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Current Issues In Federal Court Practice In The Courts In New York

Cosponsored by the Committee on Federal Courts
and the Committee on Continuing Legal Education
of the New York State Bar Association

Current Issues In Federal Court Practice In The Courts In New York

April 10, 1987 — Albany
April 24, 1987 — New York City
May 8, 1987 — Rochester
May 22, 1987 — Uniondale, L.I.

Cosponsored by the Committee on Federal Courts
and the Committee on Continuing Legal Education
of the New York State Bar Association

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4:00-4:45	APPELLATE PRACTICE
4:45	ADJOURNMENT

Program Faculty

Chair, Committee on Federal Courts,
New York State Bar Association
ROBERT L. HAIG, Esq.
Kelley Drye & Warren
New York City

Program Chair
HARRY P. TRUEHEART, III, Esq.
Nixon, Hargrave, Devans & Doyle
Rochester

Speakers (in alphabetical order)

JOHN M. ARMENTANO, Esq.
Farrell, Fritz, Caemmerer,
Cleary, Barnosky & Armentano, P.C.
Mineola
(Uniondale location)

FREDERIC BLOCK, Esq.
Block & Hamburger
Smithtown
(Uniondale location)

HON. CON. G. CHOLAKIS
United States District Judge
Northern District of New York
Albany
(Albany location)

ROBERT B. CONKLIN, Esq.
Hodgson, Russ, Andrews, Woods &
Goodyear
Buffalo
(Rochester location)

HON. JOHN T. CURTIN
Chief Judge
United States District Court
Western District of New York
Buffalo
(Rochester location)

WILLIAM J. DREYER, Esq.
Harvey and Harvey, Mumford & Kingsley
Albany
(Albany location)

PETER M. FISHBEIN, Esq.
Kaye, Scholer, Fierman, Hays & Handler
New York City
(New York City location)

ROBERT L. HAIG, Esq.
Kelley Drye & Warren
New York City
(all four locations)

E. STEWART JONES, Jr., Esq.
The Jones Firm
Troy
(Albany location)

HON. DAVID G. LARIMER
United States Magistrate
Western District of New York
Rochester
Rochester location)

J. ROBERT LUNNEY, Esq.
Lunney & Crocco
New York City
(New York City location)

HON. THOMAS J. McAVOY
United States District Judge
Northern District of New York
Binghamton
(Albany location)

HON. NEAL P. McCURN
United States District Judge
Northern District of New York
Syracuse
(Albany location)

DENIS McINERNEY, Esq.
Cahill Gordon & Reindel
New York City
(New York City location)

HON. ROGER J. MINER
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
Albany
(Rochester and Albany locations)

HON. HOWARD G. MUNSON
Chief Judge
United States District Court
Northern District of New York
Syracuse
(Albany location)

KENNETH A. PAYMENT, Esq.
Harter, Secrest & Emery
Rochester
(Rochester location)

HON. GEORGE C. PRATT
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
Uniondale
(Uniondale location)

WILLIAM J. QUINLAN, Esq.
Mead, Begley & Quinlan
Schenectady
(Albany location)

LEONARD L. RIVKIN, Esq.
Rivkin Radler Dunne & Bayh
Uniondale
(Uniondale location)

PROFESSOR DAVID D. SIEGEL
Harold F. McNiece Professor of Law
St. John's University School of Law
Jamaica
(all four locations)

HON. ROBERT W. SWEET
United States District Judge
Southern District of New York
New York City
(New York City location)

HON. MICHAEL A. TELESCA
United States District Judge
Western District of New York
Rochester
(Rochester location)

HARRY P. TRUEHEART, III, Esq.
Nixon, Hargrave, Devans & Doyle
Rochester
(all four locations)

HON. JACK B. WEINSTEIN
Chief Judge
United States District Court
Eastern District of New York
Brooklyn
(Uniondale location)

