Brooklyn Law Review

Volume 70 | Issue 3 Article 2

2005

Decretal Language: Last Words of an Appellate Opinion

Hon. Jon O. Newman

Decretal Language

LAST WORDS OF AN APPELLATE OPINION[*]

Jon O. Newman[†]

Two years ago, I prepared a memorandum for the judges of the Second Circuit discussing various aspects of decretal language and some of the choices available to judges in wording the concluding sentence of their opinions. It has been suggested that the discussion might be of use to other judges and the bar, and I have therefore adapted the memorandum into the following Article. 1. What is "decretal language"? "Decretal language" is the portion of a court's judgment or order that officially states ("decrees") what the court is ordering. In a judgment or order, decretal language usually begins with the formula "It is hereby ordered, adjudged, and decreed that . . . ."

This Article will consider the portion of an appellate court's opinion, usually the concluding sentence, that states what a court of appeals is ordering. The wording of such a portion should probably be called "opinion decretal language" to distinguish it from "judgment decretal language," but in this article, such language will be called simply "decretal language."

2. Clarity. The first rule is clarity. The decretal language must tell the district judge what the appellate court wants done. Phrases such as "judgment in accordance with opinion" or "judgment in conformity with opinion" should be avoided if practicable, although they are sometimes used, especially where the opinion includes complicated language.[1]

[†] Judge of the United States Court of Appeals for the Second Circuit.

[1] *See, e.g.*, Playboy Enterprises, Inc., 53 F.3d 549, 565 (2d Cir. 1995)

Similarly, lawyers would be well advised to tell appellate courts precisely what relief they are seeking.

3. Consistency. The decretal language should be consistent throughout the opinion, i.e., in the "syllabus" that immediately follows the caption, in any summary of the disposition in the opening paragraphs of the opinion, and in the "conclusion." There is no need, however, for the language of the syllabus or the opening paragraphs to be as detailed as the language in the conclusion. The conclusion is the place where the decretal language should be stated completely and with precision. For example, the syllabus might say only "Affirmed in part; reversed in part and remanded."

4. Affirmance. If a judgment is to be affirmed, the decretal language of an appellate opinion need say only "The judgment of the district court is affirmed."

5. Vacatur or Reversal. If a judgment is to be undone, at least in some respect, there is a difference of opinion among judges as to the circumstances in which "vacated" or "reversed" should be used in decretal language. However, in three circumstances, there is virtual unanimity as to which of these verbs should be used:

(a) If the appellate ruling *orders the complete opposite* of what the district court has ruled, e.g., the district court has entered judgment for the plaintiff (for example, on a motion for summary judgment) and the court of appeals orders entry of judgment for the defendant (for example, a Rule 12(b)(6) dismissal for failure to state a claim), the decretal language should include the word "reversed." An appropriate form would be "The judgment of the district court is reversed, and the case [or the appeal or the cause] is remanded with directions to enter judgment for the defendant."

(b) If the appellate ruling *rejects interim relief* ordered by the district court (for example, a preliminary injunction), the decretal language should include the word "vacated." An appropriate form would be "The order of the district court issuing a preliminary injunction is vacated" or sometimes just "The injunction issued by the district court is vacated."

(c) If the appellate ruling *rejects a sentence* imposed by the district court and the appellate court chooses to undo the

("Judgment in accordance with opinion."); Hight v. United States, 256 F.2d 795, 802 (2d Cir. 1958) ("[J]udgment in conformity with this opinion.").

sentence, rather than order the district court to undo it,[2] the decretal language should include the word "vacated."[3] An appropriate form would be "The sentence is vacated, and the case is remanded for resentencing consistent with this opinion."

In the many circumstances where an appellate court rejects a final judgment of a district court but does not order the complete opposite of what the district court has done (i.e., does not direct judgment for the appellant), the practices of appellate judges vary as to whether the decretal language should include the word "vacated" or "reversed." Some judges believe that "reversed" should never be used unless the appellate court directs the complete opposite of what the district court has ordered. For these judges, whenever the appellate ruling is in favor of the appellant but orders anything less than the complete opposite of what the district court has ruled (for example, the district court has entered summary judgment for the plaintiff and the court of appeals rules that a factual issue exists that requires a trial), the decretal language will include the word "vacated." An appropriate form would be "The judgment of the district court is vacated, and the case [or the appeal or the cause] is remanded for trial [or for further proceedings]." Even these judges, however, will frequently say that they are "reversing" the ruling that grants summary judgment for the plaintiff, but are "vacating" the judgment that was entered based on that ruling.

