The Under-the-Radar Work of the Appellate Division

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Quite obviously, the work of the Appellate Division, First Department, as well as other appellate courts, involves the disposition of appeals from trial courts. Attorneys who practice before our court are familiar with the requirements of perfecting and calendaring an appeal and generally are knowledgeable about the availability of argument time for various types of appeals, and I have described our appellate procedures in previous essays, "How We Operate: An Inside Look at the Appellate Division, First Department (NYLJ, May 13, 2009) and "How We Operate At the First Department" (NYLJ, Oct. 26, 2012).

But the work of the First Department includes many types of matters other than the disposition of appeals. The procedures we employ for deciding these other matters are far less understood by members of the legal community than are the procedures for deciding appeals. The purpose of this essay is to explain how we go about deciding these other categories of our work, which I refer to as "under the radar," because they often are unknown to members of the bar.

Many of these other matters involve varying sets of procedures which have been in place for what seems like time immemorial. Consideration of these different procedures illustrates that each different approach was carefully created so as to give each type of matter an appropriate degree of care and attention.

Finally, I conclude with the suggestion that the court consider reassessing the procedure we currently employ to handle one particular type of motion that is an important component of our court inventory.

A brief word about our primary work—deciding appeals. When an appeal is placed on the calendar, each justice on that day's panel receives and reviews a set of briefs and records in advance for each case, as well as a bench memorandum from a member of our Law Department summarizing its facts and contentions, reviewing the cited case law and making recommendations. The members of the panel all prepare thoroughly in advance of the calendar date and participate in oral argument; many of the justices meet for a pre-argument informal conference,

usually at noon of that day, to preliminarily discuss the issues raised by the appeals. Then, at conference immediately following that day's oral argument, they discuss the merits of each appeal and issue a preliminary or final vote, and, if necessary, the preparation of writings may begin.

Before moving on to describe other matters, there are some types of appeals, as well as other matters we address with our appeals calendar, that are handled somewhat differently than the treatment of appeals as described above. This category includes non-enumerated appeals and CPLR Article 78 special proceedings that originate in this court.

Non Enumerated Appeals: The term "non-enumerated appeals" is a catch-all that covers all types of appeals not included in the list of enumerated appeals (see Rules of the First Department, 22 NYCRR §§600.4(a) (1)-(13), 600.4[b]). Broadly speaking, in general the "non-enumerated" category covers appeals of non-final orders in Supreme Court actions (although not orders denying dismissal or denying summary judgment, which, while non-final, fall in the enumerated category (see 22 NYCRR §600.4[a] [1]).

Non-enumerated appeals appear on the appeal calendar with the other appeals, the justices still receive the briefs, records, and bench memos for these non-enumerated appeals as they do for enumerated appeals, and they still discuss their thoughts and views with the other members of the panel after the argument calendar is concluded. However, under our court rules, such appeals are normally not afforded oral argument, except by permission of the court (see Rules of the First Department, 22 NYCRR §600.ll[f] [3]). Even when a non-enumerated appeal raises complex and interesting issues, warranting the bench's complete attention, unless counsel seek and are granted leave to argue, that appeal will be decided based only on the submitted papers. An application to be permitted to orally argue a non-enumerated appeal is addressed to the justice presiding on that day's bench, and is generally in that justice's sole discretion. However, it is probably a good idea to send a copy of such an application to all the members of the panel, since one or more of them may desire oral argument, and if so may make an effort to convince the justice presiding, who initially may not have been disposed to grant the application.

Special Proceedings: Also handled with our appeals calendars are CPLR Article 78 special proceedings that originate in the Appellate Division, seeking the types of relief known under common law as writs of prohibition or mandamus; they are often used to collaterally challenge a trial court's handling of a case. A petition for

a writ of prohibition might, for example, involve a criminal defendant seeking to bar retrial on the ground that it would violate the right against double jeopardy; a petition for a writ of mandamus might, for example, be brought by a party in a civil case seeking a direction that the trial court take some required action, such as holding a hearing or signing an order.