HON. LEONARD D. WEXLER
United States District Judge
Eastern District of New York
Uniondale
(Uniondale location)

RUSSELL I. ZUCKERMAN, Esq.
Goldstein Goldman Kessler & Underberg
Rochester
(Rochester location)

FEDERAL CIVIL APPELLATE PRACTICE IN THE SECOND CIRCUIT

by

HON. ROGER J. MINER
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
Albany

FEDERAL CIVIL APPELLATE PRACTICE

IN THE SECOND CIRCUIT

by

HON. ROGER J. MINER
United States Circuit Judge
Second Circuit Court of Appeals

FEDERAL CIVIL APPELLATE PRACTICE

IN THE SECOND CIRCUIT

I. Appealability

1. Final Judgments

(a) Except where a direct review may be had in the Supreme Court, see 28 U.S.C. § 1252 (appeals from decisions invalidating Acts of Congress where U.S. is a party), 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); Ansam Associates, Inc. v. Cola Petroleum, Ltd., 760 F.2d 442 (2d Cir. 1985) (District Court failed to provide sufficiently detailed explanation).

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).

(b) Denial of a public officer's claim of absolute immunity in an action brought under 42 U.S.C. § 1983 is appealable before final judgment. Nixon v. Fitzgerald, 457 U.S. 731 (1982); Minotti v. Lensink, 798 F.2d 607 (2d Cir. 1986).

Denial of a claim of qualified immunity in a § 1983 action, to the extent it turns on an issue of law, likewise is appealable. Mitchell v. Forsyth, 472 U.S. 511 (1985). Cf. Group Health Inc. v. Blue Cross Ass'n, 793 F.2d 491, 497 (2d Cir. 1986) (immunity issues requiring resolution of factual questions).

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 or refusing a stay of arbitration proceedings is not a grant or denial of an injunction. Greater Continental Corp. v. Schechter, 422 F.2d 1100, 1102 (2d Cir. 1970). (An order compelling or denying arbitration, however, is appealable as a final decision under § 1291. 15 C.A. Wright & A. Miller, Federal Practice & Procedure § 3914, at 553 n.45.) The grant or denial of a temporary restraining order is not appealable, except in very limited circumstances. 19 Fed. Proc. L. Ed. § 47:167.

(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.

(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 Benevolent Ass'n v. Port Authority of New York & New Jersey, 698 F.2d 150 (2d Cir. 1983) (denial of class certification, ordinarily unappealable, "inextricably related" to appealable denial of preliminary injunction). Acceptance of this jurisdiction is entirely discretionary. General Motors Corp. v. Gibson Chemical & Oil Corp., 786 F.2d 105 (2d Cir. 1986).

(e) All orders denying intervention are appealable in the Second Circuit. Shore v. Parklane Hosiery Co., 606 F.2d 354, 357 (2d Cir. 1979). Cf. Hispanic Society v. New York City Police Department, 806 F.2d 1147 (2d Cir. 1986) (parties who did not seek to intervene in District Court lacked standing to prosecute

appeal). 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_, 55 U.S.L.W. 4299 (U.S. Mar. 9, 1987).

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 (eff. July 1, 1986).

(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 (eff. July 1, 1986).

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).

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. 1987) (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

(a) Factual findings by the Court, whether based on oral or documentary evidence, may not be set aside unless they are clearly erroneous. Fed. R. Civ. P. 52(a). A choice between two permissible views of the evidence cannot be clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564 (1985).

(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. Lopez v. McLean Trucking Co., 798 F.2d 611 (2d Cir. 1986).

(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 returns. 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. Williams v. City of New York, 508 F.2d 356, 362 (2d Cir. 1974).

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 $65) 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 Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli, 805 F.2d 47 (2d Cir. 1986). 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 In re O.P.M. Leasing Services, Inc., 769 F.2d 911 (2d Cir. 1985) (extension denied for failure to show excusable neglect).

