



Appellate Advocacy Research Guide

H. Douglas Barclay Law Library

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Prepared by the Public Services Department*

APPELLATE ADVOCACY RESEARCH GUIDE

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for the current location of the sources mentioned in this pathfinder.*

Purpose

This guide is intended for use in the H. Douglas Barclay Law Library. It is divided into three parts, Federal resources, New York State resources and legal writing resources. This guide will be updated periodically to reflect new titles added to the library's collection.

PART I. FEDERAL RESOURCES

Introduction

Appellate procedure involves the rules and practices by which appellate courts review lower court judgments. Appellate courts perform various functions, including correcting errors committed by the trial court, developing the law, and achieving a uniform approach across courts. Generally, appellate court procedure focuses on written briefs that state the questions on appeal and enumerate the legal authorities and arguments in support of each party's position.

By reviewing the appropriate appellate procedure rules, one can determine what judgments are reviewable on appeal, how appeals are brought before the court, the burdens on each party, what standard will be required for a reversal of the lower court (e.g., a showing of "abuse of discretion" or "clear error," etc.), and the procedures parties must follow.

It is important to be aware of the "final judgment rule," 28 U.S.C. § 1291. Usually only final judgments can be reviewed on appeal. However there are exceptions, such as error

by the trial court, subject matter jurisdiction and constitutional questions. Some exceptions can be found in 28 U.S.C. § 1292.

The United States Supreme Court adopted the Federal Rules of Appellate Procedure, which govern both civil and criminal proceedings, on July 1, 1968.

Relevant Rules

Appellate jurisdiction has been conferred upon the Supreme Court by various statutes, under authority given Congress by the Constitution (28 U.S.C. Section 1251). Practice and procedure before the United States Supreme Court is governed by the Rules of the Supreme Court.

Practice and procedure before the Court of Appeals for the Second Circuit is governed by Title 28 of the United States Code, by the Federal Rules of Appellate Procedure, by local Rules of Court, by Internal Operating Procedures, and other applicable Federal rules and laws.

The Court of Appeals entertains appeals of final orders and judgments arising from the United States district courts. It handles appeals from the United States Tax Court, petitions for review and applications for enforcement of orders and rulings issued by federal agencies, such as the Immigration and Naturalization Service and the National Labor Relations Board.

It also reviews petitions and motions for extraordinary relief, including mandamus, prohibition and stay, motions for permission to appeal interlocutory orders and judgments, motions for permission to file successive habeas corpus applications; and bankruptcy appeals from United States district courts.

Sources:

- Supreme Court of the United States website, <http://www.supremecourtus.gov/>
- United States Court of Appeals for the Second Circuit, <http://www.ca2.uscourts.gov/>
- New York State Court of Appeals, <http://www.courts.state.ny.us/ctapps/>
- Legal Information Institute, Appellate Procedure, an Overview, http://www.law.cornell.edu/topics/appellate_procedure.html

The Law: Primary Sources: Federal Codes & Rules

United States Code (U.S.C.)

Unclassified, Floor 4

See Title 28, *Judiciary and Judicial Procedure*

Title 28 is organized into several parts. These parts deal with the Supreme Court, the Court of Appeals, and the District Courts. Title 28 also has section for the Federal Rules of Appellate Procedure and other court procedure rules.

See also 28 U.S.C. § 1291 for the "final judgment rule", and 28 U.S.C. § 1292 for exceptions.

United States Code Annotated (U.S.C.A.)

Unclassified Floor 4

See Title 28, *Judiciary and Judicial Procedure*

Consult the Appendix for the Federal Rules of Appellate Procedure and the Court of Criminal Appeals. The Appendix also contains local rules and the rules supplementing the Federal Rules of Appellate Procedure for the United States Court of Appeals for the Federal, District of Columbia, and the First through the Eleventh Circuits, not found in the U.S.C.

Please note that, unlike the U.S.C., *The United States Code Annotated* provides researchers with cross-references to other West publications such as *Federal Practice and Procedure*, *West's Federal Forms* and *Corpus Juris Secundum*.

Unites States Code Service (U.S.C.S.)

Unclassified Floor 4

See Title 28, *Judiciary and Judicial Procedure* for local rules and the rules supplementing the Federal Rules of Appellate Procedure for the United States Court of Appeals for the Federal, District of Columbia, and the First through the Eleventh Circuits, not found in the U.S.C.

The *Unites States Code Service* is similar to the U.S.C.A. and cross-references such publications as *Federal Procedure*, *American Jurisprudence 2d*, *American Law Reports* and *U.S. Supreme Court Reports*.

