Remarks
New York State Bar Association Program
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Marriott Marquis

I begin with some interesting statistical information just published by the Administrative Office of the United States Courts relating to criminal appeals in the Second Circuit. For the fiscal year ending in 1988, we terminated 529 criminal appeals, constituting about 18% of our total number of all cases terminated. In 1988, 291 cases were terminated on the merits. Of these, 234 were affirmed, 31 reversed and the remainder terminated by dismissal, remand or other non-merit disposition. The reversal rate for convictions in 1988 was 10.8%, up over 2-1/2% percentage points from the 8.1% reversal rate in 1987. This is not necessarily to be taken by the defense bar as a source of great encouragement. In any event, our median time for disposition, counting from the filing of the notice of appeal in a criminal case, is 6 months, the fastest in the nation. If you can’t get a reversal, you can at least get a rapid decision.

The last item in your coursebook is my outline on Federal Criminal Appellate Practice in the Second Circuit. The outline covers the subject of appealability, beginning at page 227, mechanics of appeals, beginning at page 232, scope of review, beginning at page 239, appellate advocacy at 242 and decisionmaking at 247. I hope that the outline will be of use to you in prosecuting criminal appeals in the second circuit. As a
matter of my own self-interest, I ask that you give special attention to the section on appellate advocacy. My colleagues and I would very much appreciate a general improvement in the quality of briefing as well as oral argument. On the last page of the outline, page 251, I have listed some suggested references that may be helpful in preparing for the presentation of a criminal appeal.

Due to time constraints and the rule that a good appellate lawyer should limit argument to a few good points, I intend to cover only two topics -- one touched upon in my outline and one not covered in the materials at all. The first is the importance of making a proper record of evidentiary objections, and the second is the use of 28 U.S.C. § 2255, the principal vehicle for post-conviction relief following the completion of the appellate process. I hope to leave some time for questions and comments on anything you may care to discuss relating to appeals and post-conviction relief.

With respect to the admission of evidence, Rule 103(a)(1) of the Federal Rules of Evidence requires a timely objection or motion to strike with the specific ground for objection stated on the record, unless the specific ground is apparent from the context. Rule 103(a)(2) requires an offer of proof in the case of a ruling excluding evidence, unless the evidence to be offered is apparent from the context. Even if there is a proper
objection or offer of proof, however, there is no error unless substantial rights are affected. Of course, Rule 103(d) provides that an appellate court can take notice of plain errors that affect substantial rights but are not brought to the attention of the trial court. This is the evidentiary counterpart of the general rule that an error not objected to at trial will not be considered on appeal unless it can be classified as "plain error."

A recent case before a panel of my court involved an appellant who was convicted after a jury trial for possessing and distributing two vials of "crack." On appeal, she contended that the district court erred in allowing the government to cross examine her about her general familiarity with cocaine. In a summary order, the panel rejected the contention, citing the failure to object to the evidence, and holding that there was no plain error in light of the district court's broad discretion in evidentiary matters and the appellant's denial on direct examination that she was a dealer in cocaine. One can only speculate what the result would have been if the objection were properly made.

To summarize: Admission or exclusion of evidence is not error unless a party's substantial rights are affected and (1) a specific objection is made in cases of admission and (2) an offer of proof is made in cases of exclusion. Here are some actual
objections to the admission of evidence that are improper because they lack the necessary specificity:

"He's getting close to that legal problem, your honor."

"That's unfair, your honor!"

"That's unfair, your honor and he knows it!"

"I've been listening to Mr. McNamara for half an hour, your honor, and if he persists in testifying, I'll have no alternative but to mark him and offer him in evidence."

"Incompetent, irrelevant and immaterial . . . and against the interests of justice . . . and just no good."

"He's getting on dangerous ground, your honor."

"Objection, your honor. Counsel knows that's totally improper."

"Judge, could we get on with something that has to do with this case?"

"Objection, your honor, that's highly unusual."

My favorite: "Objection, your honor, that evidence is very unfavorable to my client."

How about this actual question and objection?:

Question. When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go also, would he have brought you meaning you and she with him to the station?

Mr. Brooks. Objection. That question should be taken out and shot.

