Appellate Practice

Certification From the Second Circuit To the N.Y. Court of Appeals: A Guide

BY SCOTT A. CHESIN
AND KAREN W. LIN

Under ordinary circumstances, New York appellate practice is divided between two non-overlapping court systems. Federal appeals are heard by the U.S. Court of Appeals for the Second Circuit, whose decisions are reviewable only by the U.S. Supreme Court; state appeals are heard by the four departments of the appellate division, whose decisions are reviewable by the New York Court of Appeals. But in a large number of cases—more here than in other part of the country—the two systems talk to each other, through the use of the certification process.

Certification is a procedure by which a federal court can ask that a state court rule on an issue of state law.[1] Federal courts are asked to interpret state law all the time—either because they are sitting in diversity, exercising supplemental jurisdiction, or hearing cases removed to federal court pursuant to statutes like the Class Action Fairness Act. In the vast majority of those cases, the state laws at issue are clear, and federal courts are well equipped to apply them. But in cases where state law is ambiguous, or the issue is novel and important, many federal courts have the option to ask for help: They can issue an order "certifying a question" to a state's high court, asking that the state court consider and decide the question in the first instance.

The Second Circuit certifies more questions to state high courts than any other federal court in the country,[2] and the overwhelming majority of its certification orders are to the New York Court of Appeals. In the past five years alone, the Second Circuit has issued 39 certification orders, 31 of which were directed at Albany. That's an average of about six New York certifications per year—the highest number of certifications to any state high court from any U.S. Circuit court in the entire country. Frequent use of the certification process has been the norm in the Second Circuit since the mid-1990s, when Judge Calabresi joined the court and became a vocal and persuasive advocate for use of the procedure.[3] In total, the Second Circuit issued 133 certification orders to New York between 1986 (when the Court of Appeals first began accepting certified questions) and the end of 2015.[4]

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NEW YORK Court of Appeals

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Given the frequency of such cases, counsel in a Second Circuit appeal presenting state-law issues should be familiar with certification and prepared to consider the various strategic questions that can arise. Below, we provide a primer to guide New York lawyers through the certification process.

How Cases Are Certified

The Second Circuit can choose to certify a question sua sponte, or it can do so at the request of a party.[5] Litigants have several opportunities to seek certification during the progress of an appeal: they can request certification in a separate motion (either before or after briefing, or even after oral argument), in the merits briefing, or at oral argument.[6]

If the Second Circuit decides to certify, it issues an opinion containing the certified question, and it sends the opinion to the Clerk of the Court of Appeals, along with the entire appellate record.[7] The Court of Appeals then determines whether to accept the request,[8] typically relying only on the materials it has received from the Second Circuit—although on occasion, it has considered letters from the parties if received in advance of its conference date.[9] The Court of Appeals technically has the discretion to deny a certification request, but it rarely does so: In the 30 years it has been accepting certified questions, the court declined only seven of 133 such requests.[10]

Once the Court of Appeals accept a certified question, the matter will generally proceed in the same manner as a normal appeal. The court will issue a briefing schedule and will hold oral argument, after which it will issue an opinion.[11] The Second Circuit, which retains jurisdiction of the case throughout the process, then disposes of the appeal accordingly.

Strategic Considerations

Usually, based on the specific issue and facts in a case, it will be apparent to counsel whether the Second Circuit or the Court of Appeals offers a more favorable forum for her position. Accordingly, we focus on the factors that are helpful to emphasize in either supporting or opposing a certification request, as counsel deems appropriate.

First, counsel should be aware that there are two necessary preconditions for certification to the Court of Appeals: (1) there must be no controlling Court of Appeals decision on the issue; and (2) the issue must be determinative of the outcome of the case.[12] Thus, lawyers should be prepared to address the presence or absence of these conditions.

However, even if the threshold requirements for certification are met, the Second Circuit has discretion not to certify a question. After all, federal courts are vested with the jurisdiction to hear state law claims, certification means adding to the already heavy docket of the Court of Appeals, and it often results in substantial delays in the ultimate resolution of a case. Therefore, in addition to addressing the preconditions for certification, counsel should » Page 12

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Overcoming the Weakness In a Summary Judgment Decision on Appeal

BY MELLISSA MURPHY-PETROS,
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While there are myriad reasons why an appellate court may reverse a motion court's decision, the focus here is on how to deal with an appeal of those favorable but potentially problematic opinions in which a motion court grants summary judgment but is arguably either overreaching or underreaching in its corresponding analysis.

Sometimes a party moves for only partial summary judgment, but the motion court grants summary judgment on all claims. Similarly, sometimes a party does not move for summary judgment at all but is nevertheless granted summary judgment in its favor. At first blush, such decisions may appear to be improper and overreaching. Indeed, it seems somewhat antithetical to the concept of notice requirements for a party to be granted relief that it has not even requested.

However, in some circumstances judges may do precisely that. Specifically, CPLR §3212(b) states: "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." In case law parlance, this is known as a court "searching the record" to grant a non-moving party summary judgment. It bears noting that generally courts may not sua sponte grant summary judgment when there is no motion for summary judgment pending before the court. In fact, in assessing whether to affirm a decision in which a court has "searched the record," appellate courts have held that summary judgment should be granted only "with respect to a cause of action *or* issue that is the subject of the motions before the court."[1] Of note, the court may grant summary judgment even where that is not the nature of the motions pending before it, provided that the parties "were deliberately charting a course for summary judgment by laying bare their proof."[2]

Thus, while a court may have gifted summary judgment relief that was not expressly sought, for the decision to be affirmed on appeal, an attorney would have to clearly demonstrate how that claim or issue was before the motion court when the court made its decision. This is easily done in situations in which a party moves for summary judgment on a common-law claim but, for whatever reason, fails to move on the corresponding statutory claim (or vice versa). A prime example that New York appellate courts see all the time involves common-law negligence claims and claims under N.Y. Labor Law §200.[3] Since Labor Law §200 is merely a codification of negligence under common law, both causes of action require an analysis of whether a party breached its duty to provide workers with a safe work environment. In cases that involve these parallel claims, appellate courts routinely hold that the claims implicate the same issues and therefore uphold decisions granting summary judgment on both causes of action, even if the party only moved with respect to one of the causes of action.

