Federal Civil Appellate Practice in the United States Court of Appeals for the Second Circuit

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FEDERAL CIVIL APPELLATE PRACTICE IN THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

by

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I. Appealability

1. Final Judgments

   (a) Appeals from all final decisions of the District Courts must be prosecuted in the Courts of Appeals. 28 U.S.C. § 1291.

   (b) "The classic definition of a final decision is one which terminates the litigation on the merits and leaves nothing for the court to do but execute the judgment." 2 Fed. Proc. L. Ed. § 3:306.

   (c) The finality rule is designed to avoid fragmented litigation, which clogs the appellate courts and causes unnecessary delay in the trial courts.

2. Partial Final Judgments

   (a) "When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the [District Court] may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay
and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). The judgment then is appealable.

(b) The District Court must (1) indicate why there is no just reason for delay and (2) expressly direct the entry of partial judgment. This certification process is reviewed on an abuse of discretion standard. Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980); Shrader v. Granninger, 870 F.2d 874 (2d Cir. 1989).

3. Collateral Orders

(a) A collateral order is appealable if it: (1) conclusively determines a disputed question; (2) resolves an important issue completely separate from, and collateral to, the merits of the case; and (3) is effectively unreviewable on appeal. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (order waiving the posting of security for costs); see Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) (orders disqualifying counsel are not collateral orders subject to appeal).


4. Interlocutory Orders

(a) Interlocutory orders granting or denying injunctions; appointing receivers; and determining rights and liabilities in admiralty cases are appealable of right. 28 U.S.C. § 1292(a). An order granting a motion to stay arbitration is appealable, but an order denying such a motion is not appealable. 9 U.S.C.A. § 15 (West Supp. 1989); see Janneh v. GAF Corp., 887 F.2d 432 (2d Cir. 1989). The grant or denial of a temporary restraining order is not appealable, except in very limited circumstances. 19 Fed. Proc. L. Ed. § 47:167. Determination of a motion to proceed in forma pauperis, 28 U.S.C. § 1915(a), is appealable, Miller v. Pleasure, 425 F.2d 1205 (2d Cir. 1970), but an order denying a request for assignment of counsel under the same statute is not, Welch v. Smith, 810 F.2d 40 (2d Cir. 1987).

(b) Where a non-final order involves "a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order
may materially advance the ultimate termination of the litigation," a District Judge may certify the order for interlocutory review, subject to acceptance by the Court of Appeals. 28 U.S.C. § 1292(b). The District Judge should give reasons for the certification and should state more than a bare finding that the statutory requirements have been met. Isra Fruit Ltd. v. Agrexco Agricultural Export Co., 804 F.2d 24 (2d Cir. 1986).

(c) Although the extraordinary writs (certiorari, mandamus and prohibition), 28 U.S.C. § 1651 (All Writs Act), are not to be used as substitutes for appeals, they may be invoked in exceptional circumstances to correct clearly erroneous rulings or to supervise procedural decisions of the trial judge to whom the writs are directed. 2 Fed. Proc. L. Ed. §§ 3:367 et seq. Mandamus was granted to resolve a discovery question involving an attorney-client issue of first impression "important to the administration of justice." In re Von Bulow, 828 F.2d 94 (2d Cir. 1987). Conditional mandamus relief was granted where the District Court delayed a pre-motion conference for five months and then denied the motion for late filing. Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647 (2d Cir. 1987).

(d) A Court of Appeals having jurisdiction over an appealable ruling may exercise pendent appellate jurisdiction over an otherwise non-appealable order. Port Authority Police

(e) All orders denying intervention are appealable in the Second Circuit. Shore v. Parklane Hosiery Co., 606 F.2d 354, 357 (2d Cir. 1979). An order denying intervention as of right (Fed. R. Civ. P. 24(a)) and granting permissive intervention (Fed. R. Civ. P. 24(b)) subject to conditions is not appealable. Stringfellow v. Concerned Neighbors In Action, 480 U.S. 370 (1987); cf. Eng v. Coughlin, 865 F.2d 521 (2d Cir. 1989) (order restricting leave to intervene only to contest discovery not a denial of intervention therefore not appealable).

5. **Judgments Entered By Magistrates**

(a) If the parties consent to trial before a Magistrate, an appeal from a judgment entered at the direction of the Magistrate is heard by the Court of Appeals. 28 U.S.C. § 636(c)(3); Fed. R. App. P. 3.1.

