How We Operate at the Appellate Division, First Department: An Insider's View

David B. Saxe
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Much of the way we work at the Appellate Division, First Department, is opaque and confusing to new colleagues at our court and virtually unknown to the outside bar. When I joined the court in January 1998, I found the established customs and procedures confusing and I learned them mostly on a hit or miss basis. Even more confusing was the architectural configuration of the court building and its adjacent annex at 41 Madison Ave. It took me months to figure out my way around.

Over the ensuing years, other judges joining the court have experienced similar confusion. Additionally, I have been struck by the questions that attorneys have asked me since I joined the First Department bench, which demonstrate an almost universal lack of understanding of how we go about our daily work. I have discovered that even seasoned appellate practitioners have only a limited understanding. So, in an effort to make these mysterious ways more transparent, I offer an updated version of an essay I wrote in 2009 on the ways and practices in which we work.
To the extent this discussion expresses personal views and preferences, in addition to facts about the operation of the court, it should not be read to reflect the views of my colleagues, past or present, but rather, as my own personal take on these matters.

The working life of an Appellate Division justice is fundamentally different from that of a trial justice. Virtually every part of the process—the way matters are assigned and decided, the manner in which the work is performed and the surroundings in which it is performed—is unlike what occurs in a trial court. In an effort to thoroughly inform new justices of such information, upon joining the court, each new justice is provided with a clerk's manual, a compendium of useful information. My discussion here refers at times to that manual, as well as other sources, both the type of information that a new justice might find most valuable initially and that which might help members of the bar understand the workings of our court.

A new justice cannot help but immediately notice that virtually every formal act of the court, and most informal acts as well, require recognition of the justices' seniority. For purposes of constituting panels, the court's Presiding Justice ("P.J.") is followed by the other six "Constitutional" [1] justices in the order in which they were designated to the court. They are followed by the certificated[2] justices and the "additional justices,"[3] in the order in which they were designated to the court. For some purposes, such as the assignment of chambers, seniority is solely by date of designation to the court, and it is irrelevant whether a justice is certificated.
But, in the courtroom and conference room, either with the full bench or with that day's panel of justices after argument, formal seniority rules prevail, and certificated justices, even those who were constitutional justices before their certification, now are seated below, or after, the constitutional justices.

It is the tradition at the First Department that most internal documents, such as memoranda, calendars and schedules, refer to the justices by their initials rather than their full names, presumably for the sake of brevity. For those documents, I am not David B. Saxe, I am DBS. This procedure may be useful in ensuring there is no confusion between two justices who have the same or similar last names, such as Justices David Friedman (DF) and Helen E. Freedman (HEF); however, it can be singularly problematic where two justices' initials are identical, as with Richard T. Andrias and Rolando T. Acosta. Nevertheless, the tradition is so firmly etched into the court's procedures that it is the justices who must be flexible; Andrias, as the more senior justice, is indicated by his initials RTA, while Acosta, as the more junior justice, must forgo the use of his middle initial, and be known by the initials RA.

While a trial judge focuses on correctly reaching and explaining a decision; the decision employs that justice's own style, usage and presentation. An appellate justice speaks for the court, and therefore the "I" is (most of the time) submerged in the "we," and substantial attention is paid to framing writings to convince or satisfy colleagues.
At the First Department, appeals, most motions, special proceedings, and disciplinary matters are generally heard and decided by panels of five, although, when necessary, sometimes panels will be limited to four, which constitutes a quorum pursuant to our State Constitution.[4] The panels are set up months in advance by the clerk of the court; each justice sits approximately the same number of times as any other justice over the course of each of our 10 four-week terms. The P.J. generally takes fewer sitting assignments because of the administrative assignments attendant to the position.
If a specified assignment date presents a problem, a justice may switch sitting dates with another justice; the clerk is then notified of the change. The composition of a particular bench is not disclosed to the public until 3 p.m. of the day preceding the court session.

In advance of each panel sitting, each justice on the panel will be provided with the briefs and records of the cases that are scheduled for that particular panel day. Each justice is advised to maintain an area in chambers to put the briefs and records for the next upcoming sitting date, where they will be available for easy access, and be placed in the order that they will appear on that day's calendar.
Chambers will also receive, in advance of the calendar date, a bench memo for most[5] appeals on that calendar, each prepared by a court attorney—that is, one of a pool of attorneys in our law department whose primary function in the court is the preparation of such bench memos.

These bench memos, often referred to as "reports," consist of a complete discussion of the facts, the decision of the lower court, the contentions on appeal, the relevant law, and a legal analysis. The court attorney will also provide a recommendation as to the suggested disposition of the appeal (i.e., affirmance, reversal, modification, etc.) and usually the bench memo will be accompanied by a short proposed memorandum decision.
Due to the internal procedures followed by our law department, a senior supervising court attorney who reviews the bench memo and recommendation may differ with the recommendation or reasoning of the court attorney. In that case, along with the original court attorney's recommendation contained in the bench memo, there will be added what is termed an override or underride, which will appear at the top of the first page of the bench memo with the initials of the supervisor. An override indicates the supervisor's belief that the court should reach a different conclusion than the one recommended by the court attorney; an underride indicates disagreement with a portion of the analysis.