These proceedings are added to the end of the appeal calendar on their return date, and are not orally argued. The members of the assigned bench receive copies of the submitted papers ahead of time, but no bench memorandum is prepared by the Law Department for these special proceedings. They are discussed and addressed during the post-argument conference.

Disciplinary Proceedings: While disciplinary matters are not placed on our appeals calendars, in many ways they are handled similarly to appeals for which no oral argument is permitted. Each of the justices on the assigned panel for a disciplinary matter receives a copy of all the submissions and a report from a member of our Law Department staff summarizing the facts and issues and making recommendations. The matter is then placed on a dedicated section of our weekly agenda entitled "Disciplinary Matters," to be discussed at our weekly conference with a view toward coming to an agreement on the appropriate disposition. At the conference, while the assigned panel first discusses and votes on the discipline recommendation, all other members of the court (the "outfield") are permitted to, and often do, "weigh in." Once the disposition is agreed on, if a written decision is required, the reporting justice then prepares the necessary per curiam opinion and circulates it for approval by the rest of the panel at the next conference. If there is a disagreement among members of the panel—an unlikely scenario—the writings are circulated in a similar fashion as an appeal.

Motions: The bulk of our "under the radar" work comes to us in the form of motions. Practitioners are often surprised to learn how they are handled, and to learn that different kinds of motions are handled differently.

Motions are returnable every day in the clerk's office of the First Department from Sept. 1 through June 30, and only on Mondays during July and August (see Rules of the First Department, 22 NYCRR §600.2). They are ordinarily decided by the appeal bench designated for the return date, unless the motion relates to a previous or calendared appeal, in which case it is directed to that particular bench. If there is no appeal bench for that date, then the next scheduled appeal bench is employed. During the summer months, a bench is assigned for each week to address motions returnable that Monday. There are procedures in place for handling motions that

are of an urgent nature, by which we can expedite calendaring, preparation of the report, voting (now made easier by the use of email) and the issuance of the order.

Unlike appeals, there is no published motion calendar. While the court keeps its own lists of motions, those calendars are not made publicly available.

The First Department does not allow ex parte motions; all motions, even applications for interim relief, are made by notice of motion served on opposing counsel.

Also, importantly, there is no oral argument. Counsel are always surprised to learn that they are not permitted to present oral argument on motions. Motions are deemed submitted on their return date, and are decided based solely on their papers. There is only one circumstance in which any oral argument may be had on a motion: that is, during an application made before a single justice for interim relief pending determination of a motion by a full bench. In those circumstances, the justice who is that day's "duty judge" may choose to entertain argument regarding whether the requested interim relief, usually a stay, should be granted. Otherwise, motions are decided based entirely on the parties' papers.

Unlike appellate decisions, motions are disposed of solely by order, with no written decision explaining our reasoning. On the exceptional occasion when we recognize that some explanation would be valuable, we normally still do not issue a decision, but rather, we may add a short sentence or a citation to the order to provide some indication of our reasoning.

Unlike appeals, we make a concerted effort to avoid dissents on motions. Such dissents are particularly awkward since our motions are decided by order, without explanation. While it is theoretically possible to file a dissent to an order, the issuance of that dissent would be as an attachment to the issued order, and would not likely be published in the New York Law Journal or elsewhere. Sometimes, if four of the five justices agree, the fifth, disagreeing member of the panel may simply recuse himself or herself from the panel.

There is one more important way in which motions are handled differently from appeals, disciplinaries, and special proceedings: the submitted motion papers are provided only to reporting justice, not to all the justices on the motion bench.

The process by which we address motions depends on how they are categorized. Initially, our handling of motions depends in part on whether they are "agenda" or "non-agenda" motions, terms which distinguish between motions that are or are not

discussed and voted on at our weekly agenda conferences, so-called because an agenda is prepared for each conference listing any proposed writing or disposition.

Agenda Motions: Agenda motions, so called because they are included on our weekly agenda conferences, are substantive in nature, and come in several types. They consist of (1) motions challenging our appellate determinations, i.e. seeking reargument and/or leave to appeal to the Court of Appeals, (2) motions for leave to appeal from an order of Appellate Term, and (3) a category denominated "miscellaneous" motions.