In some of those questions, of course, the specific ground for objection may have been apparent from the context. That certainly was true of the last objection. You can and should always avoid trouble by being specific. Sometimes, a very brief
objection will do it: objection -- irrelevant; objection -- privileged communication. More often, some brief explanation of the objection in plain language will comply with the Rule and preserve the objection. Here are some illustrations:

LEADING - Objection, your honor, counsel is putting words in the witness's mouth. This is leading.

HEARSAY - Objection, your honor, the jury cannot tell if someone who is not a witness was telling the truth. This is hearsay.

BEST EVIDENCE - Objection, your honor, it's not fair for the defendant to talk about what is in that letter and not let the jury see it. Not the best evidence.

Christopher J. Munch, Chief Deputy District Attorney in Denver, Colorado, is a lawyer who has developed a whole series of plain language objections. Here are some of his:

ARGUMENTATIVE - Objection. It's improper to ask a witness to agree with your little theory or argument. You're supposed to ask questions about the facts.

IRRELEVANT - Objection. That has nothing to do with the things this jury has to decide.

SPECULATIVE - Objection. He's asking the witness to guess. Witnesses are supposed to tell us what they know, not speculate.

HEARSAY - Objection. The witness should only be asked what he knows, not what somebody else told him.

BEYOND THE SCOPE - Objection. This is getting off the subject. It is beyond the scope of direct and violates Rule 611(b).

INSUFFICIENT FOUNDATION - Objection. Without more background there is no way to tell whether this is reliable enough to even be considered, much less believed.

NARRATIVE - Objection. He's asking the witness to give a speech instead of answering questions. The witness might accidentally say things that are improper and he shouldn't be put in that position.
Much time, of course, is wasted in making objections that take you nowhere, clutter up the record and serve no purpose. Here are some examples of those:

(a) "Self-serving" -- Hopefully, all evidence adduced by a party serves the interests of that party. By itself, the objection means nothing.

(b) "Calls for operation of witnesses mind's" -- It is our fervent desire that the mind of a witness become operational in response to any question. There are cases where the state of mind is the principal issue.

(c) "Non-responsive answer" -- A non-responsive answer is a problem only for the questioner and I conclude my discussion of evidentiary objections with some actual illustrations of non-responsive answers. Of course, the attorney asking the questions is responsible for these non-responsive answers. These questions illustrate that a well-prepared witness, like a well-prepared lawyer, is beautiful to behold but all too rare:
“Anguished English”

by Richard Lederer

Q. Did he pick the dog up by the ears?
A. No.

Q. What was he doing with the dog’s ears?
A. Picking them up in the air.

Q. Where was the dog at this time?
A. Attached to the ears.

Q. Were you acquainted with the decedent?
A. Yes, sir.

Q. Before or after he died?

Q. What happened then?
A. He told me, he says, “I have to kill you because you can identify me.”

Q. Did he kill you?
A. No.

Q. Mr. Jones, is your appearance this morning pursuant to a deposition notice which I sent to your attorney?
A. No. This is how I dress when I go to work.

Q. Have you ever been arrested?
A. Yes.

Q. What for?
A. Aggravating a female.

Q. You say you’re innocent, yet five people swore they saw you steal a watch.
A. Your Honor, I can produce 500 people who didn’t see me steal it.

Q. When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go also, would he have brought you meaning you and she with him to the station?

A. MR. BROOKS. Objection. That question should be taken out and shot.

Q. At the time you first saw Dr. McCarty, had you ever seen him prior to that time?

Q. Did the lady standing in the driveway subsequently identify herself to you?
A. Yes, she did.

Q. Who did she say she was?
A. She said she was the owner of the dog’s wife.

Q. Now I’m going to show you what has been marked as State’s Exhibit No. 2 and ask if you recognize the picture.
A. John Fletcher.

Q. That’s you?
A. Yes, sir.

Q. And you were present when that picture was taken, right?
The primary vehicle for post-conviction relief following the completion of the appellate process is a motion under 28 U.S.C. § 2255. The statute for the most part supplants the habeas corpus petition for federal prisoners by providing a commensurate remedy in the sentencing court. Indeed, the Supreme Court has indicated that 2255, if it reaches the claim of error, must be used in preference to habeas. This is not considered to constitute an unconstitutional suspension of the writ of habeas corpus.