Other judges believe that "reversed" is appropriate whenever the appellate court, on an appeal from a final judgment, rules in favor of the appellant, even though the appellant does not win the complete opposite of the district court's ruling. For these judges, an appropriate form in the example just given would be "The judgment of the district court is reversed, and the case [or the appeal or the cause] is remanded for trial [or for further proceedings]."

There is very little case law on the issue of "reversed" versus "vacated." In *Mickens v. Taylor*[4] Justice Scalia's opinion for the Supreme Court emphasized that a prior ruling of the Court in *Wood v. Georgia*[5] had only "vacated" the judgment of

---

[2] *See* para. 7, *infra.*

[3] *But see* para. 8, *infra*.

[4] 535 U.S. 162 (2002).

[5] 450 U.S. 261 (1981).

the lower court and had remanded for further proceedings (an inquiry concerning an allegedly conflicted counsel), rather than "reversed" and overturned a conviction.[6] The implication of Justice Scalia's language is that "reversed" would have been appropriate if the prior ruling had overturned the conviction, but it should be noted that such a ruling would only have required a new trial, not a final judgment in favor of the defendant.

The Supreme Court has frequently used "reversed" in the decretal language of an opinion, even though the opinion did not direct entry of judgment for the appellant.[7]

I have not found a decision that attached any significance to the use of "reversed," rather than "vacated," where the appellant prevailed on the issues raised on appeal but did not win a district court judgment in its favor.

In *Dart v. United States*[8] the District of Columbia Circuit held that statutory language authorizing the Secretary of Commerce to "vacate or modify" the decisions of administrative law judges did not empower the Secretary to reverse such decisions, and that where an ALJ had decided not to award sanctions, the Secretary's order that the judgment be modified so as to award sanctions constituted an impermissible reversal of the ALJ's decision.[9]

In *Kelso v. U.S. Department of State*[10] the district court offered the following explanation: "Although the word reverse shares vacate's meanings of to annul and to set aside, it has an additional, more extensive definition: 'To reverse a judgment means to overthrow it by contrary decision, make it void, undo or annul it *for error*.'"[11]

6. Affirmed or reversed (or vacated) in part. Whenever an appellate decision affirms part of a district court's ruling and reverses (or vacates) part of that ruling, the decretal language should specify which parts are affirmed and which parts are reversed [or vacated]. "Affirmed in part and reversed in part" is not sufficient in the decretal language (although it

---

[6] *Mickens*, 535 U.S. at 172 n.3.

[7] *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) (remand for reconsideration of res judicata defense under applicable state law standard); Cent. Green Co. v. United States, 531 U.S. 425, 437 (2001) (remand for reconsideration of immunity defense under proper standard).

[8] 848 F.2d 217 (D.C. Cir. 1988).

[9] *Id.* at 227-31.

[10] 13 F. Supp. 2d 12 (D.D.C. 1998).

[11] *Id.* at 18 (citations omitted).

will do in the "syllabus," the short explanation of the nature of the appeal and the disposition that appears in the slip opinion just below the caption).

7. Remands. In every instance where an appellate court reverses or vacates (either in whole or in part), the decretal language should include language that remands the case to the district court (although the absence of the word "remand" in a judgment that "reverses" has been held not to deprive the district court of jurisdiction to act),[12]. The remand language should tell the district judge what is to be done. Usually, some precise task will be identified, e.g., "remanded for further findings," "remanded with directions to grant leave to amend the complaint," or "remanded for trial." When an appellate court reverses (or vacates) a grant of summary judgment, the remand sometimes directs a trial, but in some circumstances the appellate court simply wants to permit more discovery with the possibility of a renewed motion for summary judgment, in which event the remand directs "further proceedings."

