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ARTICLE

UNIQUE CUSTOMS AND PRACTICES OF THE SECOND CIRCUIT

*Wilfred Feinberg**

INTRODUCTION

I intend to describe those customs and practices of the United States Court of Appeals for the Second Circuit that are unusual and, in some cases, unique. I chose this topic because some, if not all, of these customs and practices are little known outside of the official family but are worthy of scrutiny and discussion. There has been little published about them, and what has been reported is not very recent.¹ Also, I believe that the subject of court administration is generally neglected. For example, there is no course on the subject in most law schools, including Hofstra. Although the situation is changing because of the leadership of a small group of brilliant scholars²

* Chief Judge, United States Court of Appeals for the Second Circuit. This Article is adapted from the inaugural Howard Kaplan Memorial Lecture, delivered by Chief Judge Feinberg on January 29, 1986 at the Hofstra University School of Law. The text remains substantially as delivered. The assistance of Rosemary Herbert and Daniel J. Kramer in the preparation of this Article is gratefully acknowledged.

1. See, e.g., Note, *The Second Circuit: Federal Judicial Administration in Microcosm*, 63 COLUM. L. REV. 874 (1963); Karlen, *The United States Court of Appeals for the Second Circuit*, 17 REC. A.B. CITY N.Y. 500 (1962).

2. See Feinberg, *Foreword: Judicial Administration: Stepchild of the Law*, 52 ST. JOHN'S L. REV. 187, 188 n.6 (1978) (citing articles).

and the efforts of a few organizations,³ judicial administration continues to be the stepchild of the law.⁴ This comparative inattention is odd, since the way that courts operate has "a significant, possibly even dominant, influence on the quality of justice that can be obtained from them."⁵

The Federal Rules of Appellate Procedure allow considerable variations in practice and procedure among the circuits. In this sense, the thirteen federal courts of appeals, composed of twelve regional courts and the Court of Appeals for the Federal Circuit, can serve as testing grounds or laboratories in this field, similar to the function once ascribed on a broader scale to the states by Justice Brandeis.⁶

CUSTOMS AND PRACTICES

A. *Voting Memos*

The most interesting and perhaps the most valuable Second Circuit practice is the exchange of so-called voting memos by the members of a panel. This is done when the panel agrees that a case should be decided by opinion rather than by summary order. The judges usually make that preliminary, procedural decision in a brief discussion immediately after argument or submission of an appeal. This past year, about half of such appeals were the subject of published opinions,⁷ and most of those were preceded by the exchange of voting memos. The memos are sent out to the other two members of the panel promptly after argument or submission of the appeal. Most judges attempt to get them out on the same day as the argument, or on the following day, but it is not always possible to do so if the cases on the week's calendar are particularly heavy. Nevertheless, because voting conferences are usually held toward the end of the week of argument, we all understand that the memos, to be most

3. Included in this group are the Federal Judicial Center, the National Center for State Courts, the Institute for Judicial Administration, and The American Judicature Society.

4. Feinberg, *supra* note 2, at 188.

5. Note, *supra* note 1, at 874.

6. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . .").

7. For the statistical year ending June 30, 1985, 46% of decisions were by published opinions. Of the total, 42% were signed opinions; 4% were per curiam opinions. REPORT OF THE CIRCUIT EXECUTIVE, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1985, at 6-7, Table 4 (1986).

useful, should be completed by then. There used to be a tradition of not reading the memos of the other judges on a case until your own was done, except for a "peek once in a while."⁸ That has changed to a great extent, so that it is not unusual now for a memo to contain comments on the other memos.

The voting memos state the particular judge's vote as well as the reasons for the vote. They usually are a page or two in length, although sometimes they are as short as a sentence or as long as five or six pages. It is customary for the writer to analyze the principal arguments advanced by the parties and to explain why the writer agrees or disagrees with them. The views expressed are the product of some legal research, examination of the record, and consideration of the oral argument. Such work is ordinarily not extensive because the pressure of the next day's cases is very much in each judge's mind. Of course, much of the thinking that goes into the memo has already taken place, since the Second Circuit Court of Appeals is a so-called "hot" court, that is, each judge is presumed to have read before argument the briefs and the relevant portions of the appendix, most notably, any opinion by the district judge in the case on appeal.

Each memo usually starts off by stating "I vote to affirm" or "I vote to reverse," or some variation thereof. Even though the vote is subject to reconsideration at the subsequent voting conference, writing that simple declarative sentence concentrates the mind wonderfully. We are all lawyers, and the act of creating a written record, even of a tentative, nonbinding conclusion, has an intangible but powerful effect. This should not be surprising, of course. A district judge who makes findings of fact and conclusions of law under Civil Rule 52⁹ has the same experience. One of the principal justifications for that rule is that the act of recording one's views and then justifying them produces a sounder result. If that is too difficult to do, the tentative result becomes questionable. The same function is served by the voting memo. There is an immense difference between simply talking about a case and expressing your views in writing. Recording one's views on paper requires the recorder to scrutinize them more carefully. Even more important, the judge also knows that he is creating a record that others can examine too. The immediate others, of course, are the two other members of the panel, who will read the

8. Medina, *Some Reflections on the Judicial Function at the Appellate Level*, 1961 WASH. U.L.Q. 148, 150. See Medina, *The Decisional Process*, 20 N.Y. COUNTY LAW. A.B. BULL. 94, 97 (1962) [hereinafter *Decisional Process*].

9. FED. R. CIV. P. 52.

memos before the voting conference and be able to read them again when the opinion is written.