Of course, the recommendations on the bench memo are only that, recommendations, and members of the bench routinely disagree with them. In fact, they generally serve as a starting point for discussion rather than its termination. Nevertheless, regardless of the bench memo's legal conclusion, it remains useful in its summarization of the law, facts and contentions. It is suggested that new justices scan calendars early for cases that they handled in the trial court. The briefs should also be scanned when they arrive in chambers, about a week before the argument date, for the names of attorneys whose representation of a party might cause a conflict or otherwise necessitate disqualification. Unlike the trial courts, where attorneys receive advance notice of the justice assigned to their case, in the First Department, the lawyers generally only learn about the make-up of the bench on the day of argument, and it is difficult for a lawyer to seek a justice's recusal on the call of the calendar or at the time of argument. It is therefore best when a justice who needs to disqualify himself or herself can do so in advance of argument, notifying the other justices and the clerk by a memorandum.

Every appellate justice prepares differently. At a minimum, each justice is expected to read and analyze the bench memo, briefs and controlling law.[6] Briefly, a suggested approach is to first read the bench memo, then go to the record and carefully read the decision of the court below. From this, the pertinent issue or issues in the case may be gleaned. Then, the respective briefs should be reviewed. Often, briefs are laden with excessive discussion, addressing such generalities as the applicable standard of review or the requirements for summary judgment, including string cites. A new justice quickly learns to bypass this sort of boilerplate material. Normally an appellant's brief contains multiple points, but usually one or two are truly dispositive, and the justice will usually focus most attention on the salient issues. Those parts of the record that are referred to in those points must be examined. The two or three cases each side seems to be relying on should then be analyzed to determine if they are authoritative for the position advanced. An idiosyncrasy I have, but one which I do not necessarily recommend, is after I read the bench memo and the decision of the lower court, I first read the appellant's reply brief. I find that this procedure of working backwards helps me isolate the most central issues.

As a justice gets increasingly familiar with appellate practice, it becomes unnecessary to read every page of the record or of the often turgid and prolix briefs. The key is to become familiar with the pertinent parts of the record and briefs. Although it is unnecessary to write separate summaries of each case, it is a good idea to jot down marginal notes and questions on the applicable report. It is also useful to set aside an hour or so on the day of the sitting to review those marginal notes and questions you may wish to ask, because in some instances, many days, or even a week, may have passed since you read the materials, during which time you will have focused your thoughts on other matters.

The justices generally bring a folder containing the court attorneys' reports with them to argument. A court officer will deliver the briefs and record to each judge on the bench at argument, and it probably is a good idea to use Post-it notes or flags to mark parts of the record and briefs that might be relevant at argument. It is important that we come to oral argument with an open mind, available to be persuaded, even if skeptical. When we question attorneys, our purpose is not to explain why an attorney's arguments are wrong, but to give them the opportunity to persuade us that they are correct. For that reason it is my view that it is probably best to limit, or outright avoid, pre-argument discussions with panel colleagues about the merits of the scheduled appeals.

Diverse views have been expressed on this point. A blog posted by Daniel Wise, a former journalist for the New York Law Journal, refers to what he calls a "schism" among the justices as to whether it is appropriate for a subset of a panel of justices to hold pre-

argument discussions.[7] Proponents of such pre-argument discussions assert that they merely provide an opportunity for the interchange of thoughts and ideas, and are not used to coordinate agreement among the justices on that day's bench, or at least among a majority of it. However, another legal commentator and practicing appellate attorney, Norman Olch, expressed the concern on his website that "such pre-argument discussions may lead to conclusions among the judges on how to rule even before the lawyers have been heard, and...makes a judge less open to persuasion by the lawyer at oral argument."[8]

I would only add that in my experience, substantive discussion can easily turn into what amounts to lobbying your colleagues to adopt your view of the proper disposition, and although that is perfectly permissible, it may tend to cement your position before you have given counsel a chance to change your mind. Convincing your colleagues of your view is best left until after argument. It is sometimes suggested that oral argument is rarely, if ever, effective at changing the minds of a bench that already knows how it will rule. I hope, and believe, that such claims are exaggerations, or expressions of cynicism, rather than accurate assessments; indeed, there are many law review articles by judges reflecting that they may sometimes be persuaded by a convincing advocate,[9] and by legal scholars explaining why oral argument can be important.[10] But, I submit that we should not engage in conduct that may create the impression that the bench will not be open to oral appellate advocacy.

Procedures During Argument

Panels convene to hear argument Tuesdays, Wednesdays and Thursdays at 2 p.m. and sometimes on Fridays at 10 a.m. The justices meet in the robing room a few minutes ahead of time, and the court officers assist them with their robes. Shortly before the scheduled time, the bench will line up in the hallway outside the robing room in preparation for entering the courtroom. The queue enters in ascending order of seniority, with the most junior justice entering the courtroom first and going to the extreme left seat (for a five-justice panel). The next most junior justice goes to the far right; the next in seniority to the near left; the next in seniority to the near right and the most senior justice of that bench sits in the center chair and is called the Justice Presiding, or J.P., of the panel. For a four-justice panel, the far left seat is left unoccupied. Of course, if our presiding justice sits on a panel, he is always the J.P. of the panel.

Unlike some other appellate courts, in which it is determined in advance which justice will have the primary responsibility for each appeal, at the First Department we employ an assignment procedure by which we cannot be certain until the call of the day's calendar which justice will be assigned to report on which appeal. This encourages a uniformity of pre-argument preparation. Under our procedure, the clerk applies a complex methodology to determine which justice will be assigned as the reporting justice on each appeal. First, the clerk prepares a schematic that sets out the initials of that bench's justices, in the shape of a horseshoe or half-circle, loosely reflecting the justices' respective physical positions on the bench.

For example, if the bench consisted of Justices Tom, Friedman, Acosta, DeGrasse and Richter, Tom would sit in the middle, with Friedman to his immediate right, Acosta to his immediate left, DeGrasse to his far right, and Richter to his far left. In the clerk's schematic for that bench, the horseshoe or half-circle would therefore start with DeGrasse at the lower left, with Friedman next, Tom at the apex of the curve, Acosta next as the horseshoe curves down to the right, and it would end with Richter at the lower right.

