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BY FAX: 718-643-7889 (8 pages)

4:15 p.m.

March 12, 2010

Paul Kenny, Chief Clerk
Appellate Term, Second Judicial Department
141 Livingston Street, 15th Floor
Brooklyn, New York 11201

RE: Quality Control at the Clerk's Office & Appellate Term Procedures/Staffing
John McFadden v. Doris L. Sassower & Elena Sassower
Appellate Term #2008-1427-WC & #2009-148-WC
(White Plains City Court #SP-651/89; #SP-2008-1474)
John McFadden v. Elena Sassower
Appellate Term #2008-1433-WC & #2008-1428-WC
(White Plains City Court #SP-1502/07)

Dear Mr. Kenny,

This follows up the telephone message I left this morning with your secretary, Daria, stating that I had not yet received any response from you to my five letters dated February 25, 2010, March 1, 2010, March 1, 2010, March 4, 2010, and March 5, 2010 – and requesting that if you had not already mailed me your response that you advise me when it would be forthcoming, since, absent recall of the Appellate Term's February 19, 2010 and February 23, 2010 decisions/orders, I must make a motion, *inter alia*, for reargument/renewal and leave to appeal to the Appellate Division, Second Department, which is time-sensitive. As I stated to Daria, I have no objection to your taking as much time as you need to respond to my serious and substantial letters, provided my time is stayed for making such motion.

Meanwhile – and germane to my letters to you – I have obtained information as to the Appellate Division, Second Department's procedures for deciding appeals. Such procedures are posted on its webpage "How a Case is Decided", accessible from the Appellate Division, Second Department's webpage on the Unified Court System's website, www.courts.state.ny.us. A copy is enclosed for your convenience.

By contrast, the Appellate Term's webpage on the Unified Court System's website has no link to "How a Case is Decided". Why is that? Does this mean that its procedures for deciding appeals are or are not comparable to those of the Appellate Division, Second Department?

Assumedly, the Appellate Term has a manual or other written documents setting forth its procedures for deciding appeals – and motions. Indeed, the “Title Standard” for the “Chief Court Attorney, Appellate Term, Second Department”, which I downloaded from the Unified Court System’s website, reflects his duty to “[d]evelop[] policies and procedures for the law department and issue[] guidelines for implementation”. Surely this includes compliance with the signature requirement of CPLR §2219(b):

“an order of an appellate court must be signed by a judge thereof, except that upon written authorization by the presiding judge, it may be signed by the clerk or, in his or her absence or disability, by a deputy clerk.”,
See New York Jurisprudence 2d, §15 “Signing of order”.

I would appreciate access to, or a copy of, such manual or other written documents – as well as information as to the staffing of the Appellate Term’s law department. Aside from the “Chief Court Attorney” (salary grade 33), who “supervis[es] and administer[s] the operations of the law department of the Appellate Term”, how many are titled “principal appellate court attorney” (salary grade 31), “senior court appellate court attorney” (salary grade 28), “appellate court attorney” (salary grade 26), “assistant appellate court attorney” (salary grade 23)? How many bear other designations and what are they?

According to “How a Case is Decided”, after the law department “prepares a confidential written report for the panel of Justices that is to determine the cause” with “a summary of the facts and an analysis of the issues”, the report is provided to the justices assigned to the panel “in advance of the date the cause is calendared for submission or oral argument”, together with “copies of the records or appendices and the briefs of all the parties”. “The briefs are checked against the record for accuracy, and the Justices may take notes to assist them on oral argument. The law clerk for each Justice does additional research as necessary.”

How many law clerks do the Appellate Term justices have – and, specifically, how many do Justices Molia, Iannacci, and Presiding Justice Nicolai each have?

According to “How a Case is Decided”, after oral argument:

“the panel retires to the court’s consultation room, to consider each cause individually. The Justices discuss each case, vote on an appropriate resolution, and their determination is recorded by a deputy clerk. Those cases that are disposed of by a unanimous vote in favor of a draft decision are forwarded to the decision department for editing and eventual release.”

Does the Appellate Term have a deputy clerk functioning in the capacity described – or do you fill that role? And does the Appellate Term have a decision department? If so, does it have a “supervisor”, as the Appellate Division, Second Department has? How many staff members are in the decision department and what are their titles? How many are “attorney editors” who prepare decisions for publication, “check[ing] citations, grammar, and technical style”, as well as “examin[ing] the draft decision for consistency with prior decisions of the court and with proposes decisions on causes that are pending but not yet released”?

I note that the “Title Standard” for your position as “Chief Clerk, Appellate Term” includes as “Typical Duties”:

“Implement[ing] changes in procedures and court operations resulting from legislative action or policy formulation.”;

“Consult[ing] with judges and court administrators and recommend[ing] new court procedures and guidelines.”;

“Devis[ing] and implement[ing] unit work procedures and guidelines”

Also included: “Discuss[ing] difficult and unusual legal and procedural applications with attorneys and advis[ing] them as to proper procedures.”

