407	45.5	185	156	4	22	3	11.9
PRIV. PRISONER PETITIONS.....	484	29.3	142	105	11	23	3	16.2
OTHER PRIVATE CIVIL.....	1,174	37.6	441	340	22	66	13	15.0
BANKRUPTCY.....	78	42.3	33	17	15	1	-	3.0
ADMINISTRATIVE APPEALS.....	188	34.0	64	55	2	7	-	10.9
ORIGINAL PROCEEDINGS.....	37	97.3	36	4	-	32	-	-
THIRD CIRCUIT.....	2,579	46.8	1,206	992	8	201	5	15.0
CRIMINAL.....	343	55.7	191	177	-	14	-	7.3
U. S. PRISONER PETITIONS.....	159	49.7	79	72	-	7	-	8.9
OTHER U. S. CIVIL.....	328	55.2	181	134	-	47	-	26.0
PRIV. PRISONER PETITIONS.....	390	25.6	100	86	2	10	2	10.0
OTHER PRIVATE CIVIL.....	1,045	49.3	515	423	2	87	3	16.9
BANKRUPTCY.....	77	35.1	27	22	1	4	-	14.8
ADMINISTRATIVE APPEALS.....	205	41.0	84	77	-	7	-	8.3
ORIGINAL PROCEEDINGS.....	32	90.6	29	1	3	25	-	-
FOURTH CIRCUIT.....	2,760	61.1	1,685	1,421	30	189	38	10.7
CRIMINAL.....	402	60.4	243	205	1	28	8	11.5
U. S. PRISONER PETITIONS.....	136	83.1	113	97	5	9	2	8.0
OTHER U. S. CIVIL.....	308	61.7	190	136	4	42	2	22.1
PRIV. PRISONER PETITIONS.....	816	59.8	488	445	9	26	8	5.3
OTHER PRIVATE CIVIL.....	812	57.5	467	389	9	64	4	13.7
BANKRUPTCY.....	71	46.5	33	28	-	4	1	12.1
ADMINISTRATIVE APPEALS.....	192	73.4	141	120	2	7	9	5.0
ORIGINAL PROCEEDINGS.....	23	43.5	10	1	-	9	-	-
FIFTH CIRCUIT.....	4,174	52.5	2,191	1,571	202	366	51	14.3
CRIMINAL.....	529	71.3	377	319	17	34	7	9.0
U. S. PRISONER PETITIONS.....	97	55.7	54	31	16	6	1	11.1
OTHER U. S. CIVIL.....	359	60.4	217	153	17	40	7	18.4
PRIV. PRISONER PETITIONS.....	867	37.6	326	190	88	42	6	12.9
OTHER PRIVATE CIVIL.....	1,834	53.9	988	788	47	156	16	15.8
BANKRUPTCY.....	129	49.6	64	42	7	14	1	21.9
ADMINISTRATIVE APPEALS.....	278	34.9	97	64	8	12	13	12.4
ORIGINAL PROCEEDINGS.....	81	84.0	68	4	2	62	-	-