(b) If the parties consent that the appeal of the Magistrate's judgment be taken to a Judge of the District Court,
the District Court judgment is appealable only upon leave granted by the Court of Appeals in the exercise of discretion. 28 U.S.C. § 636(c)(4), (5); Fed. R. App. P. 5.1.

6. District Court Judgments in Bankruptcy Matters

(a) The District Courts have jurisdiction to hear appeals from final judgments, orders and decrees of the Bankruptcy Courts. They also may hear appeals from interlocutory orders and decrees by leave. 28 U.S.C. § 158(a), Bankr. R. 8001(a), (b).

(b) Appeals from the District Courts to the Courts of Appeals in bankruptcy matters are governed by the rule of finality. 28 U.S.C. § 158(d). Accordingly, a District Court's decision on an interlocutory matter in a bankruptcy proceeding generally is not a final judgment for purposes of appeal to the Court of Appeals. In re Stable Mews Associates, 778 F.2d 121 (2d Cir. 1985) (District Court affirmance of interim award of compensation to Chapter 11 Trustee acting as his own attorney interlocutory in nature and not appealable); In re Chateaugay Corp, 838 F.2d 59 (2d Cir. 1988) (District Court order of remand contemplating significant further proceedings in Bankruptcy Court and anticipating modification of injunctive relief not final).

7. Agency and Tax Court Decisions
(a) The appealability of an Agency decision is governed by the finality date rules established by the Agency. Western Union Telegraph Co. v. FCC, 773 F.2d 375 (D.C. Cir. 1985).

(b) Courts of Appeals have jurisdiction to review the decisions of certain Agencies in connection with applications to enforce the orders of those Agencies (e.g., NLRB). Fed. R. App. P. 15(b).

(c) Appeal from a Tax Court decision should await the entry of a formal document terminating the entire proceeding, and disposition as to less than all tax years at issue in one case is not appealable. Estate of Yaeger v. C.I.R., 801 F.2d 96 (2d Cir. 1986); Fed. R. App. P. 13.

8. Post-Judgment Motions

(a) Decisions on motions under Fed. R. Civ. P. 60 (Relief from Judgment or Order) are separately appealable under an abuse of discretion standard. In re Emergency Beacon Corp., 666 F.2d 754, 760 (2d Cir. 1981). Rule 60 allows the District Court to correct clerical errors arising from oversight or omission even after the judgment has been affirmed on appeal. Panama Processes, S.A. v. Cities Service Co., 789 F.2d 991 (2d Cir. 1986).

(b) Timely motions under Fed. R. Civ. P. 50(b) (judgment n.o.v.), 52(b) (amendment of court's findings) and 59 (new trial and amendment of judgment) stop the time for appeal
from running, and no appeal may be taken until they are decided. See Fed. R. App. P. 4(a)(4); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir. 1986) (notice of appeal considered a nullity when motion for "reconsideration," treated as motion to amend judgment, was pending).

II. Scope of Review

1. Findings of Fact


   (b) "[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. This provision is taken to mean that, where a motion for a judgment n.o.v. was not made, the appellate court can only affirm or remand for a new trial. 2 Fed. Proc. L. Ed. § 3:650.

      (i) A motion for judgment n.o.v. should be granted only where there is such a lack of evidence that (i) the verdict could have only been the result of sheer surmise or (ii) the evidence is so overwhelming that reasonable people could not have arrived at a verdict against the movant. Mallis v. Bankers Trust Co., 717 F.2d 683, 688-89 (2d Cir. 1983). Denial of the motion
is reviewed in the Court of Appeals under the same standard. Singer v. Olympia Brewing Co., 878 F.2d 596 (2d Cir. 1989).

(ii) The denial of a motion for a new trial is reviewed on an abuse of discretion standard, but "[t]o the extent that a new trial was sought on the ground that the verdict was against the weight of the evidence, [the Second Circuit] ha[s] disclaimed the authority to review a ruling on such a motion." Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 133 (2d Cir. 1986).

2. Determinations of Law

(a) "An appellate court can reverse the determination below for mere error in law, and does not apply the clearly erroneous standard in reviewing determinations of law." 2 Fed. Proc. L. Ed. § 3:652.

(b) Errors and defects appearing in the record must be disregarded if they do not affect the substantial rights of the parties. 28 U.S.C. § 2111 (harmless error rule). Courts must refuse to disturb orders and judgments unless such refusal is "inconsistent with substantial justice." Fed. R. Civ. P. 61.