The Law: Secondary Sources

American Jurisprudence, 2d

Floor 3

See topic "Appellate Review" (volumes 4 & 5) for information on the jurisdiction of Appellate Courts, appealable matters, parties, procedures, effect of appeal, appellate determinations, subsequent procedures, as well as costs and attorney's fees.

Access to this encyclopedia is by the General Index. Useful search terms include: "Appeal and Error".

Corpus Juris Secundum

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This encyclopedia is similar to *American Jurisprudence, 2d*. The topic of “*Appeal and Error*” (volumes 4 & 5) discusses such matters as reviewable decisions, assignment of error, briefs, general review standards, etc.

Access to this resource is also through the General Index. Useful search terms include: “*Appellate Courts*” and “*Court of Appeals*”

United States Supreme Court Records and Briefs

Microform, Floor 2

Supreme Court cases can be understood in light of the briefs and record on appeal. Briefs can also be used to develop arguments or to obtain research leads in similar cases. This collection contains full opinion cases dating back to 1832.

Cases are organized year and citation.

Current Supreme Court briefs, and those dating back to 1870, can also be found on Westlaw. Search the SCT-BRIEF-ALL database. Lexis Nexis provides Supreme Court Briefs from January, 1979 to the present. Search the BRIEFS database. Authorized passwords are necessary to access these databases.

Federal Appellate Forms

Am Jur Pleading & Practice

KF8836 .A5

This is a multi-volume set of general forms for practice and procedure. Consult Volume 2: *Appeal & Error*, for appellate forms.

Federal Procedure Forms (Lawyer’s Edition)

KF8836 .F4

This is a multi-volume set of general forms with a subject index. Consult § 3: Appeal, Certiorari & Review, for appellate forms.

West’s Federal Forms

KF8836 .W4

Consult *Court of Appeals* and *Supreme Court* volumes for appellate forms.

Federal Appellate Procedure and Practice Bibliography

Ursula Bentele, *Appellate Advocacy: Principles and Practice* (4th ed. 2004)
KF9050.A7 B46.

Explains the steps necessary to get a case before an appellate court, such as perfecting the appeal and preserving errors for review, etc. It also outlines various routes to take, such as appeals as of right, writs of prohibition and habeas corpus. Includes materials on appellate brief writing and oral argument.

Steven Alan Childress, *Federal Standards of Review* (3d ed. 1999) **KF 9050.C48.**

Offers a detailed description of the standards of review in the federal court system. The topics cover everything from the law and findings to judges and juries.

David C. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument* (2003) **KF8870 .F74.**

The focus of this work is on oral advocacy. Chapter topics include: *Beginning the Preparation Process*; *Types of Questions Commonly Asked*; *Moot Courts*; *Basic Approaches to Oral Argument* (which covers substantive and decorum errors); and *Attributes of the Best Advocates*.

David G. Knibb, *Federal Court of Appeals Manual: A Manual on Practice in the United States Court of Appeals* (4th ed. 2000) **KF9052 .K63.**

This manual is divided into three parts, “*Starting the Appeal*,” “*Special Appeals*,” and “*The Appeal Process*.” It is useful for the researcher when determining the legitimacy of an appeal. The appendices provide rules, statutes, cases, and time tables.

Gerald G. Paul, *Appellate Practice in the United States Court of Appeals for the Second Circuit* (1988) **KF8752 2d.A66.**

This compilation provides instruction on the process, forms, and general “dos and don’ts” of appellate procedure for the Second Circuit.

Michael E. Tigar & Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* (3d ed. 1999) **KF9050 .T54.**

Topics cover: What is Appealable, Jurisdiction of the Courts of Appeals, Record on Appeal, Argument, Judgment and Rehearing.

Frederick Bernays Wiener, *Effective Appellate Advocacy* (2004) **KF9050 .W5.**

Contents include:

- Part I. *General Principles: Why Advocacy?; Methods Of Appellate Courts In Considering Appeals.*
- Part II. *Effective Brief-Writing: Essentials Of An Effective Appellate Brief; Hints On The Process Of Brief-Writing And Research; The Finer Points Of Brief-Writing.*

- Part III. *Arguing The Appeal: Essentials Of An Effective Oral Argument; Suggestions For Preparation For Oral Argument; The Finer Points Of Oral Argument; The Task - And The Goal - Of The Advocate.*
- Part IV. *Other Issues: Rehearings; New Counsel On Appeal.*

PART II. NEW YORK RESOURCES

Court of Appeals

The New York Court of Appeals is the highest court in New York State. It is composed of a Chief Judge and six Associate Judges, each appointed by the Governor for a 14 year term. The Court of Appeals is limited to civil and criminal appellate matters and reviews questions of law. Questions of fact are reviewed only in specific instances. Most cases are appealed from the Appellate Division, although under some circumstances, direct appeal from the lower courts is allowed.