The clerk uses this schematic to assign the appeals, first the argued cases, in the order in which they appear on the calendar, then the submitted cases, in the order of their appearance on the calendar. In order to determine which justice will get that day's first assignment, the clerk first looks at the previous day's argument calendar and determines the position on the horseshoe of the justice on that panel who was the last to be assigned as reporting justice. After locating that position on the horseshoe, the clerk proceeds in a counterclockwise direction, assigning the first argued case to the justice in the spot next to that position.

Using the bench discussed above, if the justice that was assigned the last appeal on the previous day's calendar happened to have been the J.P., that is, the apex of the curve, the first argued case the next day would be assigned to Friedman, because his spot would be next as the clerk proceeded counterclockwise from the top position.

The second argued appeal would be assigned to DeGrasse, the third to Richter, the fourth to Acosta, and the fifth to Tom.

Because attorneys who requested argument time often do not appear at the argument, leaving those matters to be marked submitted, it is not certain until the call of the calendar which cases will be argued and which submitted. So, even though the clerk notifies the bench the day before as to which judge will be assigned to report on the first argued case, the bench can only be certain who is reporting on which appeal after the call of the calendar.

When the calendar call is completed, the clerk delivers to each panel member an updated calendar for the day, with the initials of the reporting justice for each appeal filled in on a previously blank box next to each case caption. On the matter of the time allotted to each case, counsel who appear for argument often feel that they will need the entire requested time, which is usually the 15-minute maximum allowed by court rule.[11]

However, it is the rare calendar where the bench can allow the lawyers to devote that much time to arguing each case; if we allowed each argued case the maximum possible time, we would be hearing argument until well into the evening. Consequently, we usually ask counsel to substantially reduce the amount of time they are requesting, and the J.P., who controls the clock, will make every effort to hold counsel to those reduced limits, interrupting them if necessary. The justice assigned as the reporting justice on an appeal may take a particularly active part in oral argument of that appeal, since, at conference, the reporting justice is given the first vote on the appeal, will take the lead in the discussion of it, and is most likely to be responsible for preparing a writing on that appeal.

That being said, the personalities of the various justices on a panel have a large impact on the direction argument takes. The J.P. controls the clock, and has the last word with regard to argument time. When an illuminated red light at the counsel table indicates that a lawyer has used up the allotted time, the J.P. has the authority to direct that argument cease. Even if another justice just finished asking counsel a question, once the allotted time has expired, protocol requires that counsel seek the permission of the J.P. (not the questioning justice) to respond to such a question, by asking the J.P.: "Judge, I see my red light is on, may I proceed to answer the question?" Indeed, not only counsel, but also the justice asking the question should defer to the J.P.'s response.

Similarly, if a justice wants to ask counsel another question after the red light has been illuminated, that justice should try to get the attention of the J.P., who may otherwise declare counsel's time up. The adoption of additional protocols by the court might be useful in the area of oral argument. For example, anyone observing argument will notice that, with some frequency, a lawyer attempting to answer one justice's question will be interrupted by another justice asking an entirely unrelated question. This is not only rude, but is frustrating both to the lawyer and to the justice seeking a response.

It is reasonable to expect the justice presiding over that day's bench to wield his or her authority in order to ensure a basic level of courtesy and evenhandedness, and to minimize the interruptions that leave the justices working at cross-purposes.

Moreover, some justices are naturally more voluble while others may be more reticent, and on occasion a justice's natural instinct toward taking part in the interchange may lead a justice to focus an inquiry on an area that really does not warrant extensive discussion, such as the fact that an argument was not preserved for appellate review. While it should go without saying that the justices have the obligation to consider whether their queries will elicit useful discussion, the responsibilities of the justice presiding may have to include gently directing the argument into more central lines of discussion.

We should also always keep in mind the discomfort experienced by most people standing at the podium and arguing an appeal, and, particularly for assigned counsel, that they may be doing their best to press what they know to be a losing point. The justices should always be courteous with counsel, and refrain from treating them with obvious disdain when taking issue with a premise they are arguing.
Finally, while on the bench, members of the panel should be careful of casual remarks made to nearby colleagues. We now have a courtroom sound system in place, and the microphones may cause a careless remark to be heard beyond its intended audience. It is better to pass a note if the need arises to convey one's thoughts to a colleague.

A justice who is disqualified from hearing a matter leaves the bench and goes to the robing room during the argument of that appeal. If another justice is vouched in, that justice will be notified in time to take the bench for argument of that appeal. If a justice has to leave the courtroom for personal reasons during argument, he or she should make sure that none of the other justices on the bench are similarly out of the courtroom. We try to make sure that there are always four justices sitting, although argument may proceed as long as a minimum of three justices are on the bench.[12] Arguments are digitally recorded for the use of the court, and are available to be accessed by the justices for subsequent in-house review. In addition, court staff are able to watch the digital feed in real time on their computers. These digital recordings are not, however, available to the general public. After arguments are concluded, the court officer will intone the end of the argument and the bench will leave the courtroom, in order of seniority, with the most senior justice, the J.P., leaving first.

Procedures After Argument

After a brief break, the panel convenes in our second floor conference room to vote on that day's appeal calendar. If the P.J. is on the panel, he or she is seated at the head of our long rectangular conference table, with the two most senior justices to his immediate right and the two most junior justices opposite them. If the P.J. is not on that day's panel, the J.P. of the panel sits in the seat to the immediate right of the seat at the head of the table, the next two justices on the panel sit to the immediate right of the J.P., and the two most junior justices sit in the two seats directly opposite the seats occupied by the J.P. and the next most senior justice.

