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Remarks: Appellate Advocacy Program, New York County Lawyers Association

Roger J. Miner '56

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U.S. Circuit Judge

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New York County Lawyers Association
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There is an old anecdote about a judge of an English Court of Appeal who said to a barrister arguing before him: "I have listened to your argument for the past half-hour and am none the wiser." The barrister replied: "I understand that, m'Lord, but I had hoped that you would be better informed." So it is with federal appellate advocacy. The job of the advocate is not to make us wiser but to inform and, even more important, to persuade. How is that to be done, and what do appellate judges look for? Generally speaking, we look for a lucid, well-structured and carefully researched brief and for oral argument that quickly gets to the heart of the case and provides direct and informative responses to questions from the bench. Like Diogenes looking for the elusive honest man, we look for the lawyer who is fully prepared, with instantaneous recall of all the facts and all the law pertinent to his or her case. We are about as successful as Diogenes. The customary excellence of law school moot court participants can be attributed simply to the hours spent in preparation. We recommend preparation very highly.

What are some of the specific things we look for in a brief? We look for a brief that is written in concise, unambiguous and understandable language. Long, convoluted and rambling sentences

are not helpful in getting the point across. Always remember that there is no limit on the number of sentences you can use in a brief. Only the number of pages is limited. Short sentences are helpful.

We look for a brief that does not try to make too many points. Three or four or five strong points are plenty for the ordinary appeal. Too many points indicate that you may not be too serious about any one of them. Each point should represent an argument demonstrating how the trial court erred or didn't err in a particular matter. We look for concise and informative point headings.

All judges look for honesty in the brief. That is, we expect an honest statement of the facts that can be supported by the record, and we expect an honest statement of the law. It is an attorney's obligation to bring to the court's attention any pertinent authority, even, or <u>especially</u>, contradictory authority. An effective brief will seek to distinguish unfavorable precedent or argue that it should be modified or overruled. The court will discover the unfavorable precedent anyway, so it is to your interest to deal with it in the brief. Dishonesty loses you many points and raises ethical considerations.

Helpful citations always are welcome. We like to see cases from our jurisdiction, other jurisdictions, statutory provisions, legislative history, law review articles, treatises, almost any kind of citation. However, it makes no sense to give six

different citations for the same point. These string citations drive us up the wall and are not helpful. We look for citations that are as closely in point as possible, but we see all too many that bear little relation to the case on appeal. Make sure that the authorities you cite support your contention.

We expect citations to be accurate, of course. We frequently are thwarted in this regard, and I cannot understand why. Sometimes it is only a typographical error that makes the citation inaccurate. Typographical and grammatical errors always are distracting and result in a loss of credibility for the brief writer. Citations to outdated law can be avoided by a simple check on Lexis or Westlaw or in Shepards citations.

We look for adherence to the prescribed format for briefs. The standard format is prescribed by the Federal Rules of Appellate Procedure and by the Rules of each circuit, but sometimes attorneys do not adhere to the Rules. Very often, the Clerk's office will reject briefs that are not in the required format, but sometimes they get through to us, with very bad results. On the subject of format, we are not very happy with brief writers who try to get around the fifty page limitation by inserting many footnotes in small type in order to make arguments that should be made in the body of the brief. One of my colleagues is so unhappy about this practice that he has adopted a personal rule that he will not read footnotes.

We look for a carefully prepared statement of facts at the beginning of the brief. We consider this a very critical part of

the brief, and it should be neither incomplete nor too lengthy. We look for a statement of facts that covers only those facts necessary to the development of the legal issues in the case. A bad habit of some lawyers is to present the facts by summarizing the testimony of each witness. We much prefer a narrative of the facts.

We do not look for perfection in a brief, but we do expect that the brief will be restricted to issues raised in the trial court. Many times we find a well-briefed argument, supported by law and logic, that we cannot consider because it was not raised below. No matter how good a point is, it cannot be included in the brief unless it pertains to an issue properly before the appellate court.

Among the things we look for and should expect to find, but frequently do not, are transcripts of testimony and exhibits, referred to in the brief, that ought to be included in the Appendix. There is nothing quite so frustrating to me as to find some reference in the brief to an exhibit that cannot be found in the Appendix. I must then go to the original record in our Clerks's office or possibly back to the District Court Clerk's office to find what I am looking for. Equally as frustrating is a reference in the brief to evidence included in the Appendix without any indication in the brief as to where in the Appendix it is located.