(c) 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. Fed. R. Evid. 103(a).
(d) Giving or failing to give an instruction to a jury may not be assigned as error unless specific objection is made before the jury retires. Fed. R. Civ. P. 51. In the rare instance, plain error in an instruction not objected to may be ground for reversal to prevent a miscarriage of justice. Heath v. Henning, 854 F.2d 6 (2d Cir. 1988).

3. Administrative Agency Decisions

(a) Depending upon the type of agency action involved, administrative agency fact-finding can be set aside as (1) arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law, 5 U.S.C. § 706(2)(A); (2) unsupported by substantial evidence, 5 U.S.C. § 706(2)(E); or (3) unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court, 5 U.S.C. § 706(2)(F).

(b) In reviewing administrative agency action, the reviewing court is charged with the duty of deciding all relevant questions of law, interpreting constitutional and statutory provisions, and determining the meaning or applicability of the terms of agency action. 5 U.S.C. § 706.

(c) Agency action violative of statutory provisions is not in accordance with law and will be set aside. ACEMLA v. Copyright Royalty Tribunal, 763 F.2d 101 (2d Cir. 1985). Cf. New York Council v. Federal Labor Relations Authority, 757 F.2d 502
(2d Cir. 1985) (expert tribunal generally entitled to deference in construing its Enabling Act).

III. Mechanics of Appeal

1. Notice of Appeal

(a) Appeal as of right is taken by filing a notice of appeal in the District Court. Fed. R. App. P. 3(a). The filing fee (currently $5) and the docketing fee (currently $100) are paid to the Clerk of the District Court, who serves notice of filing by mailing copies to counsel of record for each party other than appellant. The Clerk also transmits copies of the notice of appeal and the docket entries to the Clerk of the Court of Appeals. Fed. R. App. P. 3(d), (e).

(b) Notice of appeal as of right is filed within 30 days (60 days if federal government is party) after the date of entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1). A final judgment is not entered until a separate document is filed. Fed. R. App. P. 4(a)(6); see National R.R. Passenger Corp. v. City of New York, 882 F.2d 710 (2d Cir. 1989). If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter. Fed. R. App. P. 4(a)(3).

(c) Upon a showing of excusable neglect or good cause, the District Court may extend the time for filing a notice of appeal as of right. The motion to extend must be made within 30
days after the expiration of the time prescribed for filing a notice of appeal, and the extension cannot exceed the later of 30 days beyond such time or 10 days from the entry of the order granting the motion. Fed. R. App. P. 4(a)(5); see 650 Park Ave. Corp. v. McRae, 836 F.2d 764 (2d Cir. 1988) (extension denied for failure to show excusable neglect). A Notice of Appeal is not the equivalent of a Motion to Extend Time, but in the case of a pro se party, the District Court Clerk must "advise . . . of the appropriateness of an extension motion." Campos v. LeFevre, 825 F.2d 671, 676 (2d Cir. 1987).

(d) Leave to appeal from a certified interlocutory order (28 U.S.C. § 1292(b)) is sought by filing a petition with the Clerk of the Court of Appeals within 10 days after entry of the order in the District Court, with proof of service. If leave is granted, the necessary fees must be paid to the Clerk of the District Court within 10 days of the order granting leave, whereupon the appeal is docketed in the Court of Appeals. Fed. R. App. P. 5. The same procedure obtains with regard to permission to appeal from judgments entered upon direction of the Magistrate (28 U.S.C. § 636(c)(5)), except that the petition for leave must be filed within the time allowed for filing a notice of appeal as of right. Fed. R. App. P. 5.1.

(e) A notice of appeal is filed with the Clerk of the United States Tax Court within 90 days after the Tax Court decision is rendered; if the notice is timely filed, any other
party may file within 120 days after the decision. Fed. R. App. P. 13. A petition to review the order of an administrative agency is filed with the Clerk of the Court of Appeals within the time prescribed by the applicable statute. Fed. R. App. P. 15(a). An application for enforcement of an agency order also is filed with the Clerk of the Court of Appeals. Fed. R. App. P. 15(b).

2. **Record on Appeal**

   (a) The record on appeal consists of the original papers and exhibits filed in the District Court, the transcript of proceedings, and a certified copy of the docket entries prepared by the Clerk of the District Court. Fed. R. App. P. 10(a). The transcript, or such part as appellant deems necessary, must be ordered from the Reporter within 10 days after the notice of appeal is filed. Fed. R. App. P. 10(b)(1). See CAMP R. 3.

