

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

Appellate Division, Second Department: Calendaring Conflicts

Once an appeal is on the calendar to be heard, the Court's policy is to NOT remove it. Here are a few practical suggestions on how to avoid calendaring conflicts. (p. 5)

Appellate Division, Third Department: The Unwritten Rules You Should Know

Sometimes, these are requirements and, sometimes, just court preferences. But, make no mistake, these guidelines are vital additions to your submission. (p. 6)

Appellate Forum in LinkedIn: Why You Should Join and Participate

If you still have not joined this group, here is why you should do so today. (p. 7)

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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. ■