As an aside, a book was published sixteen years ago that came as a shock to me and, I imagine, to my colleagues. Its title was *Learned Hand's Court* and the author was Marvin Schick.¹⁰ The shock came from the realization that the book made liberal use of copies of the voting memos that had been found in the papers of Judge Charles E. Clark, which had been made available to the author by the judge's family.¹¹ The book quoted extensively from the voting memos, including such tidbits as Learned Hand's references to the Supreme Court Justices as The Blessed Saints, Cherubim and Seraphim, and The Nine Tin Jesuses.¹² The book had the effect of reminding some of us that our voting memos also have the potential of creating a permanent record for a different sort of audience. While the humor quotient of my voting memos was never very high up to that point, it dropped considerably thereafter.

What are the advantages of the voting memos? I have described the effect on the writer. But there are also sizeable benefits to the recipients as well as to the collegial process. Three heads are almost always better than one. It is a constant source of surprise to me how often this proves to be true. By one persuasive memo, a judge can change the vote of at least one, and perhaps both, of the other panel members. To my surprise, this happened the first time I sat on the circuit court; it happened the last time I sat; and it has happened often in the many years in between. This does not mean that disagreement over the disposition of an appeal is so common; it is not. Last year, 93% of our cases in which an opinion was written were disposed of unanimously.¹³ The voting memos, however, frequently disclose differences in emphasis and approach. This, in turn, has a salutary effect on the collegial process. It enables each member of the panel to approach the tentative decision of the appeal at the voting conference in a focused way, with the benefit of the insights of two colleagues, and aware of the areas of tentative agreement and disagreement. This preparation for the voting conference streamlines it and frequently makes possible quick agreement on a common ap-

10. M. SCHICK, *LEARNED HAND'S COURT* (1970). For a review critical of the author's focus, see Friendly, *Book Review*, 86 POL. SCI. Q. 470 (1971).

11. See M. SCHICK, *supra* note 10, at XIV-XV.

12. *Id.* at 142.

13. Memorandum of E. B. Goldsmith and V. Flanagan, Clerk and Chief Deputy Clerk of the Second Circuit (Dec. 23, 1985) (on file with the author).

proach. For example, a civil appeal may raise several issues, such as jurisdiction of the trial court, the plaintiff's standing to sue, and the sufficiency of the evidence to support a verdict. Even if the members of a panel do not agree on all three issues, the voting memos may make clear that they do on one and that it is dispositive. As a result, it is unusual for the conference on a week's cases to last more than an hour and a half to two hours.¹⁴ Frequently, the voting conferences are shorter than that.

The usefulness of the memos extends much beyond the voting conference. Weeks or months later, the memos benefit the eventual opinion writer, who has in written form valuable suggestions about the reasoning of an opinion, as well as a clear statement of a colleague's concerns. Having the latter enables the opinion writer to shape an opinion in a way that minimizes the possibility of a dissenting or separate concurring opinion. This not only avoids delay in final disposition but also gives the bar the guidance of a unanimous opinion.

The memos have incidental benefits, as well. In preparing them, a judge can discuss the case with a law clerk and get the benefit of a different perspective that not infrequently tests the judge's thinking. Moreover, the memos are helpful to the presiding judge in making the assignment of opinions. A long, analytical, and detailed memo is often correctly regarded as a statement that the author would be quite willing to write the opinion.

The voting memos are also useful when a draft of the proposed opinion arrives from the judge assigned to write it. The memos assist the other two judges in refreshing their recollections of the case and the discussion at the voting conference. Finally, at least one member of the court has said, not altogether in jest, that one of the reasons the Second Circuit judges get along so well is that they get rid of all their aggressions in their voting memos!

These benefits of the voting memo process must be weighed, of course, against the costs. The principal ones are the increase in work and, for out-of-town judges, the inconvenience. At this time in the court's history, out-of-town judges far outnumber those who live in the New York City metropolitan area, a reversal of the situation of twenty-five years ago.¹⁵ Of the thirteen active judges now on the

14. Because the same three judges do not always make up the panel for an entire week's sitting, several short conferences involving the different panel members are often necessary.

15. See Karlen, *supra* note 1, at 501 (only three of nine judges came from outside the New York metropolitan area).

court, only three in addition to me, namely, Judges Kaufman, Kearse, and Pierce, have chambers only at the United States Courthouse at Foley Square in Manhattan. The remaining nine come in for their sitting weeks from other locations in New York State, and from Vermont and Connecticut. Most of our senior judges reside outside of the metropolitan area. Sometimes, because of the complexity and number of difficult cases, we postpone the voting conference to the following week, at least with regard to some of the cases, in order to allow more time for the exchange of memos. A conference in person might then require a special trip back to Foley Square for an out-of-town judge, but in that situation we can, and sometimes do, confer by conference call rather than face to face. When I first came to the court in 1966, the practice was to hold the voting conference in the week after argument, although the conferences then were always in person.¹⁶

With respect to workload, there is no doubt that the voting memos require a substantial expenditure of additional effort in a short period of time. And this occurs during a pressured week when some twenty-three or twenty-four appeals are considered by the panel. Some of this time is gained back, for reasons already given, at the voting conferences, and later on when opinions are drafted and circulated. But there is no doubt that a significant net residue of additional work caused by preparation of the voting memos remains. I submit that the resulting improvement in the workings of the collegial process justifies their use.

