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Invaluable Appellate Practice Tips Directly From the Second Circuit Bench and Bar

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On October 17, the New York State Bar Association offered a valuable and specialized continuing legal education program entitled, "Update on Practice in the Second Circuit Court of Appeals." The content was presented by three Second Circuit judges, the Clerk of the Court and experienced appellate attorneys; the program was instructional to all who attended. Counsel Press' Appellate Counsel Jacquelyn Mouquin, Esq. and Associate Kersuze Morancy, Esq. attended on behalf of the company, and we are happy to offer some of the practical details of this outstanding program.

Clerk of the Court Catherine O'Hagan Wolfe opened the program with tips about how the clerk's office handles cases and how the Court's calendar is managed. Highlights included:

Calendar for motions

- Tuesday – motions where all parties are represented by counsel.
- Wednesday and Thursday – motions where at least one party is pro se.
- Friday – Anders' motions in criminal matters.

XAC (expedited appeals calendar)

- Cases are usually affirmed.
- Does not involve complex issues of law.

How to expedite appeals of your own accord

- File brief and appendix quickly (as soon as five-10 days after notice of appeal), then move to expedite appellee's time to file brief

The Appellate Law Journal *focuses exclusively on rules, practices and procedures of federal and state appellate courts nationwide. Edited by the appellate experts at Counsel Press,* ***The Appellate Law Journal*** *is designed to provide a forum for creative thought about the procedural aspects of appellate practice and to disclose best practices, strategies and practical tips.*

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and to have case calendared.

Enlargement of time to file briefs

- It is permissible to ask for more than 91 days to file a brief, if you have cause, but "married" to date you choose.
- Extensions require an "extraordinary set of calamitous circumstances."
- All enlargement requests are handled by Judge Winter, and he will remember you, so do not abuse the system.

Attorney Alan Pierce shared current issues facing the Court through case summaries. The cases noted included:

- RLI Ins. Co. v. JDJ Marine, Inc., 716 F.3d 41 (2d Cir. 2013): *per curiam* decision refusing to reinstate an appeal despite pending motion to enlarge time which included appellee's consent, where appellant had failed to file a brief and appendix by ordered due date.
- Jackson v. Fed. Express, 766 F.3d 189 (2d Cir. 2014): distinguishing a previous decision in Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241 (2d Cir. 2004), the Court held that failure to respond to a statement of undisputed facts amounts to abandonment of claims in the District Court.
- Author's Guild, Inc. v. Hathitrust, 755 F.3d 87 (2d Cir. 2014): very fact-specific copyright case including issues of standing and the scope of the record to address pending questions.
- SEC v. Citigroup Global Markets, Inc., 752 F.3d 285 (2d Cir. 2014): reversed District Court's refusal to accept consent order, holding that it is plaintiff's prerogative to determine the public interest at stake.
- Goldman, Sachs & Co. v. Golden Empire Schools Financing Authority, 764 F.3d 210 (2d Cir. 2014): fact-specific decision aligning the Second Circuit with the Ninth Circuit, and splitting with the Fourth Circuit, with regards to enforceability of broad forum selection clauses.

Pitfalls for unwary Second Circuit practitioners were presented by Attorneys David H. Tennant and Cheryl F. Korman. Important advice included:

- Reminders to ensure admission to the Second Circuit, to renew that admission every five years and to keep e-mail addresses on file with the Court up-to-date.
- Timing is different than in State Court as there is no notice of entry and the time to appeal is 30 days from the date of the order/decision/judgment at issue.
- Notices of appeal should be pristine, naming the specific party appealing and the paper(s) being appealed. In only rare cases are imperfections excused, and, generally, those imperfections must be minor.
- Since the entire record on appeal is electronic, the appendix should be much more selective and limited than in State Court.
- Oral argument is only by request of each party.
- Docket entries should be read in their entirety, rather than relying upon the docketing notice title, as the content may be more expansive than the title suggests.