Similarly, appellate courts routinely affirm decisions in which summary judgment is awarded to a non-moving co-defendant where the moving co-defendant's motion demonstrates that both parties are entitled to such relief. For example, in *Lopez-Dones v. 601 West Assocs.*,[4] certain defendants successfully moved for summary judgment with regard to a claim under Labor Law §241(6), establishing that the provisions of the Industrial Code cited in the plaintiff's bill of particulars were either inapplicable or not violated. On appeal, the Second Department found that a search of the record clearly demonstrated that summary judgment should have been awarded to the non-moving co-defendant on that claim as well.

It is much more difficult, if not impossible, to get a decision affirmed in situations in which the motion court searched the record and dismissed a cause of action based on, for example, a statute of limitations argument that was not addressed in briefing or argument.[5] The Court of Appeals has explained that permitting courts to use CPLR §3212(b) to evaluate any and all asserted claims and defenses "would be tantamount to shifting the well- » Page 12

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SHUTTERSTOCK

Preparing For Oral Argument Of Your Appeal

BY PETER B. SKELOS

During my years in the Appellate Division, attorneys would frequently ask: "Why argue the appeal?" "Haven't the judges made up their minds in advance?" My advice has always been direct and simple: Do not waive oral argument. From a selfish perspective, appellate judges enthusiastically consider the oral argument the most exciting part of their work. Counsel should approach oral argument with no less enthusiasm and preparation.

Appellate jurists are different from the trial judges in the sense that they have not been living with the case for months or years. For this reason, the appellate bench is generally more open to the influence of good oral advocacy. Appellate judges come to the argument well-prepared having read the record, briefs and bench memoranda prepared by the law department and their law clerks and they may very well have discussed the case with other members of the panel. An appellate jurist may be leaning in your favor, against you or may yet be wholly undecided. Is the bench split? Is the bench as a whole undecided? The problem is that you don't know the answer to those questions. Oral argument is your opportunity to help solidify the judge who is in your favor, tip the scales of the judge who is undecided, and yes, you may even move the judge who was leaning in favor of the adverse position. During my more than 11 years in the Appellate Division, there were countless times when the first words out of more than one judge's mouth at consultation were: "Can you believe the attorneys did not come in to argue this case?" Do you want to be the lawyer who is the object of that question? I think not. Don't waive the one last opportunity you have to influence the court of the merits of your client's position. And, certainly, don't squander the opportunity.

Of course, as with everything in life, success in appellate advocacy comes with preparation. The ultimate purpose of preparation is to convince the court of the merit of your client's position. Preparation gives you the tools and confidence to engage in a meaningful, lucid discussion with the court. But, the word *discussion* does not connote a two-way street or an even playing field. It is the court's prerogative to ask the questions and it is your obligation to satisfy the inquiry. Your goal is to reach a *conversational tone* during the oral argument. How do you get there?

The attorney who will argue the appeal should be intimately involved in preparing the brief. Although brief-writing is very often a team effort, the attorney who will argue the appeal can best understand the intricacies of the case only by actively crafting the strategy employed in the brief and by involvement in drafting the many iterations leading to the final written product.

As obvious as it sounds, make sure you have preserved the right to orally argue by following the rules of the court for reserving argument time. It is surprising how frequently counsel shows up at the Appellate Division, Second Department, without having properly reserved time by the simple means of placing the amount of time requested and the name of the attorney who will argue in the upper right hand corner of the brief.

The ultimate purpose of preparation is to convince the court of the merit of your client's position.

In the weeks—not days—before oral argument it is imperative that counsel reads the decision and order or judgment on appeal, counsel's own brief and the adverse briefs. While it is neither advisable nor possible to read the entire record, counsel should pull from the record (or appendix) copies of the relevant documents or transcripts upon which the factual argument was founded. No less important is full familiarity with the portions of the record relied upon in the adverse brief. The pertinent statutory and case law authority relied on by both parties should be reread and known inside and out. Of course, the authorities should be updated to identify any changes in the law. If there is a *new* case that you would like to rely on, bring sufficient copies to the court for the panel and your adversary. Some courts may permit you to submit the case in advance with notice to your adversary. Check the local court rules, or call the clerk of the court, to determine whether a written summary is permissible as opposed to mere notice that the case will be relied upon.

Move on to the triage part of your preparation. Appellate counsel must identify the meritorious and dispositive arguments. You may very well have meritorious arguments, but if they are not dispositive points » Page 12

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Also

First in, Last out: The Benefits of Appellate Counsel

BY BRENDAN T. FITZPATRICK

As part of a litigation team, a trial attorney and an appellate attorney work on parallel tracks toward a common goal—providing the best possible representation to the client throughout the life of a lawsuit. They go about the common goal in a different manner, however. Each attorney has different skill sets. And when they combine those skills, they provide comprehensive representation for the client while keeping litigation costs efficient. Ideally, the collaboration begins at the early stages of the lawsuit, but they can also provide invaluable assistance if hired to assist at trial.

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'Monitoring' Counsel

Hiring an appellate attorney as monitoring counsel during a trial is the role that first comes to mind when most think of an appellate attorney joining a trial team. The role of monitoring counsel is an important one, no doubt. Because he is not in the midst of the lightning fast forum the trial attorney inhabits during trial, the appellate attorney can provide the client an assessment of the trial on (1) how it is progressing, (2) how the evidence is being received into the record, and (3) how the jurors appear to be reacting to the testimony and other evidence presented to them. By writing daily trial reports for the client, the appellate attorney frees up the trial attorney to prepare for the next day of trial. But there is much more an appellate attorney can do to contribute to the trial team.