Two forms of catch-all remands have also been used: "remanded for further proceedings not inconsistent with this opinion"[13] and "remanded for further proceedings consistent with this opinion."[14] I have seen no case law that attached a consequence to the choice between these two catch-all formulations. Some judges believe that the "consistent with" formulation is a somewhat more confining direction to the district judge. The Supreme Court has used both formulations.[15]

The "consistent with" and "not inconsistent with" formulations appear to have come into use in an earlier era before the adoption of the Federal Rules of Appellate Procedure, which now provide that the mandate of the Court of Appeals includes the opinion, as well as the judgment.[16] In *Gulf Refining Co, v. U.S.*,[17] before the adoption of Rule 41, the Supreme Court ruled that "the direction to proceed consistently with the opinion of the court has the effect of making the

---

[12] *See* Exxon Chemical Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1483-84 (Fed. Cir. 1998))

[13] *E.g.*, Scott v. Coughlin, 344 F.3d 282, 291 (2d Cir. 2004) (footnote omitted).

[14] *E.g.*, Weiler v. Chatham Forest Products, Inc., 370 F.3d 339, 346 (2d Cir. 2004).

[15] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("not inconsistent with"); Christopher v. Harbury, 536 U.S. 403, 422 (2002) ("consistent with").

[16] *See* FED. R. APP. P. 41.

[17] 269 U.S. 125 (1925).

opinion a part of the mandate, as though it had been therein set out at length."[18]

8. Sentences. When an appellate ruling rejects some aspect of a district judge's sentence, an issue arises as to whether the order vacating the sentence should be entered by the appellate court or the district court. If the appellate court vacates the sentence, there is then no sentence, and circumstances might arise where the appellate court would not wish to leave the defendant unsentenced in the interim before resentencing occurs. In such circumstances, it is sometimes preferable for the appellate court not to vacate the sentence but simply to remand to the district court with instructions concerning the sentence; that way, the sentence remains in place until changed by the district court. In altering a sentence, an appellate court should consider whether it wants to alter one part of the sentence and leave the remainder in place, or alter one part and grant the district judge discretion to reshape the entire sentence *de novo.*[19]

9. Modification. Sometimes an appellate ruling effects a change in a district court ruling without either vacating or reversing. Instead, the appellate ruling "modifies" the appealed judgment. For example, an appellate change in the wording of an injunction might say "The order of the District Court issuing the injunction is modified by deleting paragraph 7, and as modified the order is affirmed."[20]

10. Dismissal. If a court of appeals does not have appellate jurisdiction over the appeal, the appeal should be dismissed. "Dismissed" is the appropriate word in decretal language when an appeal is dismissed as untimely, or because the judgment or order appealed from is not final and no basis exists for appeal from a non-final order. Other circumstances where an appeal should be dismissed are unsuccessful attempts to obtain review of orders denying judgment for a defendant on the basis of qualified immunity,[21] or unsuccessful attempts to obtain review of a sentencing judge's discretionary

[18] *Id.* at 135. *See also* U.S. v. Pan-American Petroleum Co., 24 F.2d 206, 207 (S.D. Cal. 1927) (same).

[19] *See* United States v. Quintieri, 306 F.3d 1217 (2d Cir. 2002).

[20] *See, e.g.*, Guzman v. Bevona, 90 F.3d 641, 650 (2d Cir. 1996); United States v. City of Yonkers, 856 F.2d 444, 460 (2d Cir. 1988).

[21] *E.g.*, Locurto v. Safir, 264 F.3d 154, 170 (2d Cir. 2001).

decision not to depart from an applicable Sentencing Guidelines range.[22]

11. "Appeal" versus "review." In the course of framing decretal language, courts should distinguish between the terms "appeal" and "review." "Appeal" is the proper term for referring to the process by which an appellate court exercises its jurisdiction over an appealable judgment or order; "review" is the proper term for referring to the action of an appellate court in considering an issue or ruling comprehended within an appeal. For example, on an appeal from a judgment in favor of a defendant after a jury verdict, the plaintiff-appellant might contend that the district court erred in denying its motion to amend the complaint. In such circumstances, it would be incorrect for the decretal language to say, after affirming the judgment, "And we also affirm on the appeal from the denial of the plaintiff's motion to amend the complaint." There is no "appeal" from the ruling denying the motion to amend. The "appeal" is from the final judgment, and on that appeal, the court of appeals "reviews" the denial of the motion to amend. Thus, appropriate language would be "And on review of the ruling denying the plaintiff's motion to amend the complaint, we affirm" or, more simply, "And we affirm the denial of the plaintiff's motion to amend the complaint."