Section 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

There are thus four grounds for relief:

1. That the sentence was imposed in violation of the Constitution or laws of the United States.

2. That the court was without jurisdiction to impose such sentence.

3. That the sentence was in excess of the maximum authorized by law.

4. That the sentence is otherwise subject to collateral attack.
Generally, the failure to raise a non-constitutional or non-jurisdictional claim on direct appeal precludes assertion of the claim in the collateral 2255 proceeding. However, there are exceptional circumstances where even a non-constitutional or non-jurisdictional error can result in a complete miscarriage of justice, justifying collateral relief. I’ll give you an example of exceptional circumstances in a little while. With respect to claims of constitutional or jurisdictional error, however, the rule in the Second Circuit is that such claims may be raised in a 2255 proceeding, even if they were not raised on direct appeal. There is an exception to this rule in the Second Circuit, but we don’t know what it is yet. If you will examine Brennan v. United States, 867 F.2d 111, 117 n.1 (2d Cir. 1989), you will see that we have not made up our collective minds as to whether the proper standard for the exception is the deliberate bypass test or the cause and prejudice test. That’s a loose end that one of you will ask us to tie up in the near future. For purposes of our discussion, however, it suffices to say that constitutional and jurisdictional errors generally can be raised by way of 2255 even if not raised on the original direct appeal. Brennan did not involve such claims and went off on a failure to raise a statute of limitations objection at trial and a failure to challenge the characterization of the New York State Supreme Court as a RICO enterprise on appeal. As to the failure to object to the jury
instruction on statute of limitations grounds at trial, Brennan failed the cause and prejudice test applicable to trial error. As to the failure to raise the enterprise question on appeal, Brennan failed the exceptional circumstances test.

We found that the exceptional circumstances test was met in Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988), and I refer you to my opinion in that case for some detailed discussion of 2255. In Ingber, we found that 2255 properly was used to vacate a conviction for mail fraud in light of the Supreme Court's decision McNally v. United States. The McNally holding -- that the mail fraud statute was limited to the protection of property rights -- was decided after Ingber's conviction was affirmed. McNally overruled long-established Second Circuit precedent that deprivation of intangible rights not related to money or property was punishable under the mail fraud statute. Thus, those convicted under our erroneous view of the mail fraud statute, 18 U.S.C. § 1341, were convicted of conduct that was not a crime.

We held that the retroactive application of McNally was necessary in order to avoid an unfair result, despite the fact that Ingber had failed to present his challenge either on appeal or in a petition for writ of certiorari. The challenge of course was not a constitutional one, and the time to file for certiorari had expired well before our precedents were displaced by McNally. The exceptional circumstances excusing the requirement for
raising the claim on appeal obviously were the entrenched precedents in relation to the scope of the mail fraud statute. Appeal on the question of deprivation of intangible rights in a mail fraud scheme would have been futile at the time of Ingber’s conviction. We said:

Were we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law.

Other circuits have followed us in using § 2255 to apply McNally retroactively.

The following circumstances have been held to justify challenges under § 2255 in this circuit:

A. Where the indictment on its face fails to state a federal offense.

B. Where a guilty plea was based on an insufficient factual foundation.

C. Where a guilty plea was induced by a prosecutor’s false promise.

D. Where counsel was not admitted to any bar, although the disbarment of a defendant’s counsel during a pretrial suppression hearing was held not to require the vacation of a sentence where the attorney ceased representation immediately upon learning of the disbarment.
E. A claim of perjured testimony.

F. The incompetency of the defendant at the time of court proceedings.

G. Where it was alleged that separate judgment of conviction arose out of a single criminal transaction, raising questions of double jeopardy.