The origins of the voting memo system are somewhat obscure, although the practice was well established by the time Learned Hand became chief judge. Indeed, in 1941, Judge Clark referred to it as "unique" and "hallowed by tradition."¹⁷ Judge Harold R. Medina has described both his initial skeptical reaction to the practice and his speedy conversion. He quickly came to view it as "a wonderful system."¹⁸ The late Judge Henry J. Friendly was another staunch supporter of our voting memo system and one of its finest practitioners. Under the pressure of increased filings, today's voting memos have become somewhat shorter than the mini-opinions often circu-

16. See, e.g., H. Friendly, *How a Judge of the United States Court of Appeals Works 1* (unpublished manuscript) (conferences toward the end of the week following argument), quoted in M. SCHICK, *supra* note 10, at 99.

17. M. SCHICK, *supra* note 10, at 96.

18. See, e.g., *Decisional Process*, *supra* note 8, at 97.

lated by members of the Learned Hand Court.¹⁹ Nonetheless, the memo system continues to serve as the Second Circuit's antidote to the one-man or one-woman opinion.²⁰ I echo Judges Friendly and Medina in their praise of the system and express my hope that it continues.

B. *Encouraging Oral Argument*

Another unusual, and perhaps unique, Second Circuit practice is that, with few exceptions, we allow and encourage oral argument of all appeals and substantive motions, going so far in some instances as to *refuse* permission to submit an appeal on the briefs alone. The main exceptions are for incarcerated pro se prisoners, applications for mandamus, and criminal appeals in which counsel files a brief pursuant to *Anders v. California*,²¹ and asks to be relieved. This is contrary to the national trend of actively eliminating oral argument entirely in a substantial number of fully briefed appeals.²²

We have severely cut down, however, on the time for oral argument. A generation ago, thirty minutes for each side was common, and at times forty-five minutes was allowed.²³ In most cases now in our court each side is allocated no more than ten or fifteen minutes, although the presiding judge of the panel may, and frequently does, allow counsel to continue beyond their allotted times.²⁴ To attorneys trained in the advocacy of yesteryear, that may not seem like much. Yet, it is almost always sufficient. As stated above, our panels read

19. See M. SCHICK, *supra* note 10, at 96-97.

20. See Medina, *Foreword: The "Old" Second Circuit in 1951*, 53 ST. JOHN'S L. REV. 199, 201 (1979); Note, *supra* note 1, at 892. See also P. CARRINGTON, D. MEADOR, M. ROSENBERG, *JUSTICE ON APPEAL* 9-10 (1976) [hereinafter *JUSTICE ON APPEAL*] (discussing importance of "group deliberation based on independent preparation"); Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 10-11 (1950) (deploring "one man" appellate decisions).

21. 386 U.S. 738 (1967).

22. FEDERAL JUDICIAL CENTER, *DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS* 5 & n.11 (1985) [hereinafter *JUDICIAL CENTER STUDY*].

23. Karlen, *supra* note 1, at 506.

24. The assignment of time for argument has been misunderstood by some commentators. In L.G. FORER, *MONEY AND JUSTICE: WHO OWNS THE COURTS?* 166 (1984), Judge Forer states that "[t]he Second Circuit limits oral argument on appeals to five minutes for each side," implying that this is the rule rather than the exception. This inaccuracy apparently derives from one pro se case in which each side was allowed only five minutes to argue, as a result of which the appellant unsuccessfully petitioned the Supreme Court for a writ of mandamus. *Id.* at 166 & n.25 (citing *Dacey v. Naruk*, 445 U.S. 941 (1980)).

the briefs ahead of time, and this is well known.²⁵ A lawyer who ignores the obvious implication and spends too much time on preliminary remarks will soon be reminded by the presiding judge to get to the heart of the case. The judges on the panel ask many questions, and there is much give and take. Attorneys with extensive experience in our court, for example, the Legal Aid lawyers and the Assistant United States Attorneys, usually make their points briefly and well. As a result of this policy, most of our fully briefed appeals—77.1% in the last statistical year—are argued.²⁶ This percentage is much higher than the national average.²⁷

Is it worthwhile to encourage oral argument in most cases? I submit that it is, based upon the following cost-benefit analysis. What are the costs of oral argument? The obvious one is the judicial time spent in court just listening, sometimes with great pain and suffering! But, on analysis, this does not amount to that much time. In the Second Circuit, the time spent on oral argument approximates two and one-half hours a day, five days a week, or twelve and one-half hours a week. Since in recent years the active judges usually each sit ten weeks a year, this comes to a total of about 125 hours a year for each active judge. This expenditure of time is not that large, and would be the total measurable time saved if we eliminated oral argument in all cases. But no circuit court does that. If we assume that oral argument is eliminated in slightly less than half of the fully briefed cases, which approximates the national average, the total saving would be only about sixty hours a year per active judge.

Against this, in courts that limit the availability of oral argument, the briefs still have to be read, presumably with the same care as if the case were to be heard orally, so there is no saving of time there. And there is some judge-time spent in those courts on the singling out (or screening) of cases that are not going to be argued, and on the memoranda prepared, read, and discussed in connection with disposing of them. Any such time must be subtracted from the sixty hours per judge each year that represent the judge-time cost of encouraging oral argument. Thus, the total measurable time saving per judge from cutting down on oral argument is probably about thirty hours per year.

25. See, e.g., COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *APPEALS TO THE SECOND CIRCUIT* 38 (5th ed. 1984).

26. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1985 ANNUAL REPORT OF THE DIRECTOR 245, Table B1 (1985) [hereinafter 1985 ANNUAL REPORT].