What bothers us tremendously is an attempt to sneak matter outside the record into the brief. I mentioned that an appellate

court is constrained to consider only legal issues raised in the trial court. This applies to factual matters as well. From time to time, a brief will draw to our attention a fact that cannot be found in the record before us. Opposing counsel will note the omissions soon enough, but I have seen judges take counsel to task for this type of deficiency even before opposing counsel became aware of it. In either event, the credibility of a brief is seriously impaired by the inclusion of factual matters outside the record.

We are also turned off by long quotations of testimony or precedent in the brief. Short quotations are acceptable, but remember we can find the full text of the precedent in the library and the full testimony in the record. Excessive quotation leaves little space for persuasion. Paraphrase is best. And woe to the excessive quoter who moves for leave to file an oversized brief!

We are very much put off by briefs containing irrelevancies, slang, sarcasm and personal attacks. They serve only to weaken the brief. Attacks in the brief on brothers and sisters at the bar rarely bring you anything but condemnation by an appellate court. And never, <u>ever</u>, attack the trial judge!

We look for reply briefs that really reply. Most merely repeat the arguments put forward in the appellant's original brief and should not be filed at all. The opportunity should be used to answer the appellee's brief by specific, rather than scattershot, responses. The reply brief presents the opportunity

to have the last word in a very effective way. Most reply briefs don't serve that purpose.

We look for pertinent authorities that come to your attention after the brief is filed. The Federal Rules of Appellate Procedure allow you to provide these authorities to us. However, rather than merely giving supplemental citations and the reasons for them, some lawyers violate the Rules by presenting further argument with their supplementary material.

We look for briefs that are packed with lively arguments, using your own voice and style of expression. We expect the brief to be argumentative but not pompous, dull or bureaucratic. We look for some attention-getting statements, and the first few pages are important. Overkill, however, should be avoided. We look for reasoned argument leading to a sensible result. This is especially important in a case of first impression. Where there is no precedent, try logic. The higher the court, the less interested it is in precedent anyway.

Let me now describe some things we look for in oral argument. We look for argument on one or two good points. If the brief has four or five points, oral argument should be limited to one or two. In the Second Circuit, we usually allow no more than ten or fifteen minutes for oral presentation. This is not a very long period of time when you consider that the judges may ask a number of questions. Because of the limited time, it should be clear that you should make only your best arguments on the law and leave the rest to the brief. Oliver

Wendell Holmes said: "One has to strike the jugular and let the rest go."

The judges look for a clear statement of your argument. Daniel Webster said: "The power of clear statement is the great power of the bar." Although you should not read an oral argument, an outline will be helpful to aid in presenting your case. Also, extensive quotation from the record or from a case or statute during oral argument is a great waste of time and interferes with the presentation. Quote only when it is absolutely essential to your argument. One of the things we always look for is the ability to discuss both the facts and the law contained in the brief. During my days at the bar, I was always careful to reread every case cited in my brief just before oral argument. A judge easily loses confidence in your presentation when you are unable to discuss a case cited as authority for some proposition you are urging on the court.

We look for the ability to discuss with us the most recent cases bearing on the questions presented at oral argument. Therefore, no appellate advocate should come to oral argument without shepardizing the citations contained in the brief and checking for current authority just before the presentation. A case we recently decided went off on a Supreme Court decision handed down between the filing of the brief and the oral argument. Counsel adversely affected by the decision was unable to discuss it with us, much to his detriment.

We look for a presentation that assumes that the judges are

familiar with the facts and that avoids a prolonged discussion of basic legal principles. While an attorney need not develop the facts, he or she should be prepared to respond to any question about the facts. We are very much put off by lawyers who haven't mastered the facts or who respond to a factual question with: "I don't know, your honor, I didn't try the case." As for familiarity with the law, you may assume that judges generally are familiar with such principles as guilt must be proved in a criminal case beyond a reasonable doubt. If you can pick up the legal discussion somewhere at the point of intermediate legal difficulty, I am sure we shall grasp it.

We do look for a structured argument despite our interruptions with questions. After a question is answered, it makes sense to go back to your original outline of argument. Some attorneys appear with no idea of how they intend to present their cases, and their arguments are all over the place. They seem to flounder around with no beginning, middle or end to their presentations. While one attorney was engaged in such an unstructured exercise, one of my senior colleagues passed me a note that said: "Isn't this God-awful?"

We look for honest answers to our questions. If you don't know the answer to a judge's question, offer to furnish a response in writing after oral argument. I have seen much grief come to those who responded with a guess. Answers to questions should be as direct as possible. Never answer a hypothetical question with: "That's not this case." Never answer a question

with a question. I was on a panel in which the following response was given to a question: "Why do you want to know that, your honor?" Another answer given in a case before me was: "You would not want to know that." Obviously, these are not the types of responses that we are looking for.