H. Where a claim of spillover effects of a double-jeopardy-barred criminal charge was raised.

I. Where the constitutional authority of a de facto judge was challenged.

Where a motion addresses the execution of a sentence rather than the legality of the conviction or the propriety of the sentence imposed, relief is not available under § 2255. I recently served on a panel that heard an appeal from the denial of a 2255 motion made by a prisoner who sought correction of his sentence on the claim that he was in custody during the time spent in a hospital prior to sentencing. In a summary order, we held that review of the execution of appellant’s sentence could be obtained not by a 2255 motion but through a writ of habeas corpus under 28 U.S.C. § 2241. Since the review by way of habeas corpus could be had only in the court having jurisdiction over appellant’s custodian, we held that jurisdiction was lacking in the Eastern District, the place of conviction.
Rules and forms for proceeding under § 2255 have been adopted by the Supreme Court. They are found under the title, "Rules Governing Section 2255 Proceedings in the United States District Courts." The procedural rules should be examined carefully before making a 2255 motion. After the motion is filed, it is presented the judge who presided at the movant trial and imposed sentence. If the appropriate judge is unavailable, it is presented to another judge of the same district court. The judge may either order the summary dismissal of the motion or order the U.S. Attorney to answer. Discovery is permitted, and expanded record may be directed, and an evidentiary hearing may be held. If there is a hearing, counsel must be appointed under the provisions of the Criminal Justice Act to represent an indigent defendant. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice requires.

Section 2255 itself provides that the court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Consideration of successive motions may be denied, however, "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the
subsequent application."

Although § 2255 provides a means of remedy for a prisoner in custody under sentence, the custody requirement has been read liberally so that any conditions that significantly confine and restrain will suffice. Accordingly, custody has been found where the defendant was released on his own recognizance after conviction in state court; where the prisoner was discharged while his motion was awaiting appellate review; and where the movant was free on parole. The critical moment in determining custody is when the motion is filed. The fact that a successful collateral attack may not result in release from custody is no bar to considering the motion. As the rule provides, the movant also must be under sentence for the conviction under attack.

An order entered under § 2255 is appealable, and the time limits for civil appeals apply. Since the United States always is a party, notice of appeal must be filed within 60 days of the entry of the district court’s judgment. The United States as well as the movant may appeal.

Section 2255 provides an important and flexible tool for achieving post-conviction, post-appeal relief. I commend it to your consideration.

I’m open for questions.
FEDERAL CRIMINAL APPELLATE PRACTICE

IN THE SECOND CIRCUIT

by

HON. ROGER J. MINER
United States Circuit Judge
Second Circuit Court of Appeals

May 12, 1989
APPEALABILITY

I. Final Judgment of Conviction Required

1. Except where a direct review may be had in the Supreme Court, appeals from all final decisions of the District Courts must be prosecuted in the Courts of Appeals. 28 U.S.C. § 1291.

2. The final decision in a criminal case is the final judgment of conviction, a document signed by the Judge and entered by the Clerk only after sentence is imposed. See Fed. R. Crim. P. 32(b)(1); Berman v. United States, 302 U.S. 211, 212-13 (1937).


4. Appeals from nonfinal decisions will be dismissed sua sponte for lack of jurisdiction in the Court of Appeals. In re United States, 565 F.2d 19 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978).
II. Exceptions to the Final Judgment Requirement

1. The collateral order doctrine has been developed to permit defendants to appeal interlocutory orders in certain limited circumstances: The order must conclusively determine a disputed question, resolve an issue completely separate from the merits of the action and effectively be unreviewable on appeal from a final judgment. Flanagan v. United States, 465 U.S. 259 (1984).

2. Appeals under the collateral order doctrine have been accepted for the purpose of reviewing the following:


(c) Commitment for hospitalization pursuant to 18 U.S.C. § 4241(d) because of mental incompetence to stand trial. United States v. Gold, 790 F.2d 235, 238-39 (2d Cir. 1986).

(d) Order denying dismissal of an indictment where a "colorable claim" of violation of a prior plea agreement is made. United States v. Abbamonte, 759 F.2d 1065, 1071 (2d Cir. 1985).

the prompt determination of an appeal from a release or detention order.

(f) Pre-trial restraining orders under the forfeiture provisions of the RICO and CCE Acts. United States v. Gelb, 826 F.2d 1175 (2d Cir. 1987); United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988) (in banc).