   (b) Unless the entire transcript is included, appellant must file, within the 10-day period, a statement of issues to be presented on appeal. Fed. R. App. P. 10(b)(3). Where no transcript is available, appellant may prepare and serve a statement of the proceedings, subject to objection by the appellee and approval of the District Court. Fed. R. App. P. 10(c).

   (c) Any differences of the parties with respect to whether the record discloses what occurred in the District Court must be settled by the District Court. Also, the Court of
Appeals may direct that omissions or misstatements be corrected and may order a supplemental record to be certified and transmitted. Fed. R. App. P. 10(e).

(d) The Court Reporter must furnish the transcript within 30 days after receipt of the order therefor and must request an extension from the Clerk of the Court of Appeals if necessary. Fed. R. App. P. 11(b).

(e) Local Rule 11 urges the parties to agree as to the exhibits necessary for the determination of the appeal. Failing that, each party may designate the exhibits considered necessary, and all non-designated exhibits remain with the District Court Clerk unless requested by the Court of Appeals. The Rule does not relieve the parties of their obligations with respect to preparation of the Appendix.

3. The Civil Appeals Management Plan (CAMP)

(a) Within 10 days after filing the notice of appeal or petition for review or enforcement, the appellant or petitioner must file Form C or Form C-A (Civil Appeal Pre-Argument Statement) with the Clerk of the Court of Appeals. The following are filed with the Clerk at the same time: Form D (Transcript Information) and copies of the judgment, order or decision appealed from. CAMP R. 3 (as amended Nov. 10, 1986).

(b) Staff counsel may direct the attorneys to attend a pre-argument conference to explore settlement possibilities, simplify the issues or discuss any matters related to the
expeditious disposition of the appeal. CAMP R. 5. Guidelines for the conduct of pre-argument conferences have been adopted. Conference discussions are confidential and may not be communicated to any member of the Court. In re Lake Utopia Paper, Ltd., 608 F.2d 928 (2d Cir. 1979).

(c) As soon as practicable, staff counsel will issue a scheduling order setting forth dates for the filing of the record on appeal, briefs and appendix, and designating the week during which the argument of the appeal will be heard. CAMP R. 4. The dates prescribed by the scheduling order do not necessarily conform to the filing dates set forth in the Fed. R. App. P. See, e.g., Fed. R. App. P. 31(a) (time for filing brief).

(d) Sanctions, including dismissal of the appeal, may be imposed for non-compliance with orders and directions issued pursuant to the Civil Appeals Management Plan. CAMP R. 7.

4. Motions

(a) The time and manner of making motions are governed by Local Rule 27. Notice of Motion Form T-1080 must be employed, and a copy of the lower court or agency decision must accompany the affidavits, memoranda of law and exhibits.

(b) Substantive motions normally are heard by the regular panels sitting on Tuesday of each week, and oral argument is permitted. These motions include applications for dismissal or summary affirmance; summary enforcement of agency orders; stay or injunction pending appeal or review; and leave to proceed in
forma pauperis. A single judge may hear substantive motions when the court is in recess.

(c) On a motion for stay pending appeal, the moving party must demonstrate a substantial possibility of success on the merits, a likelihood of irreparable injury if the relief is not granted, and that the stay will not harm another party or the public interest. Hilton v. Braunskill, 481 U.S. 770 (1987); Janik Paving & Construction, Inc. v. Brock, 828 F.2d 84 (2d Cir. 1987). The application ordinarily is made to the District Court in the first instance. Fed. R. App. P. 8.

(d) Procedural motions generally are decided by a single judge. These motions include applications for consolidation; intervention; substitution; extension of time to file briefs; leave to file amicus briefs; filing oversized briefs; extending time for a petition for rehearing and similar matters.

IV. Appellate Advocacy

1. The Brief

(a) The Brief must contain, in the following order:
(1) a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities, referring to the page where they are cited; (2) a statement of the issues presented; (3) a statement of the nature of the case, the course of proceedings and the disposition below, followed by
a statement of facts with references to the record; (4) an argument containing contentions, reasons and citations to authorities and the record; (5) a conclusion stating the relief sought. Fed. R. App. P. 28(a)-(c). A non-governmental corporate defendant in a criminal appeal, and a non-governmental corporate party in a civil or bankruptcy appeal, must also include in its brief, and any motion, response, petition or answer filed earlier than its brief, "a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." Fed. R. App. P. 26.1. Appellant's Brief must include, as a preliminary statement, the name of the Judge or agency member who rendered the decision and a citation to the opinion, if reported. 2d Cir. R. § 28. The form of the Brief is prescribed by Fed. R. App. P. 32 and 2d Cir. R. § 32.