In either event, the justices are seated in descending order of seniority if you make a counterclockwise circle beginning with the most senior justice. The justices generally bring to conference a folder containing their court attorney reports, a copy of that day's calendar on which is noted the initials of the justice assigned as the reporting justice for each appeal, and a loose-leaf binder that contains what we call our "bible sheets." A bible sheet is

created for each appeal, and it contains the name of the case and its appeal number, the names of counsel, the initials of the court attorney who prepared the report and the names of the justices who sat on that case, with the reporting justice's name indicated by asterisks. As is perhaps suggested by its name, the bible sheet becomes the framework for the work that follows.

The J.P. runs the conference. Initially, a preliminary vote is taken starting with the first case that appears on the calendar, running through the last. When the J.P. calls a case, the first justice to register a vote is always the reporting justice on the case, regardless of that justice's seniority within the panel. After the reporting justice has voted, the second to vote is the most junior justice, and the voting then proceeds in ascending order of seniority. If a justice was vouched in, that justice may inform the J.P. of his or her vote, or may choose to attend the conference. A justice who disqualified himself or herself on an appeal will leave the conference room when the vote is taken on that case; of course that justice will not maintain a bible sheet for that appeal.

Each justice should record the vote of every other justice on the bible sheet, along with the bench's decision on whether to impose costs. Also considered at this conference are any Article 78 original proceedings returnable that date, as well as any motions relating to any of that days' appeals. Obviously, there are many possible outcomes. The proposed memorandum decision supplied with the bench memos may provide for an affirmance (AIM, affirm in memorandum), a modification (MIM, modify in memorandum) or a reversal (RIM, reverse in memorandum). Other often-used argot includes CIM (confirm in memorandum), used, for example, when the recommendation is to confirm an arbitration award, or DIM, where an appeal is dismissed.

For criminal appeals solely involving claims of excessive sentence, an affirmance may use the acronym AACNO, standing for affirm, all concur, no opinion. Whenever the reporting justice and the bench as a whole decide unanimously that they agree with the court attorney's report and want to use the proposed memorandum decision, where, for example, an affirmance is agreed upon and the AIM is satisfactory to everyone, the bible sheet is marked "AIM without" (i.e., without costs), the memorandum decision will be released on a future decision list, and the bench will have no further responsibility for the matter (barring reargument). The bench then moves on to the next matter.

It is important that while at conference, each justice's bible sheets record in as detailed a fashion as possible the justices' respective votes, along with any notations that will explain the justices' reasoning. This type of information tends to be forgotten within weeks, while it is possible that a proposed writing on the matter will not be prepared until long afterward. Without detailed information, by the time a writing is circulated, the bench may not recall what they or any of the other justices thought about the case.

When an appeal concerns a novel issue of law or a type of factual situation not previously addressed by the court, the reporting justice may decide that the decision should take the form of a full, signed opinion, and the matter will be held for the preparation of the writing. On the other end of the spectrum, there are occasions when a bench concludes that the decision on appeal was not only correct, but so well written that rather than issue our own discussion of the matter, we might simply affirm "for the reasons stated" by that judge in order to acknowledge the excellence of that work.

Often, following argument, time is taken at the conference for a back and forth discussion of some of the nettlesome issues raised in a case. Sometimes, members of the bench may agree with the recommendation and the proposed memorandum decision, but notice ways

in which the prepared decision may be improved, perhaps by adding a citation or by editing the language to make it clearer or more concise.
Since these memorandum decisions form the bulk of our output and serve as guideposts for the bar, despite their brevity, suggestions which improve our work are encouraged. They are especially useful when they are made at conference on the argument date, so that the matter can be finalized then and there. It is advisable to try to reach a consensus on each appeal on the argument date whenever possible, since any matter not resolved joins a long list of other matters awaiting decision, while the justice's attention will be diverted to the new cases that keep arriving.

While outright disagreements regarding the proper disposition of an appeal can only be handled by writings prepared after the matter is heard, when there is a relatively minor difference of opinion on a particular point, it is far easier to hammer out an agreed-upon resolution when the matter is fresh in everyone's minds. It is possible that at the time of the conference, after reading the bench memo and briefs and hearing argument, a justice may still be unable to decide which way he or she will vote. In such case, that justice will vote "In abeyance," which will be noted on the bible sheets; if an undecided justice is leaning toward a particular vote, that should be indicated and recorded as well. In general, it is best if the reporting judge is not in abeyance, since that tends to leave the entire bench up in the air as to whether any other justice will have to undertake the preparation of an opposing writing in the matter.

If the reporting justice feels compelled to hold off on initially indicating a position on the appeal, that justice should notify the rest of the bench as soon as possible upon deciding which way to vote.
When the bench is divided as to the proper outcome of an appeal, the reporting justice writes in support of his or her position, and the opposing writing is prepared by whichever justice taking the contrary position is sitting closest to the left-hand side of the reporting justice, as they are seated at conference. So for instance, if the bench consisted of Justices Tom, Mazzarelli, Andrias, Saxe and Friedman, they would be seated so that Tom, Mazzarelli and Andrias would be on one side and Saxe and Friedman would be across from them. If Tom was assigned as the reporting justice, and he and Mazzarelli and Andrias voted one way while Saxe and Friedman voted the other, Friedman would prepare the dissenting opinion, because he would be the justice sitting closest to the left hand side of Tom.

