

PART D

**GUIDELINES FOR CONDUCT OF
PRE-ARGUMENT CONFERENCE
UNDER THE
CIVIL APPEALS MANAGEMENT PLAN**

The conference is held by Staff Counsel with attorneys for the parties under Rule 5 of the Civil Appeals Management Plan, Rules of the Second Circuit Court of Appeals, Appendix, Part C.

1 Purposes

The purposes are to consider the possibility of settlement, simplification of the issues, and any other matters which may aid in the processing and disposition of the appeal. Experience shows that preliminary review of the issues by the parties with Staff Counsel often leads to a realistic and less partisan view of the chances of success, resulting in settlement or withdrawal of some appeals or particular issues.

With a view to enabling the parties to resolve issues, Staff Counsel, after hearing counsel, is ordinarily expected to give them the benefit of Staff Counsel's views of the merits or other aspects of the appeal.

2 Authority, Preparation and Attitude of Parties

The success of the conference depends on the attorneys treating it as a serious and non-perfunctory procedure which can often save time and expense for the parties. All sides should be thoroughly prepared to discuss in depth the alleged errors and the reasons for their positions. Attorneys with primary responsibility for the litigation shall attend the conference, and such counsel shall have full authority from their clients to make such commitments as may reasonably be anticipated. If feasible, the clients should be available for consultation by phone during the conference.

3. Good Faith and Non-Coerciveness

The parties are obligated to participate in good faith with a view to resolving differences as to the merits and issues. This process requires each attorney, no matter how strong the attorney's views, to exercise a degree of objectivity, patience and cooperation that will permit the attorney to make a decision based on reason. In this process the Staff Counsel, who provides objective expertise in a forum for appraisal of the merits and expedition of each appeal, is entitled to their respect and the Staff Counsel's views should be carefully considered. The Staff Counsel's views, however, are Staff Counsel's own and not those of the court, with which Staff Counsel does not communicate about a case. If, after this procedure, attorneys believe in good conscience that they cannot reach an agreement, they are not under any compulsion to do so.

4. Confidentiality

All matters discussed at a conference, including the views of Staff Counsel as to the merits, are confidential and not communicated to any member of the court. Likewise parties are prohibited from advising members of the court or any unauthorized third parties of discussions or action taken at the conference. In re Lake Utopia Paper Limited, 608 F.2d 928 (2d Cir. 1979). Thus the court never knows what transpired at a conference.

5. Presence of Clients

Ordinarily attorneys are expected to attend the conference without their clients. However, with the permission of Staff Counsel, clients may attend with their attorneys. In the limited number of cases where Staff Counsel reasonably believes that the presence of a client might be helpful Staff Counsel may request -- or, in exceptional circumstances, require -- an attorney to have the client attend the conference with the attorney. Staff Counsel does not talk with clients outside of the presence of their attorneys.

6. Conferences by Telephone or at Distant Locations

Where considerable distances or other substantial reasons warrant, Staff Counsel may in appropriate cases conduct prearranged telephonic conferences. Where a sufficient number of cases can be accumulated and judicial efficiency and economy permit, Staff Counsel may also hold conferences within the Circuit, at locations other than Foley Square, New York City.

These provisions are designed to accommodate parties whose attorneys would otherwise be seriously inconvenienced by being forced to travel long distances or for other reasons.

7. Scheduling Orders

In the interest of obtaining prompt resolution of appeals, most scheduling orders in the Second Circuit are somewhat tighter than the schedules provided for in the Federal Rules of Appellate Procedure. See FRAP 31(a).

8. Grievances

Any grievances as to the handling of any case under the CAMP program should be addressed to the Circuit Executive, George Lange III, 40 Foley Square, Room 2904, New York, New York 10007.

(Rev. September 27, 1996)

- (a) If the appellant has not taken each of the actions set forth in paragraphs 3(a), (b), (c), and (d) of this Plan within the time therein specified, the appeal may be dismissed by the Clerk without further notice.
- (b) With respect to docketed appeals in which a scheduling order has been entered, the Clerk shall dismiss the appeal upon default of the appellant regarding any provision of the schedule calling for action on the appellant's part, unless extended by the Court. An appellee who fails to file an appellee's brief within the time limited by a scheduling order or, if the time has been extended as provided by paragraphs 6 or 8, within the time as so extended, will be subjected to such sanctions as the Court may deem appropriate, including those provided in FRAP 31(c) or FRAP 39(a) or Rule 38 of the Local Rules of this Court supplementing FRAP or the imposition of a fine.
- (c) In the event of default in any action required by a pre-argument conference order not the subject of the scheduling order, the Clerk shall issue a notice to the appellant that the appeal will be dismissed unless, within ten days thereafter, the appellant shall file an affidavit showing good cause for the default and indicating when the required action will be taken. The staff counsel shall thereupon prepare a recommendation on the basis of which the Chief Judge or any other judge of this Court designated by the Chief Judge shall take appropriate action.

7. Motions

Motions for leave to file oversized briefs, to postpone the date on which briefs are required to be filed, or to alter the date on which argument is to be heard, shall be accompanied by an affidavit or other statement and shall be made not later than two weeks before the brief is due or the argument is scheduled unless exceptional circumstances exist. Motions not conforming to this requirement will be denied. Motions to alter the date of arguments placed on the calendar are not viewed with favor and will be granted only under extraordinary circumstances.

8. Submission on Briefs; Assignment to Panel.

When the parties agree to submit the appeal on briefs, they shall promptly notify the Clerk, who will cause the appeal to be assigned to the first panel available after the time fixed for the filing of all briefs.

9. Other Proceedings.

(a) Review of Administrative Agency Orders; Applications for Enforcement.

In a review of an order of an administrative agency, board, commission or officer, or an application for enforcement of an order of an agency,

- (i) The Staff Counsel of the Court of Appeals shall issue a scheduling order as soon as practicable setting forth the dates on or before which the record or authorized substitute, the petitioner's brief and the appendix and the brief of the respondent shall be filed and also shall designate the week during which argument of the proceeding shall be ready to be heard;
- (ii) Paragraph 5 of this Plan, pertaining to Pre-Argument Conferences, and Pre-Argument Conference Orders, and Paragraphs 7(b) and 7(c) of this Plan, pertaining to noncompliance sanctions, shall be applicable to this subparagraph.

(b) Appeals from the Tax Court.

In a review of a decision of the Tax Court,

- (i) Paragraphs 3(a) and 3(d) of this Plan, pertaining to filing pre-argument statements and payment of the docket fee, shall be applicable to this subparagraph. If the appellant has not taken each of the actions set forth in those paragraphs within the time specified in Paragraph 3, the appeal from the tax court may be dismissed by the Clerk of the Court without further notice.

Paragraph 4 of this Plan, pertaining to scheduling orders, shall also be applicable hereto.

Paragraph 5 of this Plan, pertaining to Pre-Argument Conferences and Pre-Argument Conference Orders, and Paragraphs 7(b) and 7(c) of this Plan, pertaining to noncompliance sanctions, shall be applicable to this subparagraph.