(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. <u>The Civil Appeals Management Plan (CAMP)</u>

(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. *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1981). 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). 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. Fed. R. App. P. 28(f), (g). 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, with a copy to opposing counsel, setting forth the citations. Fed. R. App. P. 28(j).

(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; 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.

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 average time for processing appeals in the Second Circuit is 6 months, the fastest in the nation. See 1986 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).

SUGGESTED REFERENCES

Federal Rules of Appellate Procedure, 28 U.S.C.A. app. at 1-307 (1980 & Supp. 1987)

United States Court of Appeals for the Second Circuit Rules, 28 U.S.C.A. app. at 441-76 (1980 & Supp. 1987).

Second Circuit Civil Appeals Management Plan, 28 U.S.C.A. app. at 487-93 (1980 & Supp. 1987).

Comm. on Federal Courts of the Ass'n of the Bar of the City of New York, Appeals to the Second Circuit (5th ed. 1984).

Rules of the United States Court of Appeals for the Second Circuit Supplementing Federal Rules of Appellate Procedure (June 1, 1984).

Federal Civil Judicial Procedure and Rules 341-83 (West 1986).

16 C.A. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §§ 3945-3994 (1977 & Supp. 1986).

E. Re, Brief Writing and Oral Argument (5th ed. 1983).

2 Federal Procedure, Lawyer's Edition §§ 3:1 to 3:787 (1981 & Supp. 1986).

Feinberg, Unique Customs and Practices of the Second Circuit, 14 Hofstra L. Rev. 297 (1986).

Kaufman, Must Every Appeal Run the Gamut? -- The Civil Appeals Management Plan, 95 Yale L.J. 755 (1986).

Newman, In Banc Practice in the Second Circuit: The Virtues of Restraint, 50 Brooklyn L. Rev. 365 (1984).

Wasby, The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges, Judicature, Feb. 1982, at 340.

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207
(518) 463-3200

New York State Bar Association — (April 10, 1987 — Albany, NY)(May 8, 1987 — Rochester, NY) — Federal Civil Appellate Practice in the Second Circuit, PUBLISHED — New York State Bar Association Committee on Continuing Legal Education, Federal Court Practice Coursebook (Spring 1987).

Chief Judge Munson of the Northern District, under whom I was privileged to serve as a District Judge, never has thought much of the appellate process. (I guess that no District Judge does). He says that appellate judges are like soldiers who come onto the battlefield after the battle and shoot the wounded. He claims that he read a dissenting opinion in my court that went something like this: "I dissent, substantially for the reasons given in the majority opinion." He also claims to have read a concurring opinion written in these words: "I concur in so much of the majority opinion as is supported by the reasoning therein and dissent from the remainder." Judge Munson told me that he heard about the argument of an appeal involving one of my decisions as a District Judge. The attorney for the appellant began: "May it please the court, this is an appeal from a decision by Judge Miner." The presiding judge supposedly said: "Get on to your next point." Speaking at the ceremony marking my departure from his District Court to serve as a Judge of the Court of Appeals for the Second Circuit, Judge Munson was heard to remark that both courts undoubtedly would benefit from the event.

Regardless of how district judges such as Judge Munson regard the appellate process, it is incumbent upon lawyers practicing in the Federal Courts in New York to become familiar with civil appellate practice in the Second Circuit. To that end, I have prepared the outline that appears in your coursebook.

The outline is perhaps more detailed than necessary, but the materials are quite up to date and replace the more sketchy outline of this subject previously published by the State Bar. The outline covers a number of current issues and is divided into five parts: Appealability, at pages 285-289; Scope of Review, at pages 289-291; Mechanics of Appeal, at pages 291-294; Appellate Advocacy, at pages 294-298 and Decisionmaking at pages 298-299. Also included is a list of Suggested References at page 300.