12. Identifying the district court ruling. Whatever the appellate disposition, the decretal language should be careful to refer correctly to the nature of the district court ruling, i.e., whether it is a "judgment" or an "order." And when referring to a district court's judgment or order by its date, the operative date is the date on which the judgment or order was entered on the docket of the district court, not the date when the district judge signed the opinion or the date when the clerk filed the judgment.[23] The date that the judgment or order was entered can be ascertained from the district court's docket entries.[24]

13. Review of agency rulings. On applications to review administrative agencies like the National Labor Relations Board, which come to a court of appeals on a "petition for review" or the Board's "petition to enforce," the decretal language is either "petition to review granted, and the order of the Board is vacated [sometimes with a remand]" or "petition

[22] *E.g.*, United States v. Aponte, 235 F.3d 802, 803 (2d Cir. 2000).

[23] *See* FED. R. APP. P. 4(a)(1)(A).

[24] *See* Houston v. Greiner, 174 F.3d 287 (2d Cir. 1999) (discussing form of docket entries).

for review denied" or "petition for enforcement granted" or "petition for enforcement denied."

14. Motions. For disposition of motions, the decretal language, entered on the motion itself, is usually just "motion granted" or "motion denied."

15. Returning a case to the same panel. Sometimes the panel deciding an appeal wants a subsequent appeal in the litigation assigned to it. The most common circumstance is where the panel has remanded for a finding. Having invested time considering the issues in the appeal, the panel will normally want the case returned to it after the needed finding has been made. Sometimes the panel wants a subsequent appeal in the litigation to come before it, regardless of what prompted the remand.

The language used to accomplish a return of the case to the panel deciding the initial appeal should be carefully considered. Some panels have been using formulas such as "This panel will retain jurisdiction,"[25] "Jurisdiction will be retained by this panel,"[26] or simply "Jurisdiction is retained."[27] These formulations should be avoided. They are jurisdictionally incorrect. A court of appeals cannot simultaneously "retain" jurisdiction and send the case back to a district court for some further action. Whenever the panel wants a district court to take any further action in the case, jurisdiction must be restored to the district court. This occurs by means of the issuance of a mandate by the court of appeals. The "retain" wording is a euphemism that really means "This panel will *reacquire* jurisdiction after the required action has been taken."

Bringing a case back to the original panel can be accomplished in either of two ways:

(a) If the panel remands for a specific task such as a finding, the usual technique is to "vacate and remand" and add something like "After the district court has made the finding required by this opinion, jurisdiction will automatically be restored to this Court without the need for an additional notice of appeal; the returned appeal will be assigned to this panel." or "After the district court has made the required finding, either party may restore jurisdiction to this Court by notifying the Clerk of this Court by letter that the finding has been

[25] *E.g.*, United States v. Eng, 971 F.2d 854, 864 (2d Cir. 1992).

[26] *E.g.*, Cardillo v. United States, 767 F.2d 33, 35 (2d Cir. 1985).

[27] *E.g.*, Abrams v. Fed. Deposit Ins. Corp., 938 F.2d 22, 26 (2d Cir. 1991).

made, and the returned appeal will be assigned to this panel. An additional notice of appeal will not be needed." In the Second Circuit, this technique is known as a *Jacobson* remand[28]. It is used when the case is almost certainly going to return, and there is no need for a second notice of appeal (which, in addition to requiring an additional docketing fee, risks confusion in the clerk's office because there will then be two docket numbers for what is really the same appeal; every notice of appeal precipitates a new docket number). However worded, a *Jacobson* remand should specify the procedure for returning the case to the jurisdiction of the court of appeals. It is often useful to add something like "If any circumstances obviate the need for the case to return to the court of appeals, the parties shall promptly notify the Clerk of this Court."

(b) If the panel remands for some more general purpose, such as a retrial, but wants a subsequent appeal, if it occurs, assigned to it, the appropriate language, in addition to "vacated and remanded for a new trial" is something like "In the event of a subsequent appeal, the matter will be assigned to this panel."

In the Second Circuit, if no direction concerning assignment to the original panel is stated and an appeal is taken that relates to a prior appeal, the clerk's office will assign the appeal to the next panel that includes one judge of the Second Circuit who was a member of the prior panel.