As you know, your advice to me as to “proper procedures” for securing proper Clerk’s Returns on Appeals for my four appeals – which I precisely followed by motions before both the White Plains City Court and Appellate Term and, thereafter, by my appeal #2009-148-WC, was rejected in unsigned Appellate Term decisions and orders which concealed what was at issue

I thank you, in advance, for your expeditious response to this letter, as likewise to my previous ones.

Very truly yours,



ELENA RUTH SASSOWER

Appellant *Pro Se*

Enclosure: “How a Case is Decided” – Appellate Division, Second Department

cc: Leonard A. Sclafani, Esq.

Doris L. Sassower

New York State Attorney General Andrew Cuomo

ATT: Deputy Solicitor General Benjamin N. Gutman

Assistant Solicitor General Diana R.H. Winters

Appellate Division

Second Judicial Department

How a Case is Decided

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Appeals and Proceedings

A party aggrieved by a judgment or order that is appealable as of right (CPLR 5701[a]) may appeal to the Appellate Division by filing three copies of a notice of appeal, to each of which must be annexed a Request for Appellate Division Intervention, a copy of the order or judgment appealed from, and a copy of the decision, in the office in which the judgment or order appealed from was entered. The appellant must also serve a copy of the notice of appeal upon the opposing party (CPLR 5515[1]; 22 NYCRR 670.3). In civil cases originating in the Supreme Court, a filing fee of \$65 is payable to the county clerk (CPLR 8022[a]). There are also certain time limits imposed on the filing of a notice of appeal (CPLR 5513).

Proceedings may be commenced in the Appellate Division (CPLR 506; 22 NYCRR 670.18) either by serving and filing a notice of petition and petition, or by order to show cause and petition, filing a Request for Appellate Division Intervention, and paying the \$315 filing fee required by CPLR 8022(b) and § 670.22(a) of the rules of the court (22 NYCRR 670.22[a]).

Proceedings pursuant to CPLR article 78 which are transferred to this court pursuant to CPLR 7804(g) must be perfected in the same manner as an appeal (22 NYCRR 670.16).

Perfecting an Appeal or Proceeding

Once an appeal is taken by filing a notice of appeal or obtaining an order granting leave to appeal, or a proceeding is transferred to or duly commenced in this court, it must be "perfected". An appeal or proceeding is perfected when the appellant or petitioner has taken all the steps necessary to place it on the court's calendar (22 NYCRR 670.2[a][4]). Generally, this means filing a brief and providing the court with the papers that led to the determination under review. There

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are three main methods for perfecting an appeal (22 NYCRR 670.9). The first is the full record method, which requires the party to print all the papers which were before the court which made the judgment or order which is the subject of the appeal in a booklet called the record on appeal and to serve and file it with a brief setting forth his or her contentions. The second is the appendix method, which is similar to the full record method except that those parts of the papers that are not germane to the appeal need not be printed. The third is the original papers method, in which the appellant or petitioner serves and files a brief, and subpoenas the original papers for filing with the clerk of the Appellate Division, Second Department. The full record and appendix method are predominantly used to perfect civil causes and the original papers method is used predominantly to perfect Family Court and criminal causes (22 NYCRR 670.9[d][1][viii]). The requirements concerning the form and the content of records, appendices, and briefs can be found in CPLR 5526, 5528, 5529, and § 670.10.1, 670.10.2, and 670.10.3 of the rules of the court.

Pursuant to § 670.8(e) of the rules, an appellant has six months from the date of the notice of appeal, or, in the case of a proceeding transferred to the court pursuant to CPLR 7804(g), six months from the date of the order of transfer, to perfect the appeal or proceeding (22 NYCRR 670.8[e]). Papers are deemed filed in this court as of the time they are actually received in the clerk's office accompanied by proof of service on all necessary parties. Papers received in the clerk's office after the time to perfect the appeal has expired will be rejected as untimely, even if they were timely mailed. Papers that are rejected as untimely may not be filed unless the person seeking to file them obtains an enlargement of time to do so (22 NYCRR 670.8[d]).

The General Clerk's Office

The record or appendix and brief on an appeal or proceeding to be perfected is initially received in the clerk's office, which is located on the first floor of the courthouse at 45 Monroe Place. Before the papers are accepted for filing, the clerks determine if they have been submitted within the time limits of § 670.8 of the rules of the court (22 NYCRR 670.8). Additionally, the clerks examine the papers for compliance with various other court rules. Among other things, the proposed papers are examined for proof of service (22 NYCRR 670.08[a]; 670.9[a]; 670.9[b][4]), proper certification (22 NYCRR 670.10.2[f]), and settlement of the transcript, if any (22 NYCRR 670.10.2[q]), as well as for proper pagination, proper binding, and proper print size and page margins (22 NYCRR 670.10.1, 670.10.2, and 670.10.3). Unless it has been waived, the filing fee must also be paid at the time the record or appendix and brief are submitted.