The *New York Civil Practice Laws and Rules* (CPLR) state how an appeal is to be taken and give guidelines for preparing briefs. The rules and guidelines to the Court of Appeals are contained in Article 56, Appeals to the Court of Appeals, CPLR sections 5601 through 5615.

The rules of procedure are also found in the *Rules of Practice of the Court of Appeals* in 22 NYCRR, Part 500.

Appellate Division

The Appellate Division of the Supreme Court of New York State hears appeals directly from the lower courts, that is, from the Supreme Court, the county courts, family court, surrogate's court, and court of claims. It has original jurisdiction in specific matters, such as habeas corpus, the supervision of attorneys, and proceedings against judges of the Supreme Court.

The appellate division reviews both law and fact and is divided into four divisions, one for each jurisdiction in New York. The *New York Civil Practice Laws and Rules* (CPLR) provide rules and guidelines to the Appellate Division in Article 57 (See *Appeals to the Appellate Division* CPLR sections 5701 through 5713). Each division also maintains a set of rules of practice and procedure. They can be found in the following sections and websites:

- First Division: 22 NYCRR Part 600; <http://www.nycourts.gov/courts/ad1/index.shtml>
- Second Division: 22 NYCRR Part 670; <http://www.nycourts.gov/courts/ad2/index.shtml>
- Third Division: 22 NYCRR Part 800; <http://www.nycourts.gov/ad3/>
- Fourth Division: 22 NYCRR Part 1000; <http://www.nycourts.gov/ad4>

Source: Siegel, *New York Practice*, 3d, (West Group). KFN5995.S54

The Law: Primary Sources: New York State Code & Rules:

McKinney's Consolidated Laws of New York (McKinney's)

Stack 1: KFN5030 .A431

See title: *New York Civil Practice Laws and Rules* (CPLR). Sections 5501, etc.

Contents include: Article 55: Appeals Generally, Article 56: Appeals to the Court of Appeals, and Article 57: Appeals to the Appellate Division.

Access to McKinney's is through the multi-volume Index. Useful search terms include: "Appellate Division," "Court of Appeals," and "Supreme Court," etc.

Consolidated Law Service (CLS): With Forms Stack 1: KFN5030 .A431

Text of law is the same as in McKinney's. Consult the index for specific topics or court rules. Forms are included in the set.

McKinney's New York Rules of Court Stack 1: KFN5030 .A431

One volume pamphlet, updated annually. Provides rules for all New York courts. Located next to the McKinney's statutes. Current edition only.

New York Codes, Rules and Regulations (NYCRR)

Stack 1: KFN 5035.A22

See Title 22: *Judiciary* for Court of Appeals and Appellate Division rules.

The Law: Secondary Sources

New York Jurisprudence, 2d

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Legal encyclopedia with discussions referencing statutes, administrative law and cases.

Topics include *Appellate Review, Availability of Appellate Remedy, Jurisdiction, Venue, Parties, Scope and Standard of Review.*

***Carmody–Wait 2d Cyclopedia of
New York Practice with Forms*** (Thompson-West)

KFN5995. C3

Multi-volume treatise on civil practice and criminal procedure. Appellate practice sections include:

- Appeal and Review, sections 172:4325 - 172:4557.
- Appellate Decision, sections 70:1 et. seq.
- Appeal and Review, Criminal Procedure, sections 172:4325 - 172:4537.
- Appeals in General with Forms, volumes 10 – 10A.
- Appeals with Forms, volume 11.

New York Law Journal

Magazine Rack,

Microform

Unclassified

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Includes Appellate Division opinions unavailable elsewhere. The annual digest to its published cases, the *New York Law Journal Digest-Annotator*, is located at KFN 5047.1 .C62. Reported cases are organized by title and section. A general subject index is included.

New York Appellate Forms

***Bender's Forms for the Consolidated Laws
of the State of New York Annotated***

KFN 5068.E34

Collection of forms with statutory provisions. Includes litigation forms to assist with drafting pleadings, motions, and other proceedings. Also includes official and departmental forms.

Criminal appellate forms can generally be found in CPL Sections 460.10, 460.20, 460.70, 470.60. Consult index under Criminal Procedure and “Appeals”.

***New York Consolidated Laws Service:
Annotated Statutes with Forms Lawyer's Co-op***
KFN 5030.A45

Legal, business, pleading, and practice forms are integrated with the statutes. Search the index under Appeals for references to specific statutes.