27. The national average for the statistical year 1985 is 56.4% argued. See *id.* at 244.

I believe that this represents the extent of measurable time saved because the system the Second Circuit uses does not require additional incremental expenditure of time. Presumably, the group of cases that in other circuits are not argued as a result of screening will correspond to those on which the Second Circuit judges usually spend no time preparing memoranda either before or after argument; we simply agree on the bench while the argument is taking place, or in the robing room immediately after it occurs, that a summary affirmance is appropriate. The presiding judge will then usually assume the duty of preparing the order. Preparation of the order takes time, of course. Indeed, this is one of those unsung privileges of being a presiding judge that most of us would gladly pass up, but presumably the same kind of order would be prepared whether or not the appeal was argued.

It has been suggested that the benefit of screening cases for oral argument is not so much the time saved on argument itself, but the greater flexibility it allows in deciding those cases that are not argued. Screening is thus supposed to save the judges time otherwise spent in acquainting themselves with the facts and issues once before argument and again, later, to prepare the disposition.²⁸ Because most of the cases that would be nonargument cases in other circuits are decided immediately after argument, as indicated above, the procedures used in the Second Circuit do not require this sort of duplication of effort.

It is true that in theory eliminating oral argument in many more cases might cut down on the number of sitting weeks and thus might save time in court for all and travel time for out-of-town judges. However, I surmise that the more likely result would be to expand the oral argument time of the remaining cases somewhat and to affect the number of trips to the courthouse not much, if at all.²⁹ In this connection, it is worth pointing out that while the percentage of argued appeals for the Second Circuit is the second highest in the nation, it is not that much higher than the analogous figure for some

28. See JUDICIAL CENTER STUDY, *supra* note 22, at 3.

29. An informal survey of other circuits, where screening procedures are used to eliminate oral argument in some cases, suggests that this is indeed what happens. While there are, admittedly, other factors involved, the average number of sittings per active judge in other circuits appears to be comparable to that in the Second Circuit. Telephone survey conducted by L. Goodchild, Assistant Circuit Executive (Jan. 24, 1986) (on file with the author); Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 384 (1984).

of the other circuits.³⁰ The reason is that some submitted appeals are in the small, well-defined categories in which we do not allow oral argument, and in other appeals the parties ask permission to submit and usually, but not always, obtain it. What this confirms is that the policy of encouraging oral argument does not result in that much additional argument.

There is, however, another cost to be considered, that incurred by attorneys who, in the larger circuits, have to travel very long distances to argue before a circuit court of appeals. It is understandable why a court does not want to compel an attorney who wishes to submit such an appeal to argue, but we do not do that too often. Perhaps, in the not too far off future, use of television will enable the panel to hear an argument in open court even though the attorneys and the judges are at different locations. I saw one such demonstration some time ago, and it seemed to work splendidly. Therefore, the costs of encouraging oral argument amount to an expenditure of about thirty hours per year per judge.

What are the benefits? The most obvious one is the chance for a face-to-face interchange between the lawyers and the bench, which furthers not only the substance but also the appearance of justice. It provides the litigant a "day in court." Moreover, while oral argument does not often change the result of a case, it frequently affects the mode of disposition. Argument can uncover issues lurking below the surface and clarify confusing ones. I have often gone to court, prepared on the basis of the briefs to affirm in a summary written order, only to realize during the argument that there is more to the case than I originally thought, so that a full written opinion is advisable. This is no small benefit, not only to the litigants but also to a system that treasures case-by-case development of the law. Also, there have been a few occasions where I have changed my mind completely in a case I had tentatively regarded as a summary affirmation. Why this is so is hard to articulate, but the alchemy of oral advocacy can and does affect the mode of disposition and, to a lesser extent, the outcome.

Moreover, there is another intangible benefit from encouraging oral argument that is seldom recognized. To the extent that this policy does increase the number of occasions when the judges are actu-

30. The D.C. Circuit has the highest percentage of argued appeals, with 91% of appeals being argued. The First Circuit ranks third, behind the Second Circuit, with 68.3% and the Sixth Circuit is fourth with 67%. See 1985 ANNUAL REPORT, *supra* note 26, at 244-47, Table B1.

ally physically sitting with each other and, in the marginal appeals that elsewhere might be screened out of oral argument, agreeing in a face-to-face meeting on the result, the policy has beneficial side effects. It cannot help but improve the workings of the collegial process when it turns to the more difficult cases, presumably those that, in other circuits, are not screened out.³¹

Perhaps the day will come when the Second Circuit's filings are so high that even the average saving of some thirty hours per year for each judge would require the court to deny oral argument in many cases when the parties want it. I hope that day is a long way off.

C. *No Screening*

It is my understanding that every circuit but the Second utilizes some sort of screening procedure to identify appeals on which argument will not be heard.³² Most use staff attorneys to select likely candidates for disposition without argument. Such cases are then submitted to a special screening panel, or to a regular panel, which reviews this recommendation. If the panel disagrees, the case will be put back on the argument calendar. If not, the panel usually disposes of the merits of the appeal. Where special panels are used for screening and a case is allowed to proceed to the argument calendar, the case will often be heard on the merits by a different panel.³³

In the Second Circuit, the effect of the court's policy of encouraging oral argument is, as already indicated, that we spend no judge- or staff-time in screening cases for oral argument. This absence of screening eliminates any duplication of effort by judges and speeds up the appellate procedure. This is accomplished, we hope, not by reducing the time spent in considering the merits of the case, but by eliminating a step in the appellate process—what John P. Frank has called a “decision point”³⁴—that contributes to delay. When an appellant's brief is filed in our court, it is usually sent within a week or two to a presiding judge of a panel as part of a proposed calendar of cases to be heard at the panel's sitting some four or five weeks away. There is no intervening committee of judges or staff, or both, decid-

31. See *JUSTICE ON APPEAL*, *supra* note 20, at 16-18.

32. See *JUDICIAL CENTER STUDY*, *supra* note 22, at 7 & n.14.

33. See generally *id.* at 7-9 (comparing the screening procedures of the federal courts of appeals). For an indication of the effort expended on the screening process, see *id.* at 33-37, Table 4, “Composition and Responsibilities of Judge Panels.”