Leveraging Skill Set at Trial

The very term "monitoring counsel" connotes a passive role at trial. In some cases, a passive role is appropriate—e.g., when a client who is concerned about the possibility of an excess verdict hires monitoring attorney to observe the trial and write daily reports independent of the insurer-retained trial attorney. In most other cases, there are many benefits in including an appellate attorney as an active member of the trial team. Some of them concern a division of labor that exploits the trial attorney's and appellate attorney's discrete skill sets. One example is that the trial attorney can off-load certain time-consuming tasks especially suited for an appellate attorney—e.g., writing motions in limine, bench memoranda, pocket briefs, and other trial submissions. Because a key part of an appellate attorney's skill set is legal research, leveraging the trial motion work to him makes sense from a trial preparation and litigation costs perspective. Indeed, appellate attorneys have at the ready motion submissions on a number of issues commonly confronted during a trial.

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Influencing Trial Politics

Another important benefit involves trial politics. An appellate attorney's active involvement in the case places the judge on notice that there is an attorney on the case dedicated to preserving all issues, especially those demonstrating reversible error. Judges are more likely to proceed with caution under those circumstances; no judge wants to get reversed. This phenomenon similarly impacts opposing counsel, who would rather avoid opposing an appeal or, even worse, going through a second trial because of a reversible error. This might ultimately facilitate a favorable settlement in the client's favor and avoid a likely appeal all together. Also, an appellate attorney can provide a buffer between the trial attorney and the judge by arguing divisive but necessary motions instead of the trial attorney. An appellate attorney can be to blame for a necessary motion for a mistrial or for recusal, thereby deflecting any disfavor the trial attorney would have to face if they had made the motion.

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An appellate attorney certainly assists in more substantive ways at trial, as well. They are another set of eyes and ears to ensure all trial errors and issues are preserved for appellate review. They can ensure the evidence is clearly described in the record so that monitoring counsel or another appellate attorney at a later point is able to understand the trial transcript without the benefit of being at trial. An appellate attorney can also make sure the record is enhanced as much as possible, deciding which documents are important to the case and making sure they are marked as exhibits and clearly described for the record.

Notably, an appellate attorney can draft verdict sheets and jury instructions that reduce the chance of juror confusion and inconsistent verdicts. Appellate attorneys are extremely familiar with pattern jury instructions and the cases that interpret them. In most cases, an appellate attorney has a verdict sheet or a set of jury instructions that have already been tested and passed at both the trial and appellate level. Therefore, the client benefits from an experienced appellate attorney drafting the verdict sheet and jury instructions rather than a less-experienced trial support attorney helping the lead trial attorney.

Thus, monitoring counsel serves an important roll for a client who is unable or unreceptive to sending one of its in-house attorneys to observe the trial. Monitoring counsel—typically an appellate attorney—certainly adds value for a company involved in a lawsuit that likely will go to trial.

Value in Early Stages

An appellate counsel's limited role at trial might suffice for less complex, low exposure cases. But even less complex cases can garner large jury verdicts. Also, the strength of a party's case at trial is determined by how the attorneys have framed the issues and litigated the matter up until the point of trial. Therefore, there is palpable value to an appellate attorney collaborating with the litigation team at the early stages of a lawsuit, especially when the lawsuit has the potential for a large verdict or concerns complex legal issues.

An appellate attorney brings a different and important perspective to any case, whether routine or complex. Trial attorneys and appellate attorneys approach lawsuits differently, looking through different lenses to achieve their mutual goal of getting the best result for their client. The trial attorney takes a long view of the trial litigation, looking ahead from the very early stages of the lawsuit, up to closing arguments, and ultimately to a bench decision or jury verdict. He strategizes and uses each step in the litigation—starting with the pre-suit investigation, all the way up to the trial—to develop a compelling presentation of evidence and argument to persuade the judge or jury to his client's position.

By contrast, the appellate attorney views the lawsuit in a global sense. In most instances, this means that, as part of the litigation team, the appellate attorney focuses on framing legal issues in light of the applicable statutory law and common law and preserving those issues in anticipation of an appeal to the intermediate appellate court and possibly a court of last resort. At the early stages of a lawsuit, the trial attorney can develop the theme, collect the evidence, and build the case in concert with the appellate attorney through each stage of the litigation.

In other instances, the appellate attorney might take an even more expansive global view of the lawsuit because it impacts related litigation throughout the state, across several states, or nationwide. Similarly, the appellate attorney can oversee a client's initiative in influencing the common law on certain issues across a number of jurisdictions. Appellate attorneys are especially apt at doing so because a large part of their skill set is identifying trends and changes in the common law and finding commonalities or differences to provide support for their clients' position. Moreover, the appellate attorney can make sure the arguments across the jurisdictions are uniform and framing issues to support the client's initiative.

The value of an appellate attorney's support on a litigation team or on a trial team goes well beyond an extra set of hands to help lighten the load. The appellate attorney is skillful at creating the most favorable record for the client at the earliest stage of the litigation and continuing right up to prosecuting or opposing an appeal. The collaboration between the trial attorney and appellate attorney provides truly comprehensive representation for the client and, frequently, more economically efficient than someone working outside their skill set.

Agency Independence From Presidential Supervision: Changes Ahead

BY BORIS BERSHTEYN

While art might imitate life, the same has scarcely been said of administrative law. Rarely does that discipline—typically preoccupied with arcane procedure—reflect contemporary political debates. This year is different, however. Even as the media regales us with minutia of the Administration's dealings with federal agencies (who must follow White House orders? who fired this official and why?), similar concerns reverberate through appellate courts. But the public and the courts appear to approach the issue from opposite perspectives: Even as the public focuses on protecting agency independence from political intrusion, the trend in the courts has favored Presidential control.

Indeed, two of the year's most significant unfolding appellate developments could limit the ability of Congress to insulate administrative agencies from the President's influence. After several years spent in jurisdictional tangles, challengers to the independence of the Securities and Exchange Commission's administrative law judges (ALJs) have begun to score victories in the federal courts of appeals. Meanwhile, a panel of the District of Columbia Circuit has overturned the provisions of the Dodd-Frank Act protecting the director of the Consumer Financial Products Bureau from removal by the President. Both issues are heading for en banc consideration by the full D. C. Circuit—and could shortly become ripe for U.S. Supreme Court review.