16. Costs. It is usually helpful to make a decision as to appellate costs at the time an opinion is filed. FRAP 39(a) provides that, unless the court otherwise directs, if the judgment or order is affirmed, the appellee recovers its costs; if the judgment or order is reversed, the appellant recovers its costs; if there is a mixed outcome, e.g., "affirmed in part and vacated in part," or if the judgment is vacated or modified, neither party is awarded costs. It should be noted that use of the word "vacated" without any direction for costs has the effect of denying costs. All of these costs outcomes can be altered by direction of the court of appeals.

If nothing is said about costs in the decretal language, the panel will usually be burdened by a motion from one side or the other (or both) to award costs or to disallow costs. It is simpler to take care of the matter in the original opinion. If the opinion directs a mixed outcome, appellate costs can be apportioned, e.g., "The appellant may recover 2/3 of its costs."

[28] *See* United States v. Jacobson, 15 F.3d 19, 21-23 (2d Cir. 1994)

Sometimes a panel will disallow costs even though the prevailing party is normally entitled to them. This has happened, for example, when an impoverished appellant with a non-frivolous claim loses to a large corporation. In that circumstance, the decretal language sometimes says "No costs."

The fact that a party has been permitted to appeal *in forma pauperis* does not exempt it from appellate costs; *in forma pauperis* status exempts a party only from the obligation to *prepay* required fees.[29]

17. Sanctions for frivolous appeal. If an appeal is deemed frivolous, an appellate court may award damages (usually, attorney's fees) plus double costs.[30] Unless the appellee asks for such sanctions and thereby gives the appellant notice, the court of appeals may not summarily impose sanctions, but must first issue an order requiring the appellant to show cause why sanctions for a frivolous appeal should not be imposed.[31]

18. Issuance of mandate. Sometimes decretal language specifies the date when the mandate will issue. The mandate is the formal document that transmits the disposition by the court of appeals to the district court. It consists of the court of appeals opinion, a certified copy of the judgment (the judgment is prepared by the clerk's office), and any direction as to costs.[32] In the absence of any contrary direction, the mandate issues 7 days after the time to file a petition for rehearing (14 days) expires (i.e., 21 days after entry of the judgment of the court of appeals), or 7 days after entry of an order denying a timely petition for rehearing or motion to stay the mandate, whichever is later.[33] A timely petition for rehearing automatically stays issuance of the mandate until the petition is adjudicated.[34]

In some cases a panel wants its ruling to take effect immediately. The decretal language should add "The mandate shall issue forthwith." This language, however, does not make the appellate ruling effective on the date that the opinion is filed. The effective date is the date when the mandate is

[29] *See* 28 U.S.C. § 1915(a)(1) (2000); FED. R. APP. P. 24(a)(2).
[30] *See* FED. R. APP. P. 38.
[31] *See* DeLuca v. Long Island Lighting Co., 862 F.2d 427, 430 (2d Cir. 1988).
[32] *See* FED. R. APP. P. 41(a).
[33] *See* FED. R. APP. P. 41(b).
[34] *See* FED. R. APP. P. 41(d)(1).

issued,[35] even if the mandate is not received by the district court on that date. If a court of appeals wants its ruling to become effective on the date the opinion is filed, it should make sure that the clerk of the court issues the mandate that day.

In some cases the panel wants to have the mandate delayed, usually to permit the losing party to have extra time to seek a stay from the Supreme Court.[36]

19. Altering a Court of Appeals opinion. On occasion, a court of appeals makes some change in its own prior ruling. In the Second Circuit, this can be accomplished in one of four ways: (a) if a minor wording change is to be made, the author of the opinion files an "errata sheet" (on a prescribed form) correcting the slip opinion; (b) if a more extensive change is to be made, the panel files an unpublished order directing the change; (c) if a change is to be made that the panel wants published in the Federal Reporter, a brief opinion making the change is filed, (d) if extensive changes are to be made, the panel files an amended opinion, in which event a new slip opinion is printed. Whenever any changes are made, a revised disk containing the opinion as corrected is sent to the clerk's office so that a corrected version of the opinion will be placed on line. If a change is to be made after the mandate has issued, the amending order must recite that the mandate is being recalled.

* * * * *

The foregoing describes practices in the Second Circuit. Variations undoubtedly occur in the other circuits. Although this Article will not end with any decretal language, it is my hope that the discussion of decretal language will be useful to the bench and the bar.

[35] *See* United States v. DiLapi, 651 F.2d 140, 144 n.3 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

[36] *See, e.g.*, Mohammed v. Reno, 309 F.3d 95, 103 (2d Cir. 2002).