34. J. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 65-68 (1969).

ing whether or not the appeal is to be argued. This must be one of the reasons why the median disposition time of appeals in the Second Circuit last year was the lowest in the nation, 6.4 months, and only slightly more than half of the national average for all courts of appeals.³⁵

D. *Continuation of Trial Counsel*

A Second Circuit practice of long standing that has become fairly common elsewhere requires trial counsel, retained or appointed, in a criminal case to continue to represent appellant until relieved by the appellate court. This policy was adopted in 1968 at the instance of then-Chief Judge J. Edward Lumbard.³⁶ It was designed to eliminate a particular type of delay that used to be common in the appeal of a criminal case. After the notice of appeal was filed, a convicted defendant, if out on bail, was in no hurry to move things along. Frequently, the defendant was also less than thrilled with trial counsel's performance in the district court. This was understandable, considering the outcome. The lawyer in turn was often not anxious to be engaged in appellate proceedings in the case, whether for financial or more spiritual reasons. And the busy government attorney, secure in victory, usually moved on immediately to other things. In other words, there was a perfect "no-man's land" in which appeals used to languish while no one did anything after the notice of appeal was filed.

This was changed by Second Circuit Rule 4(b), which provides, in pertinent part:

When a defendant convicted following trial wishes to appeal, trial counsel, whether retained or appointed by the district court, is responsible for representing him until relieved by the court of appeals.

The Rule means what it says. Trial counsel has the responsibility to stay in the case unless relieved by the court of appeals. In practice, the Rule appears to have worked well. In most criminal appeals, no question arises at all because trial counsel simply handles the appeal.³⁷ Last year, for example, there were 490 criminal appeals to

35. 1985 ANNUAL REPORT, *supra* note 26, at 258, Table B4. The National median is 10.3 months. *Id.* It should be noted that both figures are compiled by the Administrative Office and include nonargued, as well as argued, cases.

36. Feinberg, *Expediting Review of Felony Convictions*, 59 A.B.A. J. 1025, 1026 (1973).

37. See Memorandum of E. Shapiro, Re: Statistics Regarding Criminal Appeals (Dec. 19, 1985) (on file with the author). In about eight percent of these appeals the defendant was

our court,³⁸ and only thirty-two applications to be relieved, of which nineteen were granted and thirteen denied.³⁹ In addition, there were twenty-four substitutions of retained counsel; all of these were handled routinely by staff counsel and granted.⁴⁰

E. *A Panel Every Week*

Another aspect of the Second Circuit's operation that is, I believe, unique is that we have a panel of the court sitting every week for most of the year. We have followed this practice for the last ten years or so. Commencing with the first week in September or even, in recent years, with the last week of August and continuing until the end of June, a scheduled panel of the court will sit every week with the exception of the Christmas and New Year's period. And during the two summer months, a panel will sit for one week in July and one week in August, usually about the middle of the month, to hear a full complement of appeals.

In contrast, most other circuits will compress the period each month when panels sit, sometimes two or three at a time, so that for at least a week or two each month there is no panel sitting. That used to be the practice in the Second Circuit in the early 1960's, when the court had nine active judges and fewer than 700 appeals,⁴¹ and sat three weeks a month, commencing from the end of September to the end of June.⁴² But with the steady increase in the court's filings, now approaching 3,000 a year,⁴³ we started to schedule a panel every week for most of the year. And, in recent years, under the pressure of a surge in filings, we sometimes have two panels sit in the same week.

Scheduling a panel for every week has many advantages. There is no built-in period of delay of a week or two each month in having an appeal heard. Similarly, our "sitting" panels also handle any mo-

represented by the Legal Aid Society. *Id.* Thus, while the same entity continued the representation, different units of the organization, and therefore different lawyers, were involved in the trial and appellate levels.

38. 1985 ANNUAL REPORT, *supra* note 26, at 245, Table B1.

39. Memorandum, *supra* note 37.

40. *Id.*

41. *E.g.*, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1961 ANNUAL REPORT OF THE DIRECTOR 223, Table B1 (1961) (in 1961, there were 674 appeals filed). In 1963, there were 695 appeals. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, 1963 ANNUAL REPORT OF THE DIRECTOR 183, Table B1 (1963).

42. *See* Note, *supra* note 1, at 877 n.36.

43. For the statistical year 1985, 2,844 appeals were filed in the Second Circuit. 1985 ANNUAL REPORT, *supra* note 26, at 245, Table B1.

tions that come along in a particular week, so that ordinarily we avoid the bother of creating special motion panels. Also, an emergency application, such as for a stay or for an expedited appeal, is simply routed to the sitting panel. The three judges on the panel are physically in the courthouse hearing appeals and ordinary motions, and are available and prepared to handle such urgent motions, sometimes in open court, with a minimum of delay. For most of the year, we simply do not have a situation in which it is necessary to put a panel together for such matters. This saves a great deal of wear and tear on the clerk of the court and, not incidentally, on the chief judge. In addition, an emergency appeal can be scheduled and heard without too much difficulty. If a panel grants a motion for an expedited appeal, it will also usually fix a prompt briefing schedule, and set the case down for argument a few weeks later, subject to the approval of the presiding judge of the panel.