The first two of the above categories are "chambers" motions, forwarded directly to the assigned reporting justice who will review the motion papers and prepare a written report which is circulated to the other members of the assigned panel, in which the issues are discussed and a ruling recommended. The other justices on the panel receive only that written report, unless they request the opportunity to obtain and review the file from the reporting justice. Once that report is circulated, the motion is placed on the next agenda for discussion and vote.

The "miscellaneous" category of agenda motions includes (1) motions that would be non-agenda motions except that they involve novel policy issues, (2) non-agenda motions where one of the justices on the panel has indicated disagreement with the recommended disposition, (3) motions that will lead to the dismissal of the appeal or the incarceration of a party if the recommendation is followed; and (4) petitions for a writ of error coram nobis. All these types of motions are discussed in a written report prepared by a member of our Law Department, after which the motion papers and the report are forwarded to the reporting justice; a copy of the report alone is circulated to all the other justices on the assigned panel. Like chambers motions, these miscellaneous motions are placed on the agenda for discussion and vote once the written report has been circulated to the panel.

Non-Agenda Motions: The non-agenda category of motions are not placed on our agenda and therefore are not discussed by the assigned bench face-to-face at a conference. This category consists primarily of what is sometimes called "housekeeping matters," including motions for adjournments, enlargements of time to file briefs, enlargements of the record on appeal, consolidation of appeals, poor person relief and the assignment of counsel, permission to file pro se briefs, permission to file amicus curiae briefs, and for dismissal of appeals (if the recommendation is to deny the motion; if the recommendation is to grant and dismiss, those motions are placed on the agenda).

The standard procedure for these motions is that a written report and recommendation is prepared by a member of our Law Department, and copies of that report are circulated to the panel, while the assigned reporting justice is the only one who receives the motion papers along with the prepared report. Each justice reviews the report. If the non-reporting justices agree with the recommended disposition, they need do nothing. If none of the justices expresses any concerns and if the reporting justice, upon reviewing the motion papers and the report, agrees with the recommended disposition, that justice will indicate approval on the report and return it with the motion file to the order department, where an order will be prepared. If any justices disagree, they may inform the reporting justice of their concerns or thoughts. The reporting justice may then prepare or arrange for a supplemental report, or, if appropriate, may have the matter placed on the agenda so that the justices may discuss it in conference.

Stays and other injunctive relief: It may be surprising to some, as it was to me, that motions for stays and other injunctive relief are categorized and handled as non-agenda motions, written up by a member of the Law Department and not discussed by the assigned bench face-to-face. It seems apparent that such motions will frequently raise substantive or complex issues warranting discussion.

An unscientific, informal glance through some recent reports on non-agenda motions for stays and injunctive relief pending appeal reflects that these reports are often lengthy and thorough, discussing issues that are often substantive in nature, and that they can concern important disputes, such as:

• A requested preliminary injunction against the continued construction of a floating park on the Hudson River Park waterfront;

• An effort to enjoin, pending appeal, a merger of two hotel groups; an application to stay the post-judgment distribution of funds held in escrow pending appeal without the posting of an undertaking;

• An application for a *Yellowstone* injunction to stay a lessee's cure period, following denial by Supreme Court;

• A requested preliminary injunction against enforcement by the New York City Health Department of a new city health code regulation requiring chain restaurants to provide information about the sodium content of their foods.

I do not mean to suggest that these non-agenda motions do not currently receive the amount of attention they deserve; I am quite sure that they do. I am suggesting,

however, that the better internal practice with such motions would be for us to treat them as we do agenda motions, so that, at least, all the justices on the panel would meet face-to-face to act together in addressing and voting on the motion.

Our clerk's manual recites that we treat as agenda motions any non-agenda motions that involve novel policy issues. If we do not change our standard procedure for all motions for stays and other injunctive relief, we should at least make more of an effort to identify those non-agenda motions that involve complex issues and concerns, and transform them into agenda motions. The reporting justice, upon review of the report and motion papers, may take the unusual step of checking with the panel's Justice Presiding -the senior justice on the panel -to ask whether the motion can be placed on the agenda to be discussed at the next conference. This small adjustment to our procedures could, I submit, optimize our decision-making in these matters.