The results could emerge as significant victories for the Executive Branch in an ongoing struggle for influence over the administrative state.

SEC's ALJ Structure

The enactment of the Dodd-Frank Act has prompted a wave of litigation challenging the way the federal government—and, in particular, the SEC—appoints and utilizes ALJs. The statute gave the SEC greater flexibility to pursue enforcement proceedings before these in-house tribunals, rather than in federal district courts. In response, enforcement targets—many of them chafing at the perceived unfairness of forums where both their adversaries and the judges are SEC personnel—have sought to identify and litigate potential constitutional frailties in ALJ proceedings.

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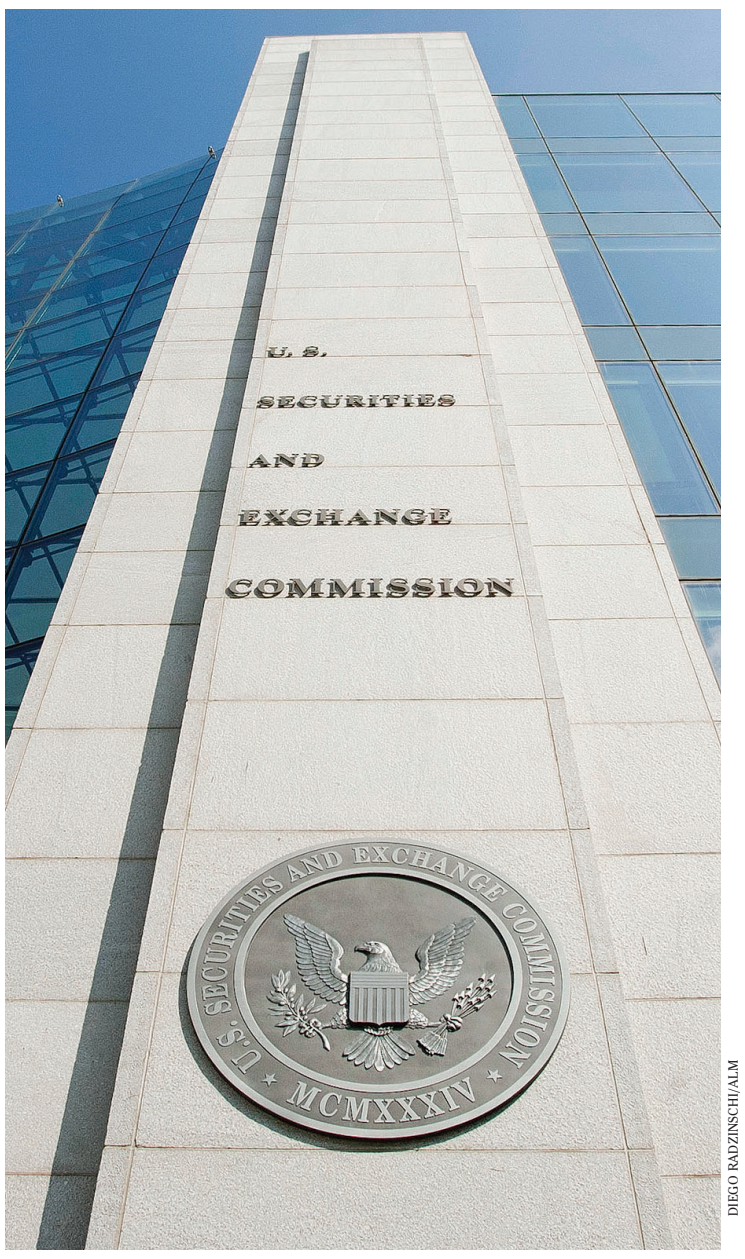
For several years, this search bore little fruit. Lawsuits against the SEC based on due process and equal protection principles received chilly receptions in the federal courts. Moreover, challenges to ALJ tribunals by plaintiffs who have not yet completed adjudications before those tribunals were deemed premature—and therefore jurisdictionally deficient.

But two arguments rooted in the separation of powers have begun to gain traction with some federal judges. One focuses on the fact that SEC ALJs have not been appointed by the President or by the head of the agency (in case of the SEC, the Commission itself). The other argument focuses on the structural difficulties a President would encounter in removing an ALJ. In effect, ALJs enjoy at least two layers of tenure protection: removing them for cause requires action by the SEC, but SEC Commissioners can themselves only be removed by the President for cause. (Full disclosure: Some of the first cases developing these arguments were brought by parties represented by Skadden Arps.)

Both the appointment and removal arguments assume that ALJs are not mere federal employees, but "officers" of the executive branch with substantial authority. The Constitution requires such officers to be appointed by the President or the agency head, and Supreme Court decisions prevent them from enjoying multiple levels of tenure protection from Presidential removal. But the precise personnel status of ALJs is highly disputed, and the only pre-Dodd-Frank decision on the subject—a decision by a split D.C. Circuit panel in *Landry v. Federal Deposit Insurance*, 204 F.3d 1125 (D.C. Cir. 2000)—held that they were merely employees, not officers. Because of the *Landry* precedent, the D.C. Circuit was the least propitious judicial forum for post-Dodd-Frank challenges to SEC's ALJ system—but that is exactly where the first decision unencumbered by jurisdictional quagmires emerged. Predictably enough, in August 2016, a D.C. Circuit panel in *Lucia v. SEC* relied heavily on *Landry* in holding that ALJs are not constitutional officers—and thus turned away a challenge to the ALJs' appointment.



DIEGO RADZINSCHI/ALM

SEC building, Washington, D.C.

But only a few months later, in December 2016, another set of challengers had better luck in the Tenth Circuit. In *Bandimere v. SEC*, a split panel of that court—unpersuaded by *Landry* or *Lucia*—held that the ALJs were indeed constitutional officers and therefore were not properly appointed by the SEC. The resulting split among the Circuits seemed destined for Supreme Court review. Then, in February 2017, the SEC suffered another setback when the D.C. Circuit vacated the panel decision in *Lucia* and agreed to rehear the case en banc. The SEC's heretofore successful defense of its ALJ system now faces real peril.