Parenthetically, this procedure represents a marked departure from the court's prior practice, under which preparation of the writing opposing that of the reporting justice was the obligation of the most junior justice taking the opposing view. This recent change was adopted in an effort to remedy an imbalance in our responsibilities, by which our most junior justices received a disproportionate share of the work load. If a panel consists of a four-justice bench and the vote is split 2-2, soon after conference a fifth justice will be vouched in, and provided with copies of the briefs and report and a bible sheet. This will normally be done without notice to the parties or attorneys, although if an attorney, upon becoming aware on the calendar date that only four justices are assigned to that day's panel, notes an objection on that date, the court may not have carte blanche to quietly add a fifth justice, and may have to first notify counsel.[13] That fifth justice will generally await the two competing writings to take a position, although a vouched-in justice may express his or her views to the rest of the bench upon reading the briefs and report.

A few hypotheticals will help illustrate our procedures:

1) Suppose on an appeal, the reporting justice and the rest of the bench agrees with the recommendation of the court attorney to affirm and votes for the prepared AIM, without

costs. Justice X, however, votes to reverse. Justice X would then prepare a dissenting opinion and circulate it to the rest of the bench. After reading that dissent, the reporting justice might conclude that the prepared AIM was sufficient to counter the dissent or, might instead decide that the short, somewhat pithy AIM was not sufficient to address matters discussed in the dissent. In the latter case, the reporting justice would prepare a more detailed writing, either a longer memo decision or a signed opinion. Further revisions may be made to the competing writings, with changes highlighted by inserting new material in boldface type and deletions indicated by use of the strikeout font or by brackets, allowing the rest of the bench to follow the changes being made in each draft.

2) Suppose the reporting justice opposes the recommendation in the bench memo, while the rest of the bench is in accord with it. In that case, the reporting justice would have to prepare a dissent and circulate it to the rest of the bench. In the event the reporting justice had remained "in abeyance" at conference on the argument date, the bench would generally hold the appeal and await the reporting justice's decision on the matter.

3) Suppose the reporting justice agrees in principle with the result reached in the prepared memorandum, but feels that a longer, more detailed writing is necessary in this case, either because it concerns a novel principle of law or because it applies established law to important new factual situations. In that case, the reporting justice will say that he/she is holding the matter and will thereafter circulate a writing, and the bible sheets will be marked "hold for Justice X to write." If the reporting justice and most of the bench votes to adopt the prepared memorandum decision, but one of the other justices believes that the appeal should be decided by a full written opinion, the proper procedure is less clear.

It has been suggested that if a justice other than the reporting justice chooses to prepare a proposed full opinion, it should be circulated to the other members of the bench in the form of a concurring opinion. That would allow the remainder of the bench to decide whether to adopt the opinion as that of the whole bench, or instead to continue to rely on the short memorandum decision to represent the court's majority decision.If a justice charged with preparing a writing ultimately concludes that the matter should be decided differently than the disposition agreed on at the initial conference, the justice should circulate the writing with a covering memorandum, called a Memorandum to Associates, acknowledging and explaining the nature and rationale for the change.

Agenda Conferences

Any appeal that is not resolved by a unanimous vote on the date it is heard will be placed on the weekly agenda, an ongoing compendium of our work in progress. It lists all appeals which have been heard and remain undecided. It further lists all open motions, disciplinary matters and administrative matters awaiting decision. The motions are further broken down into categories: motions for reargument and leave to appeal, motions for leave to appeal from Appellate Term, and a category called "Miscellaneous." Within each category, the agenda lists undecided matters starting with the oldest and ending with the most recent. Most weeks when the court is in session, an agenda conference is convened, attended by the full court, usually on Mondays at 2:15 p.m., at which the justices consider proposed dispositions of open matters. Any writings that have been prepared by justices during the prior week and circulated to the rest of the assigned panel by noon on the Friday before the conference will be listed on the agenda, to be discussed and voted on at the agenda conference. Each justice's confidential secretary will check through the agenda, which is provided to chambers on Friday afternoon, and organize the materials to be discussed, after

checking that the justice has received and had a chance to consider each of the writings listed on the agenda.

At the conference, the matters on the agenda are called in turn, and when a matter is reached in which a writing or writings has been circulated for the bench's consideration, there will be a notation below the case caption, such as "memorandum for the list by [Justice's name], J." The most senior member of the panel will call it out and ask something like, "Are we ready to vote?" If so, the panel members will offer their votes in ascending order of seniority. If a justice is not ready to vote, that justice might call out "Hold," and the matter will be held over and be listed again on the next agenda.

When the notation on the agenda below the caption of a matter reads "Hold for [Justice's name], J." or "[Justice's name], J., to write," and no writing has yet been circulated by the justice assigned to prepare a writing, when that case is called, the J.P. of the panel will intone "Hold." A justice will leave the room during the agenda conference when the appeal about to be addressed concerns an order issued by that justice in a lower court. If, upon additional consideration of the matter, or upon reading another justice's writing, a justice sees fit to change his or her original vote, that change may be orally indicated at conference, or a memorandum to associates containing that information may be prepared and circulated.