My discussion this afternoon will focus on current and recurrent problems relating to two items covered in the outline: Appealability and Appellate Advocacy. With respect to the question of what is, and what is not appealable, there are sharp differences from New York State practice, and it behooves the practitioner to be familiar with those differences. With respect to appellate advocacy, it suffices at this point to say that I have been greatly disappointed in much of the written and oral argument recently presented to the Second Circuit Court of Appeals during my sittings. By restricting my comments to these two topics, I hope to have some time for any questions you may have regarding civil appeals in the Second Circuit.

Appealability. A number of judgments and orders brought before our Court are dismissed each year simply because they are not appealable. Very frequently, our staff counsel will bring to the attention of attorneys at a conference, held pursuant to our Civil Appeals Management Program, that a particular judgment or

order is non-appealable. I understand that this can be very embarrassing for the attorneys involved. Research into the question of appealability, before the notice of appeal is filed, is strongly recommended. In determining what is appealable, we frequently refer to the rule of finality. Does the rule require a decision to be final, to the extent of ending all phases of the litigation on the merits, before an appeal may be taken to the Second Circuit Court of Appeals? The answer to that question is generally "yes," rarely "no" and sometimes "maybe."

Generally, appellate review is not available until the final judgment, resolving all the claims, cross-claims, counterclaims, consolidated claims and defenses in a case is entered. 28 U.S.C. § 1291 requires the prosecution in the Court of Appeals of all final decisions of the district courts. Let me give you some common examples of orders that are non-final and therefore not appealable:

d) RESULT OF NON-COMPLIANCE - Failure to timely file Forms C & D results in automatic dismissal of the appeal by the Clerk of the Court of Appeals. Upon a showing of good cause, accompanied by the required Forms, reinstatement is usually granted, but counsel is advised to avoid the risk.

B. Substantive Requirements

1. Finality - 28 USC §1291, Rule 54(b), FRCP

In general, a final judgment, completely resolving all of the claims raised in a single case or consolidated proceeding, must be entered before appellate review is available. Thus, if any claim, portion of a claim, counter-claim or cross-claim remains pending, a judgment on any other claim is not considered "final." This federal rule of "finality" contrasts sharply with New York State court practice. Under Rule 54(b) FRCP, a District Judge does have discretion to direct entry of judgment on a discrete claim, though not on a portion of a single claim, see, Aetna Casualty & Surety Co. v. Giesow, 412 F. 2d 468, 470 (2d Cir. 1969); but the District Court must provide, in light of the strong policy against piecemeal appeals announced in Ansam v. COLA, 760 F. 2d 442 (2d Cir. 1985), a "brief, reasoned explanation" of why there is no "just reason for delay." NOTE: Interlocutory appellate review is available, by leave of court, under 28 USC §1292(b), to resolve controlling questions of law, but leave to appeal must be obtained from both the District Court and the Court of Appeals.
NOTE: In extraordinary (rare) circumstances, appellate review of non-final orders can be had via mandamus.

X Listed below are examples of orders which have been considered to be non-final, and hence, not appealable.

- discovery orders. See, Xerox Corp. v. SCM Corp., 534 F. 2d 1031 (2d Cir. 1976)

- an order granting a new trial. See, Compagnie Nat'l v. Port of N.Y. Authority, 427 F. 2d 951, 954 (2d Cir. 1970)

- an order dismissing a complaint with leave to replead or amend. See, Elfbein v. Gulf & Western, 590 F. 2d 445, 448 (2d Cir. 1978)

- an order denying a motion to dismiss a complaint or for summary judgment. See, Pacific Union Conference v. Marshall, 434 U.S. 1305, 1306 (1977); Alart Assoc. v. Aptaker, 402 F. 2d 779 (2d Cir. 1968); RRI Realty v. Inc. Village of Southampton, 766 F. 2d 63 (2d Cir 1985)
EXCEPTION: Rejection of a government official's defense

of absolute immunity or qualified immunity, on a legal ground as opposed to a factual basis, is appealable, because defendant is entitled to be free from suit, not just liability in damages. See, Mitchell v. Forsyth, 105 S. Ct. 2806(1985). QUERY: Whether interlocutory review is available to defendant if plaintiff has sought both damages individually and equitable relief against the official in his official capacity. See, Bever v. Gilbertson, 724 F. 2d 1083 (4th Cir. 1984)(no review); Schwartz, Public Interest Litigation - Appeals From Denial Of Immunity, NYLJ Dec. 16, 1986.