And a nationwide loss for the SEC could have broader effects across the administrative state. The SEC's five ALJs are only a microcosm of thousands of such adjudicators across the Executive Branch, whose decisions could arguably be called into question by constitutional litigation.

CFPB Independence

In the meantime, the D.C. Circuit became a setting for another—and more politically salient—battle involving the Dodd-Frank Act and agency independence. The director of the CFPB, a controversial new regulatory and enforcement agency established by that statute, can only be removed by the President for cause. In that sense, the director is no different from commissioners of the SEC or of numerous other so-called independent regulatory agencies, including the Federal Communications Commission, Federal Trade Commission, or Commodity Futures Trading Commission. In the context of those multi-member commissions, the Supreme Court had upheld for-cause removal provisions as far back as the New Deal, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

But should the courts adhere to the rule of *Humphrey's Executor*—and thus permit an agency official to be insulated from Presidential control—in the context of an agency headed by a single individual? In October 2016, a split panel of the D.C. Circuit in *PHH Corporation v. CFPB* answered this question in the negative, excising from the Dodd-Frank Act the for-cause protections accorded to the CFPB's director. The majority opinion by Judge Brett Kavanaugh portrayed the dispute as a clash of fundamental principles rather than bureaucratic minutia: Without supervision by an electorally accountable president, he reasoned, the "headless fourth branch of the U.S. Government"—namely, the independent agencies that "exercise enormous power over the economic and social life of the United States"— threatened "individual liberty." Indeed, the phrase "individual liberty" conspicuously materialized no less than 10 times in the introductory pages of Judge Kavanaugh's opinion. (This is hardly surprising: Judge Kavanaugh is one of the judiciary's leading skeptics of independent agencies and he offered a thought-provoking critique of Humphrey's Executor years ago in his concurring opinion in *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011)—a dispute involving the Nuclear Energy Regulatory Commission.) The second vote on the panel's majority came from Judge Raymond A. Randolph—the dissenter in *Landry* who continues to adhere to his views in that case.

CFPB sought en banc review (supported by the Obama Administration's Justice Department as amicus curiae) and the D.C. Circuit obliged—on the same day that it ordered en banc review in *Lucia*. Indeed, the two cases could be intertwined: The resolution of the ALJ issues in *Lucia* may prove dispositive in *PHH Corporation*, which involved an ALJ adjudication.

Then, on March 17, 2017, the Justice Department—now in the Trump Administration—changed its position and submitted an amicus brief opposing CFPB. The *PHH Corporation* panel's decision striking down the CFPB director's for-cause removal protections articulated "the better view" of the law, reasoned the brief. It is, perhaps, fitting that a litigation about agency independence would eventually pit an agency's lawyers against the President's.

But would excising the CFPB director's for-cause removal protections have material, broad effects? Perhaps not. Purportedly independent agencies headed by a single official are exceedingly unusual. And removal protections might make no difference to the workings of the CFPB after an appointee of President Trump assumes leadership.

On the other hand, if the CFPB were to lose its structural independence, it could become subject to additional government-wide procedures, including centralized regulatory review by the Office of Information and Regulatory Affairs. Moreover, if the *PHH Corporation* decision were endorsed by the en banc D.C. Circuit or the Supreme Court, it would surely call into question the continuing vitality of *Humphrey's Executor* and of other indicia of agency independence.

Finally, the Trump Administration's about-face in *PHH Corporation* could be a herald of its bolder assertion of control over independent regulatory agencies. This from an Administration that has been uncharacteristically circumspect in exempting independent agencies from its regulatory reform directives. See Office of Management and Budget, *Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs,"* (stating that the executive order's requirements do not "apply to significant regulatory actions of independent agencies").

Conclusion

In short, the separation-of-powers doctrine on agency independence from Presidential supervision could be on the brink of major changes. Two important decisions pending review by the en banc D.C. Circuit are likely to chart the doctrine's direction.

Common Strategies in **Petitions for Leave to Appeal**

BY ANTON METLITSKY
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In many different contexts, a losing party cannot appeal as a matter of right, but may be able to seek leave to take a discretionary appeal. In federal court, these motions include petitions for certiorari to the U.S. Supreme Court; for en banc review; for interlocutory appeal from class certification decisions under Federal Rule of Civil Procedure 23(f); and for leave to take an interlocutory appeal under 28 U.S.C. §1292(b). In New York courts, they include motions for leave to appeal to the Court of Appeals, either directed to the Appellate Division or the Court of Appeals itself.

Petitions for discretionary appeal are unique, specialized forms of appellate advocacy. In most appellate briefing, the end goal is to convince the appellate court to adopt the legal rule favoring your client. But the focus of a petition for leave to appeal is different. Leave to take a discretionary appeal is the exception, not the rule, and the question for the court in each case is not primarily whether the decision appealed from is right or wrong, but whether the case or issues presented for appeal justify expending scarce appellate-court resources. This article provides an overview of common strategies for seeking (and opposing) discretionary appeal.

Present a Legal Question of Significance Beyond the Parties to the Case. While the legal standards vary for different forms of discretionary appeals, a successful petition for leave to appeal will present a question that is not merely important to the parties, but is of broader legal significance.

Thus, a near-absolute prerequisite for a successful petition is to present a purely *legal* question. Courts are highly unlikely to grant leave to appeal a lower court's factual error,[1] or even to appeal a lower court's misapplication of an established legal standard to the facts of the case.[2] Rather, discretionary appeal is usually reserved for the resolution of disputed legal questions. But a disputed legal question is not enough—the ordinary appellate process normally suffices to resolve most such disputes. Extraordinary leave to appeal is usually reserved for questions that matter to the legal system more broadly.