Of course, a justice is free to change his or her vote up to the time of the final voting on the matter. As a matter of courtesy, though, if you are aware that a colleague expects your support based upon your previous vote at the panel conference, it is probably a good idea to privately inform that colleague of your change of heart. As the conference proceeds, each justice will make appropriate notations on his or her copy of the agenda of what transpired for each agenda item on which he or she is a panel member. Where the entire bench votes in favor of a writing prepared and circulated by one of the justices, the notation on the agenda will read "All-for," and the matter will be removed from the agenda. When competing writings are voted on, the agenda notation will reflect the nature of the vote (i.e., 3-2 or 4-1) and indicate who is dissenting.
If the matter remained on the agenda after an initial vote, to allow for changes to be made to the competing writings, a subsequent vote along the same lines as the first vote may be indicated by the notation "SAB," for "same as before." Chambers staff will enter the information in the agenda notations onto the respective bible sheets. Once the writings are prepared and circulated, the non-writing justices should be prepared to vote on them promptly. Although it is understandable that a justice may need a little extra time to carefully consider competing writings, or if a writing was only circulated at the end of the preceding week, or if the matter is unusually complex, the optimal functioning of the court requires a speedy response to a writing, before the passage of time causes the writer and the other panel members to forget about the matter.

Writings

Timeliness: There are no statutory or regulatory time requirements for the issuance of decisions; nor does the First Department have any internal requirements for the preparation of writings. At times, it seems as if the lack of any such time limits may contribute to the development of an excessive backlog of undecided appeals.

Over the years, the court has regularly arrived at crisis points in which large numbers of appeals remain undecided for an excessive period, say, over three months. At one of those crisis points, an article published in the Sept. 27, 2006, New York Law Journal pointed out

that according to statistics released by the First Department, in the first six months of 2006, the number of appeals which remained undecided for more than two months had jumped to 100, more than double what it had been in previous years.[14]

One of the clear causes of this recurring problem has been the practice on the part of some justices to hold a large percentage of appeals in abeyance, either in order to prepare a writing expressing their thoughts and concerns, or just to allow them to take more time to consider the issues. While we expect and encourage justices to carefully consider the issues and to prepare writings expressing their views, as a practical matter one of the skills an appellate justice must learn is how to choose which appeals warrant such treatment, and which should be handled with expedition.

Since the appeals keep rolling in, the preparation or consideration of anything held in abeyance is forced to compete with the demands of preparing for and hearing subsequent appeals calendars. A justice who fails to learn how to manage the case load may keep falling further and further behind. And when that justice delays many months before preparing and circulating a writing, all the other justices are then forced to take additional time to re-familiarize themselves with the now-forgotten matter.

There are administrative efforts to solve the problem of excessive numbers of undecided appeals. In a procedure first adopted by then Presiding Justice Jonathan Lippman, the presiding justice holds Monday morning conferences each week, addressing four or five such delayed appeals, in which the justice responsible for the delay is asked to report on the status of such appeals. In extreme situations, a justice who was holding an extraordinary number of appeals could be temporarily kept off some prospective appeal calendars to allow time for preparation of overdue writings.

I would also propose that we join the many states that already have adopted time limits for the preparation and issuance of appellate opinions. Although the imposition of such limits may not be pressing right now, since generally, at this time the large majority of our writings are prepared in a timely fashion, having such guidelines in place could be useful to avoid or minimize future backlog crises. Around the country, many appellate courts have time standards; some are informal, internally agreed-upon, some are set by court rule, some by statute, and a few by constitutional provision.[15]

Perhaps the most useful guideline may be found in the ABA's Standards for Appellate Courts, requiring memorandum decisions to be prepared within 30 days of argument or submission, and signed opinions within 55 days, although cases of "extraordinary complexity" are given 90 days, and dissents are to be prepared within 30 days of receipt of the proposed opinion (ABA Standards for Appellate Courts §3.55 [1994]).[16] The provision of these standards allowing for separate time limits for multiple writings would be quite important for the First Department, since having two opposing writings is quite common here, and even three is not that unusual. Allowances should be made for the time needed for multiple writings, despite the additional delays they engender; we do not want a homogenized court where everyone agrees on everything. But, while it is good to have lively debate of legal points, and even disagreements, an eye should be kept on the calendar, so that multiple writings are not the cause of unreasonable delay. Indeed, it is arguably even more important that the justices have and abide by a set of time guidelines where the bench is in disagreement.

Dissents: Given the extent of our workload and the speed at which our inventory of new appeals can grow every week, it is a good idea for a justice who stands alone on a matter to give careful thought to whether a one-justice dissent is a good idea. For example, where

one justice disagrees with the rest of the bench on the interpretation of facts, a dissent may not be useful to the jurisprudence on the subject, while demanding the expenditure of substantial time in both the preparation of the writing and the justices' consideration of that writing.

Tone of Writings: Another consideration to keep in mind when preparing writings is the need to proceed with caution when incorporating political or social policy concerns into your analysis. Of course, there are times when such concerns form an appropriate basis for a writing. But judicial writings, especially majority opinions, should normally convey an impression of judicious objectivity, neutrality and impartiality. A majority opinion that takes an outraged tone toward one of the parties, or that sounds like the matter is of personal interest to the writer of the opinion, may cause the legal community some concern as to whether the court operates with the appropriate degree of neutrality.

This is less of a concern when writing a dissent. Often, dissents intentionally employ a tone of righteous indignation in order to emphasize the writer's position that the majority got it wrong. However, when such a dissent convinces enough of your colleagues on the bench to make your dissent into the majority opinion, it is generally a good idea to re-frame the writing to tone down the outrage before issuing the opinion. An opinion that embodies the application of a policy that is not well-accepted or established will invite criticism not just for the result reached, but for overstepping the court's authority.

Editing of Writings: After writings are approved by the bench, the approved writings will go through an editing process in which several members of the opinion room staff review the writings, cite-checking, ensuring that the official citation format is used and making suggestions for improvements in style and usage. When this review is completed, the edited writing is returned to the justice who authored it, who then decides which of the proposed alterations to incorporate in the writing.