The climax of the program was the panel discussion by Second Circuit Judges Hon. Dennis Jacobs, Hon. Robert D. Sack and Hon. Richard C. Wesley. The judges imparted wisdom on several different topics:

Oral argument:

Judge Jacobs:

- Don't focus on typos, focus on important issues.
- When it comes time to argue, it is sufficient to rest on one's brief.
- Do not attack an adversary in argument or in brief; it does not matter if one's adversary is a louse. What matters are the issues on appeal.
- Oral argument helps to get the

judges in sync with one another's thoughts.

Judge Newman:

- In oral argument, start with a roadmap. Let the Court know you plan to address three points, and briefly list them.
- Since this is a Court of mandatory jurisdiction, most cases are affirmed.
- Oral argument is not starting from a blank slate. Rather, it is more of an "insurance policy" to help judges make sure that their initial inclinations, based on the record and briefs, are correct.
- Recognize the softballs from the bench.
- Hypotheticals offered by the bench can often lead you astray. Retreat to the facts of the case and explain to the Court the limits of what needs to be decided in the case before the panel. Use phrases such as, "all you have to decide here is…" and "the most narrow ruling would be…"

Judge Wesley:

- It is important not to let your face show disrespect or displeasure with the Court during oral argument.
- Do not use the phrase, "with all due respect," when addressing the Court. The Court understands and resents the implications of the phrase. If you disagree, simply disagree in a respectful way and support your position.
- This Court does not discuss the case before argument. Therefore, oral argument functions as a conversation between judges, not just between judges and attorneys.

Briefs:

Judge Jacobs:

- The structure of the brief should be based on what is most persuasive for your case – either strongest argument first or sequential arguments (such as jurisdictional issues, meat of the case, jury instructions, etc.).
- Do not forget to include analysis of why the facts are applicable to the law and why the legal proposition should lead to the proposed results based on the facts.

Judge Newman:

- The problem with lengthy briefs is typically that they are repetitive, not that they contain too many issues for consideration.
- Start with the strongest arguments.
- Arguments should not be in the footnotes.
- Do not put new arguments in the reply.
- The key to an excellent brief is never to say anything the reader is not prepared to read and make sense of.
- The preliminary statement is to summarize issues and say why certain facts will be important; do not include your entire argument.
- The client is often the neglected audience; do not be too technical in your brief.

Judge Wesley:

- Avoid unnecessary facts (including unnecessary dates).
- Try to remember the forest through the trees.
- Trial counsel should strongly consider consulting with, or using, appellate counsel.
- Be a storyteller and a teacher, because cases are really about human conflict. Therefore, identify overarching principals of law and juxtapose facts so they require certain results.
- Since judges are "wretched generalists," make briefs understandable to the lay person. Have spouses, neighbors or partners read briefs.

Tone for Civil v. Criminal Appeals:

- Judge Newman indicated that no different tone should be taken by the parties although attorneys in criminal appeals often need to be braver, because of the higher likelihood of affirmance.

***Amicus* Briefs:**

Judge Jacobs:

- The most useful *amicus* briefs focus on ramifications and the broader impact of the case, because main briefs tend to

focus on limiting or maximizing damages monetarily.

Judge Newman:

- Whether *amicus* briefs are useful depends on the quality of the main briefs. *Amicus* briefs can often fill a void left by a bad main brief.
- They are most useful if they alert the Court to the significance of rulings in the field, especially if the principal of law being addressed will have ramifications in a particular industry.
- Often, *amicus* briefs by trade associations just rehash the main briefs' arguments.

Judge Wesley:

- *Amicus* briefs by government agencies or in very technical cases can be very helpful. Those offered in "interest litigation," such as Second Amendment cases, tend to be less useful.

Rehearing *En Banc* and Panel Rehearing:

- The judges seemed to want more opportunities for rehearing *en banc* although the consensus was that it is a process that should be used sparingly. None of the judges on the panel believed that rehearing *en banc* was injurious to the congeniality of the Court. Usually, only about one case per year is granted rehearing *en banc*. It is often denied, because the Court believes the Supreme Court will take the case. There was some discussion as to whether denials of rehearing *en banc* for this reason should be issued with a right to reconsider if the Supreme Court denies the case.
- Judge Newman suggested that petitions for panel rehearing should be more than just the main briefs repackaged. They should address factual mistakes at the front of the petition.