- an order finding liability only, reserving for future determination the amount of damages. See, Liberty Mutual Ins. Co., 424 U.S. 737,744.
  EXCEPTION - Ordering the delivery of real property, which can create an irreparable injury, may be appealable. Compare, Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848), with In Re Martin-Trigona, 763 F. 2d 135 (2d Cir. 1985).

- an order awarding interim attorneys' fees. See, Hastings v. Maine-Endwell, 676 F. 2d 893 (2d Cir. 1982); In Re Stable Mews Assoc., 778 F. 2d 121 (2d Cir. 1985). But see, Falvey, Significant Developments In The Law, NYLJ May 29, 1986 (discussing Rule 11 cases in 7th Cir. and D.C. Cir.)

- an order not followed by entry of a "judgment". See, Kanematsu-Gosho v. M/T Messiniaki, ___ F. 2d ___, 86-7610 (2d Cir. Nov. 7, 1986). Under FRAP 4(a)(2), a notice of appeal filed after announcement of a decision, but before entry of judgment, is treated as filed on the date of the judgment. But make sure to get a judgment.

- an order by a District Judge staying his own proceedings.
  NOTE: In Moses H. Cone Memorial Hospital v. Mercury Constr. Co., 460 U.S. 1, 11 n.11 (1983), the Court held that a stay order is final, and hence appealable, "when the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal court to state court." Thus, federal abstention in favor of state court adjudication, which effectively ensures under principles of res judicata, that there would be no further litigation in a federal forum, constitutes a surrender of jurisdiction which is appealable. In contrast, a decision not to abstain is not a final, appealable decision. RRI Realty v. Inc. Village of Southamption, 766 F. 2d 63 (2d Cir. 1985)

- an order fully resolving the merits, but not resolving the issue of attorneys' fees, is not appealable in only two instances: in a stockholder derivative action, where the fees come out of the common fund, see, Lewis v. S.L. & E Inc., 746 F. 2d 141 (2d Cir. 1984); and where attorneys' fees are contractually stipulated, see, Krear v. Nineteen Named Trustees, 776 F. 2d 1563 (2d Cir. 1985). In all other instances, where fees are based upon a fee-shifting statute, or Rule 11, or upon inherent authority upon a finding of "bad faith", a timely notice of appeal from judgment on the merits must be filed even though fees remain unresolved. See, White v. New Hampshire, 455 U.S. 445, 452 n.14 (1982); Ellender v. Schweiker, 781 F. 2d 314 (2d Cir. 1986).

During my tenure as a New York State Supreme Court Justice, I found that a plaintiff had taken the trouble to appeal an order of mine directing compliance with one item in a bill of particulars. Aside from the fact that there are no bills of particulars in federal practice, such an appeal would be impermissible under our appellate procedure. As I have indicated previously, however, there are some limited exceptions to the rule of finality. 28 U.S.C. § 1292(a) provides a statutory appeal as of right from interlocutory orders granting or denying injunctions, appointing receivers and determining rights and liabilities in admiralty cases. The right to appeal from a grant or denial of an injunction order is a little tricky. For example: While an order compelling or denying arbitration is appealable as a final decision under § 1291, an order granting or refusing a stay of arbitration proceedings is not considered a grant or denial of injunction under § 1292(a). An order refusing to stay proceedings in the district court pending arbitration is considered an appealable interlocutory order refusing an injunction, if the underlying action is legal, rather than equitable, in nature. Here is a recent cite on that: Gilmore v. Shearson-American Express, 811 F.2d 108 (2d Cir. 1987). Very recently, we held that preliminary relief afforded by the district court under the provisions of a statute was not an injunction of the type contemplated by § 1292(a). Only orders

issued pursuant to the equity powers of the district court qualify. The case is Korea Shipping Corp. v. New York Shipping Association, 811 F.2d 124 (2d Cir. 1987).