Once those changes are made, the writing is returned to the Opinion Room, marked "final." The rest of the bench is generally not included in this editing procedure. Only if substantive changes are made to the writing in this final process will the justice recirculate it to the rest of the bench, either with the notation "FYI, not on agenda" if the new changes are not major, or—in the rare event the writing has been changed in a material way—with a memo to associates indicating that the matter is being placed back on the agenda to ensure the other justices have the opportunity to consider and respond to the new material. When the final process is completed, the decisions will be issued in due course with one of the court's twice-weekly decision lists.

Motions: The Clerk's Manual fully describes the court's motion processing procedures. For purposes of this discussion, it must be noted initially that there are "agenda" motions and "non-agenda" motions. Non-agenda motions are theoretically of a non-substantive nature, such as those seeking adjournment of the appeal to a later term, while agenda motions generally address substantive issues, or consist of motions in which the recommended disposition is dismissal of an appeal.

For most non-agenda motions, a five-justice panel is assigned to each motion, and a court attorney prepares a short report with a recommendation, which is circulated to the assigned justices. But, it will not be listed on the agenda, and the assigned panel will not actually meet to discuss and vote on the disposition as it does for agenda motions, unless one of the justices contacts the reporting court attorney or the opinion room to indicate disagreement with the recommendation or some other concern. Barring disagreement, the only action any justice will take on a non-agenda motion will be that the reporting justice will sign off on the

report and return it along with the motion file to the Order Department for the preparation of an order.

Agenda motions include those for reargument, leave to appeal to the Court of Appeals, and leave to appeal from Appellate Term. These type of motions are assigned to chambers for preparation of a report. Reargument motions and motions for leave to appeal are assigned to the reporting justice on the underlying appeal, or, if that justice authored the dissenting opinion, to the justice who prepared the majority writing. Motions which relate to a pending appeal and were returnable on the date of the related appeal are forwarded to the chambers of the justice reporting on that appeal, and are generally determined in the context of the decision on the appeal.

The category of "Miscellaneous" motions on the agenda includes those which would lead to the dismissal of an appeal, those leading to the incarceration of a party if the recommendation is followed, those involving novel policy issues, and those in which a member of the assigned bench disagreed with the court attorney's recommendation for a non-agenda motion. The reports on miscellaneous motions are generally prepared by court attorneys.

Certain types of non-agenda motions are handled by a single justice, including applications for leave to appeal from a trial court's denial of a criminal defendant's motion to set aside a conviction or sentence under CPL 440.10 or 440.20. From time to time, in random rotation, each justice will be assigned to serve as that day's interim stay duty judge, deciding that day's single-justice applications for interim stays of orders being appealed, and occasionally being presented with bail applications or ex parte applications for surveillance warrants. Newly designated justices are often surprised, as I was, to find that there is no court reporter available to stenographically record arguments on interim applications. They are also often surprised to discover that for applications for bail pending appeal, the defendant is permitted to request a particular judge. A justice is well-advised to avoid holding over such a single-justice application beyond his or her duty day; clerical confusion and complications tend to multiply when that occurs.

The New York Law Journal recently published an excellent and thorough article by former Associate Justice James M. McGuire and Steven A. Engel, providing practice pointers regarding interim stay applications.[17] The article also points out the expansive authority the single justice holds in considering these applications. The justice should keep in mind that almost all of these applications will then be reconsidered by a full five-justice panel, with briefing by both sides, and to grant limited short-term relief only where it is necessary to preserve a party's rights (without undue prejudice to the other party).

Disciplinary Matters

When the Departmental Disciplinary Committee handling a lawyer disciplinary complaint determines that it is necessary to obtain an order of our court imposing some sort of discipline on an attorney, it makes a motion for the appropriate order. For example, such a motion may seek the immediate suspension of a attorney pending consideration of charges of professional misconduct, or automatic disbarment based upon the attorney's conviction of a felony, or the imposition of discipline based upon a hearing panel's findings and conclusions.

Each attorney disciplinary application is an agenda matter. They are determined by a five-justice bench, and addressed at the agenda conference. A court attorney initially prepares a

memorandum reporting on the application. All the members of the court are provided with copies of the submitted papers on each disciplinary application, and all justices are entitled to be heard with regard to each such application, although only the assigned bench will vote on the matter.

We commonly call the bench that gets to vote the "infield" and the remainder of our colleagues the "outfield." If the disposition of the matter involves public discipline (censure, suspension or disbarment), the reporting justice prepares a per curiam opinion. Traditionally, the court encourages unanimity in these matters, but in recent years, the occasional dissenting opinion has been filed. In other circumstances, such as the issuance of a private reprimand or the reinstatement of a previously suspended or disbarred attorney, the DDC's application may be disposed of by the court's issuance of an order, prepared by the Opinion Room clerk, containing no analysis or discussion.

Bar Admission

The Appellate Division's powers also include authority over bar admission, an area easily overlooked since most often, the court does no more than grant the application made by the Character and Fitness Committee at each swearing-in ceremony for new attorneys, thereby admitting to the New York State bar applicants whose good character has already been fully vetted and approved by the committee. I do not mean to minimize this important task; swearing in groups of newly admitted attorneys is a moving and solemn occasion. In fact, each justice is, from time to time, assigned the important task of addressing a group of newly admitted attorneys at the ceremony held in our courtroom; these occasions give the justice the opportunity to offer the new attorneys his or her own unique perspective and wisdom regarding the practice of law and the obligations it entails, such as the responsibility to engage in pro bono activities.