Judges' Personal Style of Reading a Case:

Judge Jacobs:

- His personal clerks often read the material first.
- He reads clerks' bench memo first.
- He next reads the appellant's brief, as long as it is useful (and avoids repetition).
- He then reads the appellee's brief.
- He may not read the reply brief at all or may only look for a certain case in the Table of Authorities in the reply brief and read that section.

Judge Newman:

- He starts with the District Court opinion being appealed.
- In civil cases, he next reads the appellant's brief. In criminal cases, he will read the government's brief first, because the appellant's attorneys in criminal matters often "overwrite" the issues and distort facts.
- He recommends keeping the required summary of the argument section short, because he finds reading it a waste of time. He believes the Table of Contents is sufficient.

Proposal to Reduce Word Limits in Briefs:

- None of the judges supported this proposal. Judge Wesley does recommend being able to summarize your arguments in 30 seconds or four sentences.

Differences between Oral Argument in State and Federal Court:

- Judge Wesley, who has served on both the New York Court of Appeals (NYCOA) and the Second Circuit, shared on this topic. He explained that, in the NYCOA, the Court wants you there, because most cases are there by permission rather than by right. This can lead to a more focused argument than in the Second Circuit.

All in all, this was an extremely helpful program whereby attendees gained much insight into how to best practice in the Second Circuit. Counsel Press was proud to sponsor and be a part of this worthwhile event.

How to Avoid Calendaring Conflicts in the Supreme Court of the State of New York, Appellate Division, Second Department

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The Supreme Court of the State of New York, Appellate Division, Second Department is generally quite flexible with practitioners appearing before it when it comes to briefing schedules, enlargement requests and even the scheduling of oral arguments. The Court takes its calendar very seriously though. Once an appeal is on the calendar to be heard, the Court's policy is to ***NOT*** remove it. The Court does not want to hear about events, plans or obligations that prevent you from attending your oral argument after it has been scheduled.

The Court is willing, however, to consider dates that you (and/or your adversary) are unavailable *before* scheduling the oral argument. All they require is a letter, preferably submitted at the time the last brief is filed, setting forth dates that the parties cannot attend oral argument. Since the Court sometimes takes several months to calendar an argument, attorneys have a continuing obligation to advise the Court of their unavailability as such dates arise.

So, if you have any vacation time planned, family commitments, religious holidays or professional obligations that cannot be changed and still have an appeal pending for which you are awaiting an oral argument date, write to the Court to advise of your unavailability. The letter may be sent by fax to the attention of the Court's Calendar Clerks at (212) 401-9114.

Similarly, communication with the Court is essential when a cause (defined as, among other things, an appeal or proceeding – *see* 22 NYCRR 670.2[a][1]) becomes unnecessary because the underlying action has wholly or partially settled, or any of the issues become wholly or partially academic. Furthermore, if the cause should not be calendared because of bankruptcy, death of a party, inability of counsel to appear, etc., the Court must be notified immediately. *See* 22 NYCRR 670.2[g]. If an attorney or party fails to promptly notify the Court, sanctions may be imposed at the Court's discretion. Notice may be sent to the Clerk of the Court by fax to (212) 419-8457 or by e-mail to ad2clerk@courts.state.ny.us.

So, whether it's advising the Court of your own unavailability or providing notice that the Court's attention to a matter is no longer needed, as with any relationship, communication is key.

The "Clerk's Law" or the Unwritten Rules You Should Know (Part III: New York State Appellate Division, Third Department)

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Proceedings in appellate courts are very different from those in trial courts, and each one of the appellate courts has their own set of rules and internal operating procedures. If you do not follow the rules carefully, you may lose the chance to have your appeal considered. In addition to what is stated in rule books, each court has a set of unwritten rules or "clerk's law." Sometimes, these are requirements and, sometimes, just court preferences. These court-specific common practices can only be gleaned through experience, frequent communications with the clerks and through processing multiple filings in a particular court.