A fairly sure-fire way to avoid the rule of finality is to get the district judge to direct the entry of a partial judgment -- that is a final judgment affecting one or more but fewer than all of the claims or parties. I say fairly sure-fire because you must have the district judge make an express determination that there is no just reason for delay and expressly direct the entry of the partial judgment. The district judge must say why there is no just reason for delay, and we may refuse to accept the case for review if the explanation given is lacking in the necessary detail. We do apply a light standard of review to these partial judgment certifications, however, -- abuse of discretion. The entire process is governed by the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. A very recent decision of ours involving the standards for Rule 54(b) certification is Cullen v. Margiotta, 811 F.2d 698, 710-712 (2d Cir. 1987), decided in February.

A much less certain way to gain review of a non-final order is found in the certification procedure set out at 28 U.S.C. § 1292(b). To utilize that procedure, the district judge must determine that the 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." As is apparent, only a novel question of law is adequate to invoke this procedure and then only if the conclusion of the litigation can be hastened by resolution of that question. The certification is subject to acceptance by the Court of Appeals, and acceptance is rare. As a district judge, I invoked the statute but once, and the question was rejected by the Circuit Court.

Reviewable collateral orders of the type discribed in Cohen v. Beneficial Industrial Loan Corp., are few and far between. Such orders must satisfy a three-fold test: They must conclusively determine a disputed question, resolve an important issue completely separate from, and collateral to, the merits of the case, and be effectively unreviewable on appeal. Courts are reluctant to find all three conditions satisfied. Cohen itself involved an order waiving the posting of security for costs.

While the Cohen collateral order exception to the rule of finality was judicially created about forty years ago, another exception has only recently been engrafted on the rule by the courts. The new exception allows immediate appeal from the denial of motions to dismiss or for summary judgment in civil rights claims against public officers who have raised the defense of absolute or qualified immunity. 42 U.S.C. § 1983 allows claims against those who, acting under color of state law, deprive a person of a right, privilege or immunity guaranteed by the Constitution or by a statute of the United States. A

defendant who raises the claim of absolute immunity, such as a judge (I have been sued several times by disgruntled litigants) is considered entitled to have the rejected defense determined on appeal immediately to avoid the inconvenience of trial, if possible. Likewise, those who have the defense of qualified immunity, such as police officers who claim to have acted in good faith, may have appeals from denials of this defense heard immediately if the resolution of factual issues is not required. For example, if a police officer conducted a search in a generally judicially-approved manner thereafter held to be unconstitutional, it might be said that there was a good faith, qualified immunity defense as a matter of law.

While all orders denying intervention (of right or permissive) are appealable in the Second Circuit, the Supreme Court held a few weeks ago that an order denying intervention of right but granting permissive intervention subject to conditions is not appealable.

An arcane rule to bear in mind is the rule of pendent appellate jurisdiction. This rule has nothing to do with state claims appended to federal claims as in the pendent jurisdiction of a district court. It deals with our exercise of jurisdiction over an otherwise non-appealable order which appears in the record before us along with an appealable order. A note of caution: Pendent appellate jurisdiction is purely discretionary,

and I was a member of a recent panel that exercised its discretion to reject the pendent question.

I think that I have hit most of the highlights of appealability and do wish to move on to appellate advocacy. I refer you to the outline for the rules on appealability of judgments entered by magistrates (some new provisions here), district court judgments in bankruptcy matters, agency and tax court decisions and post-judgment motions. Just a word with respect to post-judgment motions: While timely motions for judgment n.o.v., for amendment of the court's findings, and for new trial or amendment of judgment stop the time for appeal from running until they are decided and are not separately appealable, a direct appeal may be taken from a decision on a motion for relief from a judgment or order brought under Rule 60 of the Federal Rules of Civil Procedure.