(b) Except by permission of the Court, principal Briefs cannot exceed 50 pages and Reply Briefs cannot exceed 25 pages, exclusive of pages containing the tables and any addendum containing statutes, rules and regulations, and the corporate disclosure statement required by Fed. R. App. P. 26.1, see Fed. R. App. P. 28(f), (g); Fed. R. App. P. 28 advisory committee's note. Excessive footnoting should be avoided.

(c) If pertinent authorities come to the attention of a party after the Brief is filed or after oral argument but before decision, that party should promptly advise the Court by letter,

(d) Parties should be referred to in the Brief by name or description rather than "appellant" or "appellee." Fed. R. App. P. 28(d).

(e) Some deficiencies noted: excessive quotations of the record and authorities; inaccurate citations; typographical and grammatical errors; outdated authorities; disorganized arguments; failure to identify and distinguish adverse precedent; lack of clarity; prolix sentences; excessive use of adverbs; uninformative point headings; inadequate statement of the issues presented; incomplete factual presentation; statement of the facts through summary of witness' testimony rather than narrative; discussion of material outside the record; use of slang; inclusion of sarcasm, personal attacks and other irrelevant matters; excessive number of points; lack of reasoned argument; illogical and unsupportable conclusions; failure to meet adversary's arguments; failure to recognize that the purpose of the Brief is to persuade. See 2d Cir. R. § 28.

2. The Appendix

(a) The appellant is responsible for preparing and filing the Appendix to the Briefs. It must contain: (1) the docket entries in the proceeding below; (2) relevant portions of the pleadings, charge, findings or opinion; (3) the judgment,
order or decision in question; (4) other parts of the record to which the parties wish to direct the Court's attention. Memoranda of law filed below should not be included. Fed. R. App. P. 30(a). The form of the Appendix is governed by Fed. R. App. P. 32.

(b) The parties are encouraged to agree on the contents of the Appendix. If they cannot, the appellant must serve on the appellee a designation of the parts of the record to be included and a statement of the issues to be presented, within 10 days after the filing of the record. The appellee then must designate the portions of the record it desires to include, within 10 days thereafter, and the appellant must include the parts so designated. Fed. R. App. P. 30(b).

(c) Unless the parties otherwise agree, the cost of producing the Appendix must be paid initially by appellant. If the appellant considers the items designated by appellee unnecessary, the appellee must be so advised and must then advance the costs of including those items. The cost of production is taxed as costs, except that the cost of producing unnecessary items may be imposed on the requesting party. Local Rules may provide for sanctions to be imposed upon "attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix." Fed. R. App. P. 30(b) (although the Second Circuit has not yet
adopted such a rule, these sanctions have been imposed under the Court's inherent powers).

(d) An alternative method, allowing for deferred preparation of the Appendix, is provided, and the Appendix may be dispensed with altogether in a limited class of cases. Fed. R. App. P. 30(c); 2d Cir. R. § 30. When exhibits are designated for inclusion, they may be bound in a separate volume, suitably indexed with a description of each exhibit. Fed. R. App. P. 30(e); 2d Cir. R. § 30.

(e) Preparation of an appropriate Appendix is an important factor in successful appellate advocacy. Underinclusion is just as serious a deficiency as overinclusion. Frequently, Briefs refer to matters in the record that are not included in the Appendix. This creates an unfavorable impression on the Court.

3. Oral Argument

(a) Although the Court is authorized to dispense with oral argument in certain cases, 2d Cir. R. § 34(g), the custom in the Second Circuit is to allow it whenever requested. Time requests are passed on by the presiding Judge, and the time currently allowed to each side averages 10-15 minutes. Appellant may reserve time for rebuttal. Argument is heard by a panel of 3 Judges. Once a case is set for oral argument, there may be no continuance, except by order of the Court on good cause shown.
Engagement of counsel (other than in the Supreme Court) is not good cause. Fed. R. App. P. 34; 2d Cir. R. § 34.

(b) Oral argument is a very important element of appellate advocacy and should not be waived. It presents an important opportunity to persuade the Court. The Second Circuit is a "hot bench" and the Judges welcome the opportunity to clarify their thinking and that of their colleagues through the interchange with counsel. A Judge's tentative conclusions about a case have been "turned around" on many occasions by oral argument.