This all contributes to expediting the appellate process and has other less obvious, but significant, benefits. There is little need for a frenzied search for available judges, many of whom are far away, to handle emergency motions and appeals. In addition, the automatic character of this system refutes any possible allegation that an emergency panel was composed to achieve a particular result. The calendaring in the recent, highly publicized case of *Texaco, Inc. v. Pennzoil Co.*⁴⁴ is an example of this system in operation. After the parties agreed on an expedited briefing schedule, the appeal from the decision of the district court was simply assigned to an already established panel scheduled to sit during the week after the last brief was due.

Moreover, since the judges' sittings are approximately equal over the year, the burden of handling such urgent matters, which are frequently more complex than an ordinary motion or appeal but must be heard and resolved in less than usual time, is borne in approximately equal fashion. This is no small matter because the difficulty of handling a motion for a stay or an expedited appeal, involving, for example, a complicated tender offer or an order committing to jail an allegedly contemptuous grand jury witness, can be considerable. In the latter case, a statute commands the panel to decide the matter within thirty days of the filing of the notice of appeal, which may give the panel only a few days to decide the case.⁴⁵

44. 626 F. Supp. 250 (S.D.N.Y.), *modified*, 784 F.2d 1133 (2d Cir. 1986), *prob. juris. noted*, 106 S. Ct. 3270 (June 23, 1986).

45. 28 U.S.C. § 1826(b) (1982). *See, e.g., In re Grand Jury Proceedings, A Grand Jury*

There is at least one disadvantage to spreading out the panels throughout the month. Bunching all the panels together each month for a two-week period, for example, brings a greater number of judges together at the same time, thus tending to increase collegiality. This is not a minor consideration. Collegiality not only makes life more pleasant, but for reasons I have expressed elsewhere,⁴⁶ improves the work product of the court. Nevertheless, I submit that the availability of a scheduled panel almost every week improves the operation of a court of appeals considerably to the benefit of the litigants and the public. I do not think that we planned our present schedule that way; it more or less simply happened in response to a heavier caseload. That characteristic of the federal appellate courts is unlikely to disappear; I doubt that our schedule of a panel each week will either.

F. *Few Hearings In Banc*⁴⁷

The Second Circuit has not been receptive to in banc proceedings, that is, having the full court, rather than simply a panel, consider an appeal. In 1948, Congress codified the Supreme Court's holding that a court of appeals had the power to sit in banc,⁴⁸ but the practice was slow to catch on here. The tradition of hostility to in bancs goes back a long way in the Second Circuit. Learned Hand strongly disapproved of in bancs, and while he was Chief Judge we had none.⁴⁹

Our first in banc review of an appeal occurred in 1956.⁵⁰ Thereafter, we had them in moderate numbers. For the past decade, at least, we have had by far the fewest in bancs of any of the other regional circuit courts.⁵¹ In one of those years, we had none; in three of those years, only one; and in five of the years, only two.⁵² In only

Witness v. United States, 776 F.2d 1099 (2d Cir. 1985).

46. Feinberg, *supra* note 29, at 385-88.

47. I adopt the spelling used in FED. R. APP. P. 35 and decline to enter into the debate as to whether the old french "en banc" is preferable. See Newman, *Foreword: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOKLYN L. REV. 365, 365 n.1 (1984).

48. See 28 U.S.C. § 46(c) (1982) (codifying *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941)).

49. See M. SCHICK, *supra* note 10, at 116-17.

50. *In re Lake Tankers Corp.*, 235 F.2d 783 (2d Cir. 1956) (in banc), *aff'd sub nom. Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957).

51. This excludes the First Circuit which, until 1980, had only three judges.

52. In statistical year 1984, there were no in bancs in the Second Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1984 ANNUAL REPORT OF THE DIRECTOR 116,

one year did we exceed the latter number.⁵³ During the same period, the other regional courts of appeals averaged many more in bancs each year; the highest was the Fifth Circuit with thirty in banc hearings in 1978 alone, and twenty-four in 1980.⁵⁴ The Fourth Circuit had eighteen in 1985; the Eighth Circuit had fifteen.⁵⁵

There is an obvious difference of opinion as to the utility of in banc proceedings; those circuits that frequently invoke the procedure presumably believe it useful to do so. I do not intend to canvass the arguments for and against in bancs. That has been done well elsewhere.⁵⁶ What should be noted in the present context, however, is that in bancs not only delay the disposition of a particular appeal, which in itself may not be too significant, but also consume a large amount of time and effort that would otherwise be expended on other cases. That effect, to which attention is infrequently paid, is significant. Whether that cost is outweighed by a benefit to the administration of justice is the crucial question. My own view, that in bancs are rarely worthwhile, has already been recorded elsewhere.⁵⁷

Table 7 (1984).

There was one in banc in each of the statistical years 1982, 1983, and 1985. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1982 ANNUAL REPORT OF THE DIRECTOR 87, Table 8 (1982); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1983 ANNUAL REPORT OF THE DIRECTOR 109, Table 9 (1983); 1985 ANNUAL REPORT, *supra* note 26, at 121, Table 7.