The role of Counsel Press' appellate counsel and appellate paralegals is to advise and shield our clients from all potential pitfalls. Part I of this article covered the procedures of the Appellate Division, First Department and Appellate Division, Second Department; Part II focused on the Appellate Division, Fourth Department. In this article, we will go over some of the unwritten rules of the Appellate Division, Third Department. For

the purposes of preparing this article, we had a discussion with Tasia Federov, Court Clerk Specialist at the Appellate Division, Third Department. Ms. Federov recommends raising any questions pertaining to the rules, written or unwritten, to the clerk's office prior to filing your record or brief. Some of these points may seem fundamental, but, make no mistake, these guidelines are vital additions to your submission.

Brief Requirements:

While the form and content requirements for briefs are listed in the Appellate Division Rules (*see* Section 800.8), the Third Department does have preferences regarding format that do not appear in the rules. The Court prefers briefs to be prepared in Times New Roman 14 point. Briefs should be double-spaced, except for headings, and include a Table of Authorities. The Court also prefers that briefs be single-sided. The reasoning behind this, Ms. Federov said, is so the justices can take notes on the reverse pages.

Addendum versus Appendix:

While the Third Department will allow unreported decisions to be attached to the brief, they

require the attached decision be referred to as an addendum rather than an appendix or exhibit. Additionally, the unreported decision should be cited in a footnote or noted in the Table of Contents. The notation or footnote should reference that the decision is being attached to the brief for the convenience of the Court.

Contents of the Record on Appeal:

Section 800.5(a) of the Appellate Division Rules pertains to the form and content of a record on appeal or review. Section 800.5(a)(4) references that the judgment roll should be included in the record. While it is not mentioned specifically, it is required that the initial pleadings be included in the record on appeal. It is always necessary to include the summons, complaint and answer, as well as bills of particulars. Ms. Federov mentioned this is a problem that does arise with appeals filed in the Third Department.

There are many other unwritten rules that counsel should be cognizant of. We will continue publishing the "unwritten rules" series and will be covering other New York appellate courts, as well.

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Appellate Forum: LinkedIn Group Powered by Counsel Press – Why You Should Join and Participate

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Just about a year ago, Counsel Press launched a new group on LinkedIn named Appellate Forum. Around 4,000 appellate practitioners joined the group since then, making it the largest appellate lawyer network of its kind, online and offline. If you still have not joined the group, below is a quick overview of why you should do so today.

LinkedIn Groups: What They Offer

While you may already have a LinkedIn profile, you may not be fully aware of all the great features this popular site offers, and you may be missing out on the main benefits. One of the best ways to build stronger relationships within LinkedIn is through groups.

Lawyer LinkedIn groups provide a way to stay abreast of legal trends around the country in your area of practice, as well as giving you a way of getting to know attorneys who you would otherwise probably never

meet. You have an opportunity to draw on the knowledge of other members and it may not show up in an earnings report, but posting a question to a group of seasoned law practitioners can save time, money and frustration.

Appellate Forum: Why Join This Group

The Appellate Forum group focuses exclusively on rules, practices and procedures of U.S. federal and state appellate courts. This group serves as an expansive sounding board – to air questions and exchange information relating to appellate practice. Appellate Forum is powered by Counsel Press, with the commitment to answer all posted questions in all appellate matters nationwide.

What does this all mean for you? It means that you will have access to an exceptional appellate practice resource – *i.e.*, fresh articles on the procedural aspects of appellate practice; strategies and best practices; updates in the appellate courts; announcements for appellate events (*e.g.*, summits, seminars, CLE courses, etc.). You will be able to engage with your industry peers on important topics pertinent to this area of practice and will expand your professional network. You will also be able to draw on the knowledge of Counsel Press' appellate experts – our appellate counsel and paralegals who annually prepare and file over 8,000 appeals. Just post a question and we will take it from there.

How Do You Join and Participate?

If you have a LinkedIn profile, joining Appellate Forum is simple. When you are logged into your account, find Appellate Forum by typing the name in the search field at the top of the LinkedIn home page; then simply hit the "Join Group" button.

Once you join Appellate Forum, discussions will come directly to your email and you can quickly see what is being discussed and decide if you want to participate. You can also start a discussion which will allow you to lead.

Appellate Forum is an excellent resource that helps appellate practitioners across the country to connect and exchange important information. Join Appellate Forum today!