There are occasionally circumstances, however, in which applications for bar admission must be handled more closely by the court, in which we require a formal hearing before a subcommittee of the Character and Fitness Committee, a subsequent vote by the full committee, and a formal motion seeking admission. Indeed, in a recent, unusual admission application, we were required to consider the applicant's past criminal history and decide the serious question of whether he currently possessed the requisite character to be permitted admission to the New York bar; while the majority voted in favor of the applicant's admission, I felt compelled to file a dissent expressing the view that the applicant had not established that he had the necessary character to be admitted to the New York bar.[18]

It was not until I filed my dissenting opinion that I realized, with some surprise, that despite my dissent, there was no means by which further appellate review of the issue could be sought. Because the majority of the Character and Fitness Committee had voted in favor of the applicant's admission, the committee was the proponent of the motion to admit the applicant in accordance with its recommendation, and of course the applicant himself supported the motion. So, even though an argument could be made that his admission was against the public interest, there simply was no interested party who would take the position opposing the majority's grant of admission, or seek further appellate review of the determination.

Had the majority of the committee voted to deny the application for his admission, the matter would have come before the court through a motion by the applicant to admit him

despite the committee's vote, and under those circumstances, procedures for further appellate review would have at least been available, whichever way the court ruled.

Conclusion

The First Department is highly tradition-bound, and traditionally, its inner workings have been unpublicized. Most of the procedures I have described here have been unchanged for scores of years. Yet, the court has recently demonstrated, both by its adaptation to computerization, and by the justices' recent alteration of the age-old procedure for assigning opposing writings, that it has the ability to accommodate changing times. The foregoing is offered in the hope that this information will assist newly-designated justices in their acclimation process and that its broader publication will foster a better understanding generally of how our work is accomplished.

David B. Saxe *is an associate justice on the Appellate Division, First Department.*

Endnotes:

1. The New York State Constitution Article 6, §4, provides that the First Department consists of seven justices of the Supreme Court, designated from the ranks of all the justices elected to the Supreme Court; these justices are often referred to the "constitutional" justices, as distinguished from the remaining additional and certificated justices.
2. Pursuant to the New York State Constitution Article 6, §25 (b) and Judiciary Law §115, a Supreme Court justice may continue to serve upon reaching age 70 provided the Administrative Board has certified the justice's continued mental and physical fitness: such certification is required every two years until the justice reaches age 76, at which time retirement is mandatory.
3. Pursuant to New York State Constitution Article 6 §4 (e) and Judiciary Law §71, the governor may designate additional justices upon certification by the constitutional justices that additional justices are necessary for the court to complete its work.
4. See NY Const art VI, §4
5. No bench memo is prepared for criminal appeals raising only the issue of excessive sentence.
6. From a May 22, 2009 letter to the editor (NYLJ, May 22, 2009, page 6, col. 1) written in response to the Law Journal's publication on May 13, 2009 of an earlier incarnation of this article, it appears that the earlier article may have created a misapprehension that I view reading the briefs as unnecessary. I therefore take this opportunity to more clearly specify that review of the briefs, as well as the decision on review and the bench memo, is a crucial part of the justice's preparation.
7. See post dated May 3, 2012 at http://wiselawny.wordpress.com.
8. See posted dated May 17, 2012 at http://www.fullcourtpass.com/2012_05_01_archive.html.
9. See e.g., Dwyer, Feldman and Nylander, "Effective Oral Argument: Six Pitches, Five Do's and Five Don'ts From One Judge and Two Lawyers," 33 Seattle Univ. L.R. 347 (Winter 2010); Williams, "Appellate Advocacy: Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments," 50 S.C. L. Rev. 591 (Spring 1999); Gersten, "Appellate Practice: A Special Issue: Effective Brief Writing and Oral Argument: Gaining the Inside Track," 81 Fla. Bar. J. 26 (April 2007).
10. See e.g. Martineau, "The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom," 72 Iowa L. Rev. 1 (October 1986).
11. See 22 NYCRR §600.11(f)(2).

12. *Ruzicka v. Rager*, 305 NY 191, 199-200 (1953).
13. An appeal presented to a four-justice panel is "whenever necessary...deemed submitted also to any other duly qualified justice of the court, unless objection is noted at the time of the argument or submission," (22 NYCRR §600.1[c]. The primary impact of this rule is to authorize the subsequent vouching in of a fifth justice on a four-justice panel, which is most often necessary when the original four-justice panel is split 2-2. However, the final clause of the provision, gives counsel the right to note an objection on the calendar date if only four justices are assigned to that ay's panel. The rule does not specify exactly what is to follow when such an objection is noted on the calendar date. It would seem that in such circumstances counsel should at least be notified of the intended addition to the bench, possibly to have the opportunity to seek the recusal of that particular judge if necessary.
14. See Wise, "Buckley Staying in Post, Stalling McGuire's Progress" (NYLJ, Sept. 27, 2006).
15. See e.g., Cal Const art VI §19; Md. Const art IV, §15; Alaska Stat §22.05.140 (b) (1990); Fla R. Jud Admin 2,085[d] [2]; New Mexico Rules of Appellate Procedure 12-406.
16. I note that the 55-day time frame the ABA standards adopt for circulating opinions comes close to the guidelines currently applicable to New York State's trial courts for issuing decisions, which require matters to be decided within 60 days after final submission (Rules of the Chief Judge [22 NYCRR] §4.1).
17. See McGuire and Engel, "Stay for Awhile: CPLR 5519 (c) Stay Applications in the First Department" (NYLJ, Aug. 27, 2012 at S12).
18. *Matter of Neal Eugene Wiesner*, 94 AD3d 167 (2012), 2012, NY Slip Op 02069.