In 1976, 1978, 1979, 1980, and 1981 there were two in bancs in this circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANNUAL REPORT OF THE DIRECTOR 161, Table 7 (1976); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1978 ANNUAL REPORT OF THE DIRECTOR 167, Table 8 (1978) [hereinafter 1978 ANNUAL REPORT]; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR 204, Table 9 (1979); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR 208, Table 7 (1980) [hereinafter 1980 ANNUAL REPORT] (due to clerical error, this report incorrectly lists the number as 4); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1981 ANNUAL REPORT OF THE DIRECTOR 193, Table 7 (1981).

53. In 1977, the Second Circuit had six in bancs. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 176, Table 6 (1977).

54. 1978 ANNUAL REPORT, *supra* note 52, at 167, Table 8; 1980 ANNUAL REPORT, *supra* note 52, at 208, Table 7.

55. 1985 ANNUAL REPORT, *supra* note 26, at 121, Table 7.

56. Compare, e.g., Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?*, 69 JUDICATURE 7 (1985) (concluding that the disadvantages of the in banc procedure outweigh the advantages) and Newman, *supra* note 47, at 382-85 (praising practice of holding minimum number of in bancs) with Note, *Playing With Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 VA. L. REV. 1505, 1508-09 (1984) (availability of in banc procedure serves "crucial function in the administration of federal courts").

57. Feinberg, *supra* note 29, at 376-77.

G. *60-Day List*

As the name implies, the 60-day list is a compilation of all appeals not disposed of within sixty days of the date of argument, and indicates for each case the panel members and the judge to whom the opinion has been assigned. Use of the list apparently began during the period 1959-1971, when Judge Lumbard was Chief Judge.

The list is circulated periodically to all members of the court and reviewed case-by-case at the meetings of the court, usually held bimonthly, where the list is always a principal item on the agenda. At this meeting, each active judge to whom an opinion is assigned reports on the status of any unfiled opinions for cases argued more than sixty days earlier, and predicts roughly when a draft opinion will be circulated to the panel members or, if the opinion is in circulation already, when it will be filed. The presiding judge of a panel, always an active judge, has the responsibility for determining the status of opinions assigned to senior or visiting judges and to report on them at the meeting. Ordinarily, nothing is actually said to prod the opinion writer and there is no criticism. Despite our efforts to avoid it, we all find ourselves on the 60-day list at one time or another. Nevertheless, the use of the list at these meetings exerts pressure in subtle ways. I interpret the increased number of opinions filed immediately before our meetings as a sign that the system is working.

I believe that what makes our practice different from those used in the other circuits is also what makes it particularly effective. I refer to the simple fact that judges know they will report to their colleagues on the status of any delayed opinions. We also have a tradition in the circuit of giving the highest priority to work on a colleague's opinion. If a concurring or dissenting opinion is to be prepared, it should be written at the earliest opportunity. Thus, the 60-day list also encourages the judges to review their colleague's drafts promptly, so as not to be responsible for delaying the filing of an opinion.

I understand that other circuits use 60-, 75- or 90- day lists not unlike ours, but they apparently do not have a regular, and comparatively frequent, forum at which delayed opinions are orally reported on, albeit very briefly, by the opinion writer to the other members of the court. I believe that peer pressure exerted by the combination of the 60-day list and regular reporting at court meetings plays a significant role in our ability to dispose of appeals promptly.

H. *Civil Appeals Management Plan*

The Civil Appeals Management Plan, or CAMP, as it is colloquially referred to, is a relatively new Second Circuit practice, but one that has been well received. CAMP was started in 1974 by then-Chief Judge Irving R. Kaufman; it uses staff counsel to encourage voluntary settlements in most civil cases and to eliminate the necessity for many procedural motions by dealing with them at preargument conferences. CAMP expedites the processing of appeals generally. I understand that similar programs have now been adopted in several other circuits. I mention CAMP because this circuit was the first to use it. Since this very successful program has been excellently described elsewhere,⁵⁸ however, I will not go into it further here.

I. *Exchange of Tabs*

Another tradition that seems unique to the Second Circuit is exchange of what we call tabs, which are small, rectangular pieces of paper, one side of which, like a postage stamp, has a gummed substance on it. The writer of a draft opinion sends the opinion to the other two members of the panel, together with a tab. The panel member signifies concurrence by returning the tab to the opinion-writer, with a vote ("I concur"), signature, and date written thereon, together with a memorandum containing any suggestions for the opinion. In the event a panel member files a concurring or dissenting opinion, that opinion and a tab indicating the vote ("I concur with separate opinion" or "I dissent with separate opinion") are sent to the author of the main opinion. The latter affixes the tabs of the other panel members to the back of the main opinion and files both it and any separate opinion. An opinion is not filed without these tabs.

The use of tabs is a custom of ancient vintage. A. Daniel Fusaro, who retired in 1984 as Clerk of the Court, recalls that the practice was in use when he came to the Clerk's Office in 1934, and believes it started in the earlier days of the Court. At first, the custom seems to be silly and, at best, merely quaint. But on reflection, the practice reveals obvious advantages that help to account for its longevity.

A veritable minuet is possible with the device of a tab. The tab

58. See, e.g., Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986); Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974).

may be sent without any suggestion for change in the draft opinion except perhaps mention of a typographical error or two. Frequently, the tab is sent with a memorandum containing a number of suggestions for changes in the opinion and, almost as frequently, the writer accepts them. But it is quite clear to the writer that the opinion may be filed without making the changes, so long as the tab is sent with no mention that it is conditional. It is also possible, of course, to make clear in the accompanying memorandum that the tab is conditional. Usually, however, a judge who feels that strongly about the suggested changes will simply offer the suggestions in a memorandum but withhold the tab. There is then no need to make explicit that concurrence may be withheld; the absence of the tab speaks volumes. This has the virtue of avoiding direct confrontation, although the meaning is clear. Finally, if a colleague feels that he or she must write a separate opinion, either concurring or dissenting, the tab will accompany that opinion.