(c) Some deficiencies noted: reading from a prepared text; quoting extensively from a case or from the record; deferring answers to questions; referring to the Brief rather than responding directly to the inquiry; unpreparedness; lack of familiarity with precedential cases decided since the filing of the Briefs; excessive discussion of the facts; lack of familiarity with relevant facts; unnecessary discussion of basic legal principles; unfamiliarity with cases cited; responding with a "guess"; lack of a structured argument; ineffective presentation of the issues; insufficient voice volume; distracting mannerisms; answering questions with questions; attempting to cover too many points; emotional arguments; coat-tugging and note passing; misuse of rebuttal time; division of argument among lawyers on the same side; extensive explanations of recent decisions of the Court.
4. **Sanctions**

   (a) The prevailing party may be awarded just damages and double costs for delay or for a frivolous appeal. 28 U.S.C. § 1912; Fed. R. App. P. 38. An attorney who multiplies the proceedings unreasonably and vexatiously may be liable for excess costs, expenses and attorney's fees attributable to such conduct. 28 U.S.C. § 1927.

   (b) Sanctions, including dismissal, may be imposed for failure to comply with time limitations or any rule or order related to the appeal. 2d Cir. R. § 38; CAMP R. 7. The sanction provisions of Fed. R. Civ. P. 11 apply to motions in the Court of Appeals as well as in the District Court. *In re Martin-Trigona*, 795 F.2d 9, 12 (2d Cir. 1986).

V. **Decision Making**

1. **Initial decision making**

   (a) The median disposition time for processing appeals in the Second Circuit is 6.1 months, the fastest in the nation. See 1989 Report of the Second Circuit Executive. A decision may come in the form of a written opinion or a summary order. Decisions may be announced from the Bench, but such dispositions are rare, except in the case of argued motions. Summary orders are not formal opinions and are unreported. Since they are considered to serve "no jurisprudential purpose," they may not be
cited or otherwise referred to in unrelated cases before the Second Circuit or any other court. 2d Cir. R. § 0.23.

(b) Tentative votes are taken at conferences held immediately following oral argument or at the end of the week. Voting memoranda, giving reasons for the tentative votes, are exchanged in a number of cases. Writing assignments are made by the senior active Judge, unless that Judge dissents, in which case the assignment is made by the next senior active Judge. Drafts of opinions and summary orders undergo extensive review by panel members, and positions frequently are re-aligned. Summary orders generally are not used in cases of reversal, and any panel member may object to decision by summary order.

(c) In arriving at a decision on a question of state law, the Second Circuit now may certify the question to the New York Court of Appeals. N.Y. Rules of Court § 500.17 (N.Y. Ct. App.); see Kidney v. Kolmar Laboratories, Inc., 808 F.2d 955 (2d Cir. 1987). Certification may be made by the court sua sponte or on motion. 2d Cir. R. § 0.27 (added Nov. 10, 1986). Acceptance of the question is discretionary with the New York Court.

(d) Following receipt of the opinion or order, the clerk enters judgment and, on the same date, mails copies of the opinion or order to the parties. Fed. R. App. P. 36. The mandate issues 21 days thereafter, unless the time is shortened or enlarged by order. Fed. R. App. P. 41. The bill of costs must be filed within 14 days after judgment. Procedures relating
to taxation of the bill of costs are set forth in Fed. R. App. P. 39 and 2d Cir. R. § 39.

2. Post-judgment decision making

(a) The decision-making process may continue with a petition to the panel for rehearing, which must be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition must particularize the points of law or fact petitioner contends were overlooked or misapprehended in the opinion. Oral argument is not ordinarily permitted, and no answer to the petition will be received unless required by the Court. If a petition for rehearing is wholly without merit, a sum not exceeding $250 may be taxed as additional costs against the petitioner. Fed. R. App. P. 40; 2d Cir. R. § 40.

(b) The petition for rehearing may also contain a "suggestion" for rehearing in banc. The vote of a majority of the Circuit Judges in regular active service is necessary to secure in banc consideration. An appeal or other proceeding may be heard in banc initially, but in banc hearings generally are disfavored. They are limited to cases where consideration by the full Court is necessary to maintain uniformity of decisions and where questions of exceptional importance are involved. Fed. R. App. P. 35; 2d Cir. R. § 35.

(c) Issuance of the mandate is stayed upon timely filing of a petition for rehearing. If the petition is denied,
the mandate issues 7 days thereafter. A further stay may be
sought by motion on notice pending application for writ of
certiorari to the U.S. Supreme Court. Fed. R. App. P. 41; 2d
Cir. R. § 41. The pendency of a suggestion for a rehearing in
banc does not automatically stay the mandate. Fed. R. App. P.
35(c).