Some legal questions are self-evidently important—for example, the constitutionality of the Affordable Care Act.[3] But in most cases, the petitioner will be required to provide the court with indicia of significance beyond the question itself. The following are several common approaches to demonstrating a question's importance—most of which do not depend on demonstrating an error in the lower court's decision.

Split in decisional authority. Perhaps the best way to demonstrate a legal question's broad significance is to show that lower courts have disagreed over the question, particularly if the reviewing court will be able to resolve the conflict. These circumstances provide the appellate court with an opportunity to serve what may be its most important function—assuring uniformity in the law. Indeed, nearly every formal standard for granting leave to appeal expressly or implicitly includes a lower-court conflict.[4] As noted above, when a petitioner can demonstrate a split in decisional authority, the correctness of the decision becomes much less significant—the need for uniformity itself may suffice to warrant leave to appeal.

Law declared unconstitutional. Even without a decisional conflict, courts will often view the judicial invalidation of a legislatively enacted statute to be sufficiently important to warrant discretionary review.[5] As with a conflict of authority, a legal error in the invalidation is less important than the simple fact that a court overrode legislative will, which is often enough to warrant further judicial scrutiny.

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While the legal standards vary for different forms of discretionary appeals, a successful petition for leave to appeal will present **a question that is not merely important to the parties, but is of broader legal significance.**

Appeal will resolve many pending cases at once. Even if a decisional conflict has not yet developed, a petitioner may be able to demonstrate a basis for discretionary appeal by showing that immediate appeal will "have precedential value for a large number of cases."[6] Regardless of the merits of the decision, review of such cases conserve significant judicial resources by potentially cutting off needless litigation in lower courts.

De facto nationwide or statewide rule. In certain circumstances, a precedential decision by a single intermediate appellate court may suffice to warrant further discretionary appeal, because the decision will effectively establish a single rule for the nation (if in federal court) or the state (if in state court). For example, a Second Circuit plaintiff-friendly decision construing an Exchange Act statute-of-limitations provision may result in a de facto nationwide rule, because venue is normally appropriate in New York district courts under the Exchange Act,[7] so future plaintiffs facing a potential time-bar will have no trouble filing there.[8] The U.S. Supreme Court or New York Court of Appeals may want to pass on such questions because of their effective national (or statewide) reach.

Legal error. While legal error itself may be neither necessary nor sufficient to justify leave to appeal, a petition that fits into one or more of the categories above is almost always enhanced by demonstrating legal error. And legal error may itself suffice to warrant discretionary appeal if the error is clear or important enough. For example, some courts will accept an interlocutory appeal of a class certification decision if a "district court's class certification decision is manifestly erroneous."[9] The Supreme Court will "[o]ccasionally" summarily reverse "obvious" errors.[10] And courts are more likely to grant discretionary appeal merely to correct a perceived legal error when that error also disturbs well-settled expectations among the relevant actors.[11]

Finally, a petition for discretionary appeal should explain why it presents an appropriate "vehicle" to resolve the important legal question presented—in other words, that the reviewing court will be able to reach the legal question. To take one example, a case may be a poor vehicle if there is a potential impediment to the reviewing court's jurisdiction—for example, a lack of finality in the case of a petition to the New York Court of Appeals. To take another, a case may be a bad vehicle if the decision on appeal is independently supported by an alternative holding that is itself unworthy of further review.

Seeking Leave to Appeal From the Court That Decided the Question. Special considerations may apply when the petition for leave is directed at the court that rendered the decision the petitioner seeks to appeal—for example, a petition to the district court for interlocutory appeal under §1292(b), or a petition to the Appellate Division to appeal to the Court of Appeals. For obvious reasons, such petitions are unlikely to be successful if they merely seek to relitigate the merits of the legal issue. Such petitions should instead focus on non-error-based indicia of significance, such as a conflict in authority—a court may well believe that its decision was correct, but that the legal system as a whole would benefit from uniformity that can only be achieved through appeal to a higher court. Such petitions can also be enhanced by explaining to the court why further appeal will conserve judicial resources—including the court's own time and effort—by efficiently resolving potentially dispositive legal issues early in the proceedings.

Opposing Discretionary Appeal. Finally, it is worth noting that briefs opposing discretionary appeal are just as unique and specialized as petitions seeking such relief. While a brief opposing discretionary appeal will of course seek to defend the lower court's decision, such briefs should be focused mirror-image strategies to those described above. A successful brief in opposition will explain not only (and, in many cases, not even primarily) why the lower court got it right, but why the case is not worth the time and resources associated with an extraordinary appeal. A brief in opposition will explain, for example, why the legal issue presented is not important beyond the parties to the case; why that legal issue is not disputed but well-established; and why the petition in any event presents a poor vehicle for the court to resolve the issue. The party opposing discretionary appeal usually begins at an advantage—again, discretionary appeal is the exception rather than the norm. A good brief in opposition should maintain that advantage by convincing the court that the petition for leave is much ado about nothing—or, perhaps, much ado about something better addressed in another case.

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1. See, e.g., Sup. Ct. Rule 10; *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (Rule 23(f) appropriate for errors "of law."); 28 U.S.C. §1292(b) (interlocutory appeal only for "controlling question of law").
2. See, e.g., Sup. Ct. Rule 10; NYCRR 500.22(b) (leave to appeal to N.Y. Court of Appeals appropriate for "novel" issues).
3. See *NFIB v. Sebelius*, 567 U.S. 519 (2012).
4. See, e.g., Sup. Ct. Rule 10 (certiorari); Fed. R. App. P. 35 (a), (b) (en banc review); NYCRR 500.22(b)(4) (appeal to Court of Appeals); see also 28 U.S.C. §1292(b) (interlocutory appeal warranted when, among other things, "there is substantial ground for difference of opinion" over a "question of law").
5. See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012) (certiorari); *Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010) (en banc review).
6. *Flo & Eddie v. Sirius XM Radio*, 2015 WL 585641, at *2 (S.D.N.Y. Feb. 10, 2015) (granting §1292(b) petition).
7. 15 U.S.C. §78p(b).
8. See Pet. for Cert. in *Credit Suisse Securities v. Simmonds*, 2011 WL 1479066, at 22, cert. granted, 564 U.S. 1036 (2011).
9. *Chamberlan*, 402 F.3d at 959.
10. Stern et al., Supreme Court Practice 280 (10th ed. 2013).
11. See, e.g., *In re Kellogg Brown & Root*, 796 F.3d 137, 151 (2015) (granting writ of mandamus).