None of this is world-shaking, of course. But neither is it completely trivial. Use of well-defined and understood procedures eliminates misunderstanding and unnecessary irritation. Moreover, the various possibilities allow the process of negotiating the final opinion to proceed in the least abrasive way. The result is frequently the elimination of concurring—and, occasionally, dissenting—opinions and improvement of the final product.

REFLECTIONS

I trust that this examination of customs and practices, most of which are found only in the Second Circuit, or had their genesis there, has been useful and interesting. I have a few concluding observations.

Through this discussion of our unique practices, I do not intend to suggest that our way of doing things is better than the procedures followed in other circuits. We certainly have no monopoly on innovative or interesting practices, and we cannot afford to become complacent. Because the regional circuit system allows the circuits to be semi-autonomous in many ways, however, increased communication between them should be encouraged to permit the sharing of information about internal operating procedures. In the past year, we had an extensive interchange of ideas between the Second and Third Circuits, through a joint conference. I understand that other pairs of circuits have also met together from time to time. Another little-known forum for such exchange of information is the biannual Con-

ference of Chief Judges, which takes place after each meeting of the Judicial Conference of the United States. Each circuit has its own local problems and its own methods of dealing with them. We can learn much from each other.

Cataloguing and describing circuit practices and procedures in detail and examining their effect demonstrates the importance, in the late Judge Harold Leventhal's phrase, of "seiz[ing] the inch."⁵⁹ Sometimes the inch turns out to be a foot or even a yard. This is particularly true in the area of court administration, where progress is more surely made incrementally. Thus, to deal with problems of Supreme Court overload and perceived need for increased resolution of intercircuit conflicts, it may not be necessary to create an entirely new intercircuit tribunal. It may be sufficient, and it certainly seems advisable, to try less radical measures first.⁶⁰ To cope with the flood of appeals, it may not be necessary to eliminate the right to have oral argument entirely in a significant number of cases. It may be preferable to shorten argument appreciably and avoid screening. At least, that seems to be worth trying. Similarly, the effect of a particular practice, such as the absence of screening, on eliminating delay may not be tremendous, but when combined with other practices, such as scheduling a panel to sit each week, keeping in bancs to a minimum, and continuation of trial counsel in criminal cases until relieved, the cumulative effect may be great.

Customs and practices—even ancient ones, perhaps particularly ancient ones—deserve scrutiny and assessment of current worth. This article is an attempt to do that. The justification for the scrutiny is two-fold: one obvious reason is to determine whether old ways of doing things should be changed or discarded in the light of current conditions and needs. A less obvious, and perhaps more important, reason points in the other direction. Such scrutiny may reveal that the benefits of a particular custom are great and that a determined effort to preserve and strengthen it is justified. A good example of this is the voting memo system. In the face of a tidal wave of litigation and the bureaucratization of the courts that accompanies it, it is difficult to retain what has been called the "Hart-Hand" model, in which courts of appeals judges are members of a "small, elite, collegial, deliberative, on-going institution" whose opinions are

59. See Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 713 n.120 (1984).

60. See *id.* at 695 & n.51.

the result of a “‘maturing of collective thought.’”⁶¹ However, devices such as the voting memos help.

Examination may show that a practice began simply as a method of dealing with a particular situation. The scheduling of a panel every week, for example, was a response to the increase in filings. It seems doubtful that the resulting side benefits discussed earlier were consciously sought. But on closer examination, their value is evident.

The circuit system permits local experimentation, but that, too, must be accompanied by continued reassessment of any new practice. In the 1970's, we tried a system of oral dispositions in open court and followed that procedure in a considerable number of our cases. For a number of reasons, including the reaction of the Bar and the advantages of a written order over an oral disposition, use of the latter procedure has decreased sharply.⁶² Similarly, in response to criticism from members of the Bar, we have recently reexamined our practice of disposing of appeals by summary order and we are making a conscious effort to restrict its use to its intended purpose, namely, disposition of those appeals where the panel is unanimous and “no jurisprudential purpose would be served by a written opinion.”⁶³ A few years ago, we were disposing of about 65% of our appeals by summary dispositions.⁶⁴ This past year, the comparable figure was 54%.⁶⁵

Of course, I do not suggest that we should not try to find new ways of dealing with new, and old, problems. I suggest only that we should periodically appraise any innovation. In 1962, the Second Circuit was described as “a laboratory for administrative and procedural reform.”⁶⁶ I believe that it still is, over two decades later.

61. Monaghan, Book Review, 99 HARV. L. REV. 344, 344-45 (1985) (reviewing R. Posner, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)).

62. The high point for such dispositions was 34% of all decisions in 1977; for the 1985 statistical year, the comparable figure was 1%. See *Method of Rendering Decisions*, Second Circuit Court of Appeals, Internal Memorandum (on file with author).

63. 2d CIR. R. § 0.23. See generally Pratt, *Forward: Summary Orders in the Second Circuit Under Rule 0.23*, 51 BROOKLYN L. REV. 479 (1985).

64. E.g., in 1982, 62% of appeals were decided by summary orders and an additional 3% by decisions from the bench. REPORT OF THE CIRCUIT EXECUTIVE, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1982, at 7 (1983).

65. REPORT OF THE CIRCUIT EXECUTIVE, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1985, at 6 (1986).

66. Note, *supra* note 1, at 875.