3. Appeals under the collateral order doctrine have been rejected for the purpose of reviewing the following:


(c) Denial of motion to dismiss on sixth amendment speedy trial grounds. United States v. MacDonald, 435 U.S. 850, 857 (1978).

(d) Continuances under the provisions of the Speedy Trial Act. United States v. Gurary, 793 F.2d 468 (2d Cir. 1986) (extensions of time granted both to return an indictment and to conduct a preliminary hearing).

(e) Collateral protective order prohibiting defendant from disclosing confidential documents made available to him by government. United States v. Caparros, 800 F.2d 23 (2d Cir. 1986).


III. Appeals by the Government

1. While the double jeopardy clause prohibits the appeal of a judgment of acquittal, the government is provided a statutory right to appeal as to certain matters in criminal cases. 18 U.S.C. § 3731 allows appeals from:

   (a) Order dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except where the double jeopardy clause bars further prosecution.

   (b) Suppression or exclusion of evidence, where the defendant has not been put in jeopardy, before the verdict or finding, if the United States Attorney certifies that the appeal
is not taken for purpose of delay and that the evidence constitutes substantial proof of a material fact.

(c) Release of a person charged with or convicted of an offense, or denial of a motion for revocation or modification of conditions of release. See also 18 U.S.C. § 3145(b) (motion for revocation or amendment of detention order).

2. The government may appeal from the dismissal of a portion of a count of an indictment only if the portion arguably could have been set forth as a separate count. United States v. Tom, 787 F.2d 65, 77 (2d Cir. 1986).

3. A pre-trial ruling denying the government's motion to use certain evidence at trial is appealable by the government. United States v. Valencia, 826 F.2d 169, 172 (2d Cir. 1987).

4. Orders granting motions to suppress wiretap evidence or denying wiretap applications are appealable if the United States Attorney certifies that the appeal is not taken for purposes of delay. 18 U.S.C. § 2518(10)(b).

IV. Sentence

1. Under the new sentencing provisions, both the government and the defendant have the right to appeal to the Court of Appeals for review of a final sentence. 18 U.S.C. § 3742(a), (b).

2. An appeal of an otherwise final sentence imposed by a Magistrate may be taken to the District Court as though the
appeal were to a Court of Appeals from the District Court. 18 U.S.C. § 3742(f).

V. Appeal After Conditional Plea

1. A defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to review the adverse determination of any pre-trial motion on appeal from the judgment. The approval of the court and the consent of the government is required for a conditional plea. Fed. R. Crim. P. 11(a)(2).

2. A defendant who prevails on appeal must be permitted to withdraw the conditional plea. Id.

MECHANICS OF APPEAL

I. Pre-Appeal Proceedings in the District Court.

1. The District Court must advise a defendant found guilty after trial of the right to appeal and of the right to apply for leave to appeal in forma pauperis. Fed. R. Crim. P. 32(a)(2).

2. If the defendant so requests, the Clerk of the District Court must prepare and file a Notice of Appeal on behalf of the defendant. Id.

3. As to any defendant found guilty after trial, the District Judge must complete and transmit to the Clerk of the
District Court for transmittal to the Court of Appeals "Form A," required by the Revised Second Circuit Plan To Expedite The Processing Of Criminal Appeals (hereinafter "Plan"), containing, inter alia, the following information:

(a) Sentencing data;

(b) Whether any transcripts were ordered during trial;

(c) Whether defendant is eligible for appointment of counsel on appeal pursuant to the Criminal Justice Act; whether there is any reason that trial counsel should not be continued on appeal; and whether the minutes of trial should be transcribed at the expense of the government.

See Plan, sec. 1.

II. The Notice of Appeal and Related Matters.

1. The Notice of Appeal by a defendant is filed in the District Court within ten days after the entry of the judgment or order appealed from. If filed before such entry, but after announcement of a decision, sentence or order, the Notice of Appeal is treated as filed on the date of entry. Fed. R. App. P. 4(b).