Now to Advocacy. A few years ago, then Chief Justice Burger made some comments about the low state of trial advocacy in the United States. I don't know how he came to the conclusions he did, because the court he was sitting on does not have a very good view of trials. From my own experience on the trial bench, New York State Supreme Court and United States District Court, trial lawyers generally do an adequate, often an outstanding job, in representing their clients at the trial level. My experience has been much different as an appellate judge. Frankly, I am amazed at the poor quality of the briefs and oral arguments I

frequently am confronted with at the Second Circuit Court of Appeals. It is with a great deal of self-interest, therefore, that I share with you some observations, warn you of some pitfalls and offer you some suggestions respecting appellate advocacy in the Second Circuit.

First, the Brief. 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. 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.

Just this past week, 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 chock-full 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 they're in point.

Every once in a while, we find a Brief containing a fine argument, supported by law and logic, on some arcane point of law. Unfortunately, we can't consider the point, because it was not raised below. An issue not raised in the district court cannot considered in the Court of Appeals. Grace Towers Tenants Association v. Grace Housing Development Fund, 538 F.2d 491, 495 (2d Cir. 1976). The principal was reiterated in a decision issued by a panel of my court two weeks ago. Christensen v. Kiewit-Murdock Investment Corp., No. 85-7964, slip opinion decision March 26, 1987. These two citations probably should be added to the Scope of Review section of my outline (Part II). No matter how good the point is, don't include it in the Brief if it isn't raised at the trial level.

There is no reason to present a Brief loaded with inaccurate citations, typographical and grammatical errors and citations to outdated authorities. Yet we frequently see Briefs containing one or more of these deficiencies, any one of which will cause the Brief writer to lose credibility with the court. The standard format of a Brief is prescribed by the Federal Rules of Appellate Procedure and the Rules of our Circuit, and we insist on strict adherence to that format. Failure to adhere to the format may be 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 will certainly lose you points with the panel hearing your case.

Principal Briefs cannot exceed fifty pages and reply Briefs cannot exceed twenty-five pages. We adhere strictly to those requirements, although there is such a thing as a motion to file an oversized Brief. We take a dim view of those who attempt to increase the number of words in the Brief by extensive use of footnoting. Avoid this annoyance!

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 is different from most other forms of writing in that it has as its only purpose the persuasion of the reader. This should be borne in mind at all times.

The statement of facts is a very critical part of the Brief. It should not be incomplete, nor 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 list the name of each witness, followed by a summary of his or her testimony. A narrative of the facts is much preferred.

In the narrative of the facts, as well as in other portions of the Brief, it often is necessary to refer to testimony or exhibits. The testimony or exhibits referred to should be included in the Appendix. Make sure that they are included! There is nothing quite so frustrating to me as to find some reference in the Brief to a piece of evidence that is 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. The form and development of the Appendix is discussed in the outline under Appellate Advocacy for a good reason. I urge you to study it well!

I think that an excessive number of points weakens the brief, just as the use of slang, sarcasm, personal attacks, and other irrelevant matters weaken the brief. Choose three or four or five strong points, preface them with concise point headings and proceed to argue how the court below erred. Support your conclusions with appropriate authorities and reasoned arguments. Meet your adversary's argument 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 makings of a winning brief.

Oral Argument. Good appellate advocacy requires good oral argument as well as good briefing. It's always amazing to me that an attorney, offered a change to argue, prefers to submit. On many occasions, my preliminary thinking about a case has been turned around by oral argument. Our custom is to allow oral argument whenever requested, and I urge you to accept the opportunity it offers to persuade the Court to decide in your favor. Although the time allowed for oral presentation is short,

customarily ten or fifteen minutes, it can be used to good advantage.