What we are looking for are lawyers who understand that oral argument is essential to effective appellate advocacy and that the exchange of questions and answers between court and counsel is the most important part of oral argument. The judges rely on counsel's responses to resolve their doubts, clarify their thinking, and, if you watch closely, sometimes to argue with each other. All this is very important for the appellate advocate.

We look for lawyers who can argue the entire case for their side. Most of us do not favor the division of oral argument, except in the most unusual circumstances. When more than one lawyer argues for one side, trouble often ensues. The judges may fail to honor the division and ask questions of lawyers on points with which they are not familiar.

What turns us off in large measure are attorneys who ask us to overrule the Supreme Court. We are very reluctant to do that. In an admiralty case not too long ago, the lawyer insisted that the Supreme Court was wrong. I am afraid there was not much that we could about it. Also, it is a turn-off for us to be asked to overrule <u>recent</u> precedent from our own court. We are bound to follow our own court precedent in the absence of an in banc decision or the concurrence of all the judges of the court.

We look for counsel who will present his or her argument in a tone of voice and at a rate of speed that we can follow. Some lawyers speak so quickly that Justice Rehnquist has called them "Casey Jones" because of their similarity to the engineer of an express train. Although we expect some emphasis during an argument and do not enjoy listening to a monotone presentation, screaming and yelling is extremely unhelpful. You should demonstrate some passion for your cause, but this usually can be accomplished by modulations of speech.

We are much put off by coat tuggers, pencil tappers and note passers, by those who say "I'll get to that" and never do and by those who respond to a judge's inquiry by citing a page in the brief or in the record. Why would you want to cause a judge to root around in the papers and be distracted from the argument? Answer the question to the best of your ability and then refer to an appropriate page if necessary.

We look for, and view with favor, those lawyers who do not use their rebuttal time unless it is absolutely necessary. It probably is a good idea to reserve some time for rebuttal when you represent an appellant. However, the judges are very pleased to hear the words, "I waive my rebuttal," where such waiver is indeed warranted.

There is no purpose in discussing your pleasure at being in our court or in disparaging yourself or in flattering the judges. The latter is most unnecessary and wasteful. As Justice Jackson said, "there is no need to flatter judges because they have a high enough regard for themselves." It is acceptable, however to

address a judge by name, and we have no objection to that. I recall one attorney who started his argument by explaining what a great honor and privilege had befallen him by being retained to argue before us. He went on and on about our court and its distinguished judges until he had used up most of his time with his airy persiflage.

From time to time we admonish attorneys that they are not before a jury, so great is the emotional presentation that they make. It is surprising to me to see how many lawyers still try to boost their cases with a visceral approach. I suppose that judges get just as emotional as anybody else, but a lawyer who asks us whether we would like our grandmothers to be victimized by conduct such as that demonstrated in the case at bar is marked down as a sure loser. During the course of one very bad argument, an attorney screamed: "I have a most unfortunate client"; all three of us nodded in agreement.

We look for lawyers who know when to stop. One of the most discouraging things we get to see is a lawyer who has finished his or her argument but insists on saying a few words to fill the remaining time. Sometimes those extra words are just superfluous and annoying and sometimes they are actually detrimental to the speaker's case. To illustrate, I conclude with another exchange that supposedly occurred in the English Court of Appeal: "I shall have finished my argument in five minutes, m'Lord." "I know you will have finished, but will you stop?" We look for a lawyer who stops when he is finished. And I know that lawyers look for judges who know when to stop.

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

by

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(1989 Edition)

FEDERAL CIVIL APPELLATE PRACTICE

IN THE SECOND CIRCUIT

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).

(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); compare Group Health Inc. v. Blue Cross Ass'n, 793 F.2d 491, 497 (2d Cir. 1986) (immunity issues requiring resolution of factual questions) with Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988) (immunity issue resolved in absence 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 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

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). Compare Akerman v. Oryx Communications, Inc., 810 F.2d 336 (2d Cir. 1987). 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). 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

(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. 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,

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; 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).

SUGGESTED REFERENCES

Federal Rules of Appellate Procedure, 28 U.S.C.A. app. at 1-412 (West 1989).

United States Court of Appeals for the Second Circuit Rules, 28 U.S.C.A. app. at 119-216 (West Supp. 1989).

Second Circuit Civil Appeals Management Plan, 28 U.S.C.A. app. at 170-90 (West Supp. 1989).

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16 C.A. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §§ 3945-3994 (1977 & Supp. 1989).

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2 Federal Procedure, Lawyer's Edition §§ 3:1 to 3:787 (1981 & Supp. 1989).

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

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