Upon acceptance of the record or appendix and the brief by

the clerk's office, the appeal or proceeding is perfected. ↑

The Record Room

The clerk's office stamps each copy of the record or appendix and brief indicating the date and time it was received by the court. It then sends all but one of the nine copies to the court's record room, where they are held for eventual distribution to the panel of Justices assigned to determine the cause. ↑

The Data Entry Department

The remaining copy of the papers accepted by the clerk's office is given to the data entry department, where the fact of its filing, the date and time thereof, and the date and method of service, is recorded in the court's computer system. ↑

The Calendar Clerk

From data entry, one copy of the papers on the appeal is sent to the office of the calendar clerk where it is held for the filing of the respondent's brief, the appellant's reply brief, if any, and possible amicus curiae briefs. The calendar clerk re-examines the papers to determine that the appeal has been properly perfected, and docketed the request for argument time, which must be noted on the cover of all briefs submitted to the court (22 NYCRR 670.10.3[g][1]). A notation is made on the calendar of those causes in which argument time has been requested, but in which oral argument is either limited or not permitted under the rules (22 NYCRR 670.20).

When all of the briefs have been received, or the time to file them has expired, the calendar clerk's copy of the papers on the cause is sent to the law department. ↑

The Law Department

The chief court attorney heads the law department, assisted by two deputies. They review the causes forwarded to them by the calendar clerk for procedural irregularities that may need to be addressed before the cause is heard. They also note the issues raised by the briefs, and assess them in terms of difficulty and complexity.

Following this preliminary review, each cause is assigned, generally in the order of perfection, to one of a staff of court attorneys assigned to the law department. The court attorney prepares a confidential written report for the panel of Justices that is to determine the cause. Each report contains a summary of the facts and an analysis of the issues. The report is circulated to the panel in advance of the date the cause is calendared for submission or argument. ↑

Calendaring: Argument and Submission Calendars

Once the confidential report on a cause is completed, the cause is placed on the court's day calendar. The assignment of causes to specific calendar dates is the responsibility of the chief court attorney and his deputies. Causes in which oral argument is permitted and has been requested are heard on Mondays, Tuesdays, Thursdays, and Fridays from September through mid-June. Oral argument is generally held in the courtroom at 45 Monroe Place, in Brooklyn, but several times a year argument is also held in courthouses in Mineola, Central Islip, and White Plains.

The court holds a submission calendar on numerous Wednesdays throughout the year for causes in which argument was not requested or is not permitted (22 NYCRR 670.20), or in which the court has determined not to hear requested argument (22 NYCRR 670.20[d]).

The calendar clerk and the record room put together the formal calendar, sending it to the *New York Law Journal* for publication, and distributing the records or appendices and the briefs to the panel of assigned Justices.



Chambers Work

In advance of the calendar date, each Justice on a day calendar panel receives copies of the records or appendices and the briefs of all of the parties for each cause scheduled for that date, as well as a copy of the confidential report prepared for each case. The briefs are checked against the record for accuracy, and the Justices may take notes to assist them on oral argument. The law clerk for each Justice does additional research as necessary. A Justice may circulate an additional report or proposed decision from his or her chambers.



Calendar Day

On those days when the court sits to hear oral argument, the call of the calendar is at 10 a.m. in the courtroom at 45 Monroe Place. As the calendar is called by the Justice Presiding, each attorney rises to indicate the amount of argument time requested. An attorney who has submitted a brief without a request for argument time will not be permitted to argue. Any party may forego argument and submit the matter, even when argument has been requested on the cover of the brief. Rebuttal is not allowed.

Following oral argument, the panel retires to the court's consultation room, to consider each cause individually. The Justices discuss each case, vote on an appropriate resolution, and their determination is recorded by a deputy clerk. Those cases that are disposed of by unanimous vote in favor of a draft decision are forwarded to the decision department for editing and eventual release.





Decision Department

The decision department consists of a supervisor, a staff of attorney editors, and a number of clerks and typists. The decision department voting clerk receives the papers concerning each cause directly from consultation and records the vote taken at consultation into the court's computer system. If the voting was not completed after the initial consultation, the voting clerk circulates majority, concurring, and dissenting decisions drafted thereafter by members of the bench, and records the votes as they are received.

The supervisor of the decision department assigns each decision on which the voting is complete to an editor, who then prepares it for publication. Among other things, the editors check citations, grammar, and technical style. They also examine the draft decision for consistency with prior decisions of the court and with proposed decisions on causes that are pending but not yet released.



Decision Release and Remittitur

On Mondays throughout the year, following internal review, the Presiding Justice approves the release of the final list of the decisions to the public. Those decisions approved for the week are printed in quantity on the court's press. A set of the decisions is given to the data entry department, where the date and the disposition of the cause are entered in the court's system, and another set is made available to the public in the general clerk's office. The decisions are mailed to the *New York Law Journal*, the Office of Court Administration, and the State Reporter.

After the cause is decided, the original papers, the record on appeal or appendix, and the briefs are remitted to the clerk of the court of original instance, with a certified copy of the decision. Original exhibits are returned to the parties.