The Second Circuit is a red-hot bench. Each member of the panel hearing oral argument has read the briefs, and sometimes there has been an exchange of memoranda among the Judges prior to the courtroom presentation. The Judges therefore generally come to the oral argument with a tentative view of the outcome of the case. Many of my colleagues have told me that their tentative views also have been discarded as the result of oral argument.

Because of our familiarity with the case, there often is a lively exchange of questions and answers between court and counsel in the Second Circuit. It is not unusual for the entire time allowed for argument to be taken up in this manner. The exchange is important, because the Judges use it to resolve their doubts, clarify their thinking, and, if you watch closely, sometimes to argue with each other. I urge you to respond directly to any question asked. Never say "I'll get to that, your Honor." I've heard that response from several attorneys who never did get around to answering the question.

Attorneys sometimes react to questions from the bench in strange ways. One responded to a question by a colleague of mine as follows: "Why did you ask that question, your Honor?" Obviously, one should not answer a question with a question. I am told that the following answer came in response to a question by a Judge in the Eighth Circuit: "You wouldn't want to know

that, your Honor." That didn't go over too well, either. Sometimes an attorney will not know the answer to a question from the bench. Don't "wing it!" Say you don't know and offer to furnish the answer after argument in accordance with Rule 28(j) of the Federal Rules of Appellate Procedure.

One of the rules of the Supreme Court says something to the effect that the reading of an argument is discouraged. It is a waste or time to read your argument in the Second Circuit as well. It is too distracting, precludes eye contact with the Judges, and deprives you of the necessary flexibility to answer questions from the bench. Recently, a young attorney read his entire argument at such a rapid pace that we were loath to interrupt with a question, for fear he would lose his place. During the argument, one of my senior colleagues passed me a note in which he wrote: "Isn't this Godawful?" My own impression is that its a good idea to write out a beginning sentence, an ending sentence and to set up an outline of everything you want to cover in between.

The key to effective argument is, of course, preparedness. I have found the best appellate oral argument in law school moot court competitions, and that is because the students spend hours and hours working under supervision on their Briefs and their oral presentations. Practicing attorneys seldom have the luxury of that much preparation. However, it frequently seems to me that almost no effort has gone into preparation for oral argument.

I know that some of the larger firms set up an in-house appellate bench for a moot argument before the real thing. A law school professor I recently met at a moot court competition told me that she was hired by lawyers from time to time to assist them in preparing for oral argument. In the final analysis, familiarity with the facts of your case, as well as familiarity with all the applicable law, is essential for effective oral argument. A few months ago, we heard oral argument from an attorney who was unfamiliar with a new Supreme Court case that was dispositive of the matter he was arguing. The Supreme Court decision had been issued after the Briefs in his case were filed. A brief trip to the Lexis machine prior to his appearance in our Court could have saved him a lot of embarrassment.

Since we do have a hot bench, extensive quotations from the record or from the authorities is to be avoided. It is a waste of valuable time. Also wasteful are discussions of basic legal principles. Get right to the heart of the case -- the disputed issues. The Judges will do it if you don't. At the same time, you should remember that an attempt to cover too many points may indicate that you don't have any really strong points.

Nature has provided some people with strong or pleasant voices. Neither is necessary to present an effective oral argument. However, the presentation must be loud enough so we don't have to strain to hear it. The words should be clearly enunciated, and the presentation should be slow enough for us to

follow it. There is a microphone in our courtroom and a podium that adjusts up and down for height. Lack of height and weakness of voice therefore are not handicaps in the Second Circuit Court of Appeals. However, the attorney must talk directly into the microphone and not move away from it. Distracting mannerisms should be avoided, and emotionalism should be eschewed at all costs. You are not talking to a jury when you argue to us. Finally, be mindful of the tenth commandment promulgated by John W. Davis, one of the greatest appellate advocates of all times. As a matter of fact, I now obey that tenth commandment, which is this: "When you are finished, sit down."