2. An appeal from a judgment of conviction also may be taken within ten days after the entry of an order denying a timely motion in arrest of judgment or for a new trial; if the motion for new trial is made on the ground of newly discovered evidence, the extension of time to appeal is conditioned on the
3. A Notice of Appeal by the government is filed in the District Court within thirty days after the entry of the judgment or order appealed from; "entry" means entering in the criminal docket. Id.

4. The time for filing a Notice of Appeal may be extended for thirty days, with or without a motion, by the District Court "[u]pon a showing of excusable neglect . . . before or after the time has expired." Id.


6. The Clerk of the District Court serves notice of the filing by mailing copies of the Notice of Appeal to counsel of record for each party other than appellant. In a case of an appeal by a criminal defendant, the Clerk serves a copy of the Notice of Appeal, either personally or by mail, upon the defendant. Fed. R. App. P. 3(d).

7. The Clerk also has the duty to transmit copies of the Notice of Appeal and the docket entries to the Clerk of the Court of Appeals, who must promptly enter the appeal in the appropriate
records. Id.; Plan, sec. 2. The appeal then is entered upon the Court of Appeals docket. Fed. R. App. P. 12(a).

8. At the time of filing the Notice of Appeal, counsel for the appellant must furnish "Form B," required by the Plan, to the Clerk of the District Court. This form certifies that the transcript has been ordered and satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript. Plan, sec. 3.

9. When a transcript has been ordered, the court reporter must notify the Clerk of the Court of Appeals "immediately" of the estimated length of the transcript and the estimated date of completion. Id., sec. 4.

10. The time for completion of the transcript "shall not exceed thirty days from the order date except under unusual circumstances which first must be approved by the Court of Appeals upon a showing of need." Id.

III. Proceedings in the Court of Appeals

1. As soon as possible after the Notice of Appeal is filed in a criminal case, a scheduling order is issued in the Court of Appeals providing:

(a) That the record on appeal be docketed within twenty days after filing of the Notice of Appeal;

(b) That the brief and appendix of appellant be filed not later than thirty days after the date on which the
transcription of the trial minutes is scheduled to be completed, unless a longer or shorter period is established for good cause shown.

(c) That the Appellee's Brief be filed not later than thirty days after the date on which Appellant's Brief and Appendix are scheduled to be filed, unless a longer or shorter period is fixed for good cause shown.

(d) That the argument will be heard during the week designated in the order.

Plan, sec. 5.

2. Although not referred to in the Plan, a Reply Brief may be filed and served by an appellant within fourteen days after service of the Brief of the Appellee. Except for good cause shown, a Reply Brief must be filed at least three days before argument. Fed. R. App. P. 31(a).

3. The Court of Appeals may enter any other orders deemed desirable for prompt disposition of appeals. These include orders: appointing counsel on appeal; setting date for filing transcriptions of trial minutes; requiring attorneys for co-appellants to share a copy of the transcript; and instructing the Clerk to permit counsel to remove and examine the record. Plan, sec. 6.

4. The record on appeal consists of the original papers and exhibits filed in the District Court, any transcript of
proceedings, and a certified copy of the docket entries prepared by the Clerk of the District Court. Fed. R. App. P. 10(a).

5. The record on appeal must be filed by the date fixed in the scheduling order. See supra III.1.(a). Motions to extend time to file the record ordinarily will not be granted. If the transcript is incomplete, the record should be filed and supplemented upon completion of the transcript. Plan, sec. 5(a).

6. Each appellant is required to take such action as may be necessary "to enable the clerk to assemble and transmit the record." Fed. R. App. P. 11(a).

7. Any differences of the parties with respect to whether the record discloses what occurred in the District Court must be settled by the District Court. Also, the Court of Appeals may direct that omissions or misstatements be corrected and may order a supplemental record to be certified and transmitted. Fed. R. App. P. 10(e).

8. Section 11 of the Second Circuit Rules Supplementing Federal Rules of Appellate Procedure (hereinafter "Supp. Rules") urges the parties to agree as to the exhibits necessary for the determination of the appeal. Failing that, each party may designate the exhibits considered necessary, and all non-designated exhibits remain with the District Court Clerk unless requested by the Court of Appeals. The Rule does not relieve the parties of their obligations with respect to preparation of the Appendix under Supp. Rule § 30.