Certification

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consider highlighting the presence or absence of the following factors, which tend to influence the Second Circuit's decision on whether to certify a question.

Ambiguity: Even if there is no controlling Court of Appeals decision on point, in many cases, the Second Circuit will nevertheless be able to predict how the Court of Appeals would rule, and will therefore decline certification. This may be the case where the issue is straightforward (for instance, where the court is being asked to interpret unambiguous statutory language), where there are unanimous Appellate Division decisions on point, or where decisions from analogous cases provide sufficient guidance. Accordingly, it can be beneficial to marshal decisions from the New York Appellate Division departments and trial courts, as well as decisions from other jurisdictions to demonstrate that there either is or is not ambiguity in how the Court of Appeals would rule.

Broader Significance: Because of the added costs and burdens associated with certification, the Second Circuit is unlikely to certify an issue unless it has a significant impact beyond the specific dispute between the parties, even if there is ambiguity in the law. Thus, counsel can reduce the possibility of having a question be certified by casting it as intensely fact-bound.[13]

Conversely, the Second Circuit will be more hesitant to rule, and therefore more likely to certify, if the unresolved issue before it appears to be particularly important and likely to have effects beyond the particular case at hand—such as a challenge to a state statute under the state constitution, a state-law preemption question, or a question about the applicable rules of construction or standards of review. If possible, counsel should consider quantifying the impact of a ruling in such a case—for example through the number of individuals who would be affected or the amount of money at stake.

Additionally, issues that are likely to recur present a compelling case for certification. The Second Circuit's interpretation of New York law is not precedent, and if an issue will arise again, it is often more desirable to have a binding articulation of the governing principles from the Court of Appeals than to perpetuate a situation in which federal courts and lower state courts are left to guess about what the Court of Appeals would do.

Value Judgments and Public Policy Choices at Stake: Legal issues sometimes require courts to make value judgments and choose among competing policy goals—for example, determining whether an interpretation of a statute furthers the policies desired by the legislature or whether the costs imposed by a rule are justifiable in light of other benefits. The Second Circuit will generally eschew resolving state law issues that require such judgments because the role of a federal court in interpreting state law is limited to predicting what a state court would do.[14] By contrast, such questions are well suited for the Court of Appeals, which, as the highest state court in New York, is charged with determining what the law of New York is, taking into account all relevant considerations.

Time Is of the Essence: Finally, in rare cases, there may be a pressing need for resolution of a case, which might weigh against certification.[15] Once a case is certified to the Court of Appeals, if the Court of Appeals accepts the request, the average time from acceptance until a decision is seven months, although parties can request a calendar preference.[16]

These are, of course, not all of the considerations that may factor into the Second Circuit's decision of whether to certify a question to the Court of Appeals. But in the majority of certification decisions, they will play a large role in the Second Circuit's decision, and counsel ignore them at their own peril.

1. Federal courts are authorized to certify questions of state law to the highest court of almost every state and the District of Columbia and Puerto Rico. Advisory Group to the N.Y. State and Fed. Judicial Council, Practice Handbook on Certification of State Law Questions by the United States Court of Appeal for the Second Circuit to the New York State Court of Appeals (3d ed. 2016) (Handbook), at 1 n.2, available at http://www.ca2.uscourts.gov/docs/Third%20Edition%20of%20Certification%20Handbook.pdf.
2. A Westlaw search of certification orders from each circuit court of appeals for the period March 1, 2012 to March 1, 2017 reveals that the other circuits certified questions to state courts in the following number of cases: First Circuit: 15; Third Circuit: 10; Fourth Circuit: 9; Fifth Circuit: 19; Sixth Circuit: 4; Seventh Circuit: 4; Eighth Circuit: 1; Ninth Circuit: 36; Tenth Circuit: 15; Eleventh Circuit: 24; D.C. Circuit: 0.
3. See, e.g., *McCarthy v. Olin Corp.*, 119 F.3d 148, 157-61 (2d Cir. 1997) (Calabresi, J., dissenting)
4. Handbook, supra note 1, App'x A.
5. Handbook, supra note 1, at 7.
6. See Local Rule 27.2(b); Handbook, supra note 1, at 4-5.
7. N.Y. Ct. App. R. 500.27(b)-(c).
8. Id. 500.27(d).
9. Handbook, supra note 1, at 10.
10. Handbook, supra note 1, App'x A. In addition to the seven certification requests that were declined by the New York Court of Appeals, eleven certification requests were withdrawn. Id.
11. Handbook, supra note 1, at 12; N.Y. Ct. App. R. 500.27(e).
12. N.Y. Ct. App. R. 500.27(a).
13. See *Gutierrez v. Smith*, 702 F.3d 103, 117 (2d Cir. 2012).
14. See *Colavito v. N.Y. Organ Donor Network*, 438 F.3d 214, 229 (2d Cir. 2006).
15. See *Gutierrez*, 702 F.3d at 117.
16. See Handbook, supra note 1, at 10.

Weakness

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accepted burden of proof on summary judgment motions."[6] This logic is sound because absent such limitations every party would have to preemptively argue every claim and defense whenever any party moves for summary judgment on any claim.

Of course not every argument or issue is so cut and dry and litigators often have to make use of their reasoning skills to convince an appellate court that an issue was, in fact, "before the court" when the court granted summary judgment. Generally, attorneys can take advantage of the disjunctive phrase "cause of action or issue" and choose which better fits an argument. Often, arguing that an issue was before the court allows a broader scope than just a cause of action. For example, the Third Department found that the issue of a "lack of legal requirement" to pay the alleged damages was so broad that it encompassed any cognizable legal theory of recovery.[7]

On the other end of the spectrum of trial court decisions that do not correspond entirely to the motions before the court are decisions in which the motion court grants summary judgment but fails to address in its opinion certain arguments that were raised either in the briefs or during argument. Under these circumstances, a court may be said to have "underreached" in its analysis. Like the "search the record" decisions, getting these decisions affirmed on appeal also should not be daunting. For example, if the motion court decides a dispositive issue, such as whether an action is barred by the statute of limitations, it does not need to address remaining arguments, such as those concerning the merits, because they are moot.

If however, the motion court failed to address a cause of action in an order, but decided the issue during argument, then the attorney should seek to resettle the order. Resettlement of an order can be done via stipulation or motion and is a procedure by which a party can request a court to clarify or correct an order so as to reflect the disposition of the motion more accurately.[8]

Note that resettlement may not be used to effect a substantive change in a prior decision of the court and that resettlement generally does not affect an appeal from the original order.[9] Having a complete and accurate order that explains the court's reasoning with regard to all causes of action will clearly create a better position to get a summary judgment decision affirmed on appeal. In the event that the court completely ignored causes of action that were not rendered moot, both in argument and in its opinion, but nevertheless granted the client summary judgment, then it is probably best to leave the onus on the adversary to take action, whether through an appeal or motion for reargument.

Of course, a solid legal argument is needed to get any decision affirmed on appeal. However, there are several practice tips that can buttress such arguments:

• For example, it is worthwhile to get in the habit of always requesting "any such further relief that the court deems just and proper." That way, an attorney can always claim that he did, in fact, seek the relief that the court granted, no matter what it is.

• Furthermore, it is a good idea to submit with motions complete copies of deposition transcripts and contracts, not just excerpts. Doing so ensures that there is actually evidence before the court to support the attorney's arguments and the court's decisions and that there is actually a record to search.

• Finally, it is often worth the expense to hire a court reporter to transcribe oral arguments on motions for summary judgment. Indeed, being able to actually cite to the lower court's reasoning and the entirety of the issues addressed only strengthens arguments and provides a clear basis on which the appellate court can reach its decision.

1. See, e.g., *Dunham v. Hilco Constr. Co.*, 89 N.Y.2d 425, 430 (1996).
2. See, e.g., *Rainbow Hill Homeowner Assn. v. Gigante*, 32 A.D. 533, 533, 821 N.Y.S.2d 223, 223 (2d Dep't 2006).
3. See, e.g., *Hunter v. RJL Dev.*, 44 A.D.3d 822 (2d Dep't 2007).
4. *Lopez-Dones*, 98 A.D.3d 476 (2d 2012).
5. See, e.g., *Baron v. Brown*, 101 A.D.3d 915, (2d Dep't 2012) (holding that the motion court exceeded its authority to search the record and grant summary judgment based on the statute of limitations where defendants did not move on that basis).
6. *Dunham*, 89 N.Y.2d at 430.
7. See *Perkins v. Kapsokefalos*, 57 A.D.3d 1189 (3d Dep't 2008).
8. See, e.g., *Foley v. Roche*, 38 A.D.2d 588 (1st Dep't 1979) (resettlement of an order is a procedure designed to correct errors or omissions and may be utilized for the purpose of correctly expressing the decision of the court).
9. CPLR §5517(a)(2).

Oral Argument

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then they should not be the focus of your preparation for oral argument. In order for you to win the case, you must direct your attention to the two or three points that you must get the court to listen to and focus its attention on. No less important than the strengths of your argument are its weaknesses and the strengths of the adverse party's position. Remember, the chances of the court throwing you softballs during oral argument are slim. You must be ready for the hard questions—the questions which, if not satisfactorily addressed, may undermine the success of your appeal.

Having completed the triage, move on to the preparation of a more detailed outline; this should be the road map of your argument. Where do you want to go and how are you going to get there? Prepare your opening statement—a concise sentence or two by which you identify exactly what it is that you want the court to do. Then prepare the words to describe concisely and forcefully the route you are going to use to get the court to your destination—these are the two or three reasons why the court should grant the relief requested. Also, prepare your concluding words—which will not be that different from your opening—the words that again describe the specific relief requested. Reading from your outline is not recommended, but the opening, road map and closing should be delivered as close to verbatim as prepared. There is one other exception to the rule: If there are specific record references or lines from cases that you feel you need to read verbatim to the court, these should be included in your outline for ready reference rather than fumbling through the record at the lectern.

The balance of the outline should include the facts and the law that support the relief requested and the reasons advanced. Needless to say, the oral argument is not likely to follow your outline and wedding yourself to the words used in the balance of the outline will not result in the conversational tone you want to have with the court. The best way to reach that *conversational tone* is to moot your oral argument. Former appellate judges and appellate practitioners familiar with the court should be selected to be members of the moot panel. While it may be easier to put some members of the appellate team on the moot bench, that will not be as effective in presenting an experience close to live as having moot panelists who are no more familiar than the live panel. The moot panelists should be asked to read the briefs and the cited portions of the record just as the live bench would.

Moot preparation can be a three-tiered process. There are occasions when a live panel will be soft or cold and not ask many questions. Appellate counsel's first moot may be a run-through with very few questions asked by a cold moot panel. The second tier is the hot moot bench. This panel should be prepared with questions on issues that bother the panelists—those issues that they perceive may prevent the court from granting the relief requested. This may be done in a series of sessions each timed to meet the time reserved for oral argument or in one long session wherein the areas of concern are vetted until conversation on those issues is exhausted. The attorney should try different ways of addressing the issues. After a day or so away from the case, the attorney, the appellate team and the members of the panel should join together for a critique. This discussion should focus on identifying the pros and cons of counsel's argument and suggestions for improvement. The critique should foster adjustments as needed. However, the appellate team should be mindful of the needs of the advocate and what best fits the advocate's personal style because we cannot remake an attorney's DNA overnight.

Having properly prepared, the appellate advocate should approach the most stimulating day of oral advocacy with confidence and enthusiasm.