West's McKinney's Forms

KFN 5068.W4

Forms listed under “Appeals” include: Affidavits, Affirmations, Appellate Division, Appellate Terms, Argument, Briefs, Certificates and Certifications, Convictions, County Court, Court of Appeals, Notice, Notice of Appeal, Notice of Motions and Applications,

Orders, Perfect Appeal, Permission to Appeal, Record on Appeal, Remittitur, Reversal, Stay or Suspension of Judgment, Stipulations, Taking an Appeal, and Transcript.

Bender's Forms for the Civil Practice

KFN 5990.A65 B4

Volume 7A includes CPLR Articles 55, 56 and 57. These include Appeals Generally (which includes motions and rules), Appeals to the Court of Appeals, and Appeals to the Appellate Division.

Procedure and Practice Bibliography of New York

Mark Davies, et al., *New York Civil Appellate Practice* (1996) **KFN6075 .D2**. CD supplement updated 2008.

Contents include: organization and jurisdiction of the appeals court, taking the appeal, amicus curiae, CPLR 5704, injunctions, perfecting appeals (generally and for each court), appeals to the Court of Appeals, appellate advocacy, etc.

Arthur Karger, *Powers of the New York Court of Appeals* (3d. ed. 2005) **KFN6081 .C65**.

Provides an analysis of New York's appellate law in civil and criminal matters. Topics include the Court of Appeals' jurisdiction, the finality requirement, procedural aspects of questions of law, review of appeal, disposition after the decision, as well as citations to relevant statutes, cases and rules. Includes forms.

Thomas R. Newman, *New York Appellate Practice* (1985 & Supp. 2005) **KFN 6075 .N49**.

A guide to handling appeals before New York courts. Also includes appellate practice forms and court rules.

Alan D. Scheinkman, *Practitioner's handbook for appeals to the Appellate Divisions of the State of New York* 2nd ed. KFN6078 .N49 2005.

THE NEW YORK BAR ASSOCIATION, *New York Appellate Practice: How to Take a Civil Appeal in New York State* (1989) **KFN6078 .N481**.

A collection of essays by leaders of appellate practice in New York.

Robert L. Ostertag & James D. Benson, *General Practice in New York* (1998) **KFN 5080 .G36**.

Provides expert analysis of substantive law together with practice pointers and model forms. Contents include:

- Volume 24, Chapter 37: Civil Appellate Practice Before the Appellate Division and Other Intermediate Appellate Courts.
- Volume 25, Chapter 38: Criminal Appellate Practice Before the Appellate Division and Other Intermediate Appellate Courts.
- Volume 25, Chapter 39: Civil and Criminal Appeals to the Court of Appeals.

David D. Siegel, *New York Practice* (4th ed. 2005) **KFN 5995 .S53**.

Treatise covers the state judicial process, comparing and contrasting New York and Federal practice where appropriate. Topics include judgment, res judicata, enforcement of judgments, appeals, special proceedings and arbitration.

PART III. OTHER RESOURCES:

The following is a list of current resources in the law library. Please note that this list is not exhaustive. For other titles in the law library collection please see a reference librarian.

Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (2d. ed. 2003) **KF9050 .A935**.

Contents include the purpose of written and oral advocacy and technical requirements for briefs.

Mary Beth Beazley, *A practical guide to appellate advocacy* 2nd ed., New York: (2006) **KF251 .B42 2006**.

A guide to writing strong arguments. Sections include, “*Designing the Biased Problem*” and “*Designing the Biased Solution*”.

Michael R. Fontham, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* (2007) **KF251 .F65 2007**.

A guide to writing, editing, and presenting effective written and oral arguments.

Bryan A. Garner, *The Winning Brief: 100 Tips For Persuasive Briefing In Trial And Appellate Courts* (2d. ed. 2004) **KF251 .G37**.

Covers all aspects of planning and organizing a brief. Offers examples of good and bad writing from actual briefs.

Austen L. Parrish, *Effective lawyering: a checklist approach to legal writing and oral argument* (2007) **Law KF250 .P37 2007**.

Michael D. Murray, *Appellate advocacy and moot court* (2006) **Law KF251 .M88 2006**

Gregory A. Castanias, *Federal appellate practice and procedure in a nutshell* (2008) **KF9050.Z9 F43 2008**

Bradley G. Clary, Sharon Reich Paulsen, Michael J. Vanselow, *Advocacy on appeal* (3rd ed. 2008) **KF9050 .C59 2008**.

Antonin Scalia, *Making your case: the art of persuading judges* (2008) **KF8870 .S28 2008**.

Introduction to Advocacy: Research, Writing, and Argument (David Ware et al. eds., 7th ed. 2002) **KF281 .A2 I57**.

Authors develop every aspect of appellate advocacy from preparation through oral argument.

See Appendix for:

- General Rules of Style and Citation of Authorities.
- Sample Record: *Bell-Wesley v. O'Toole*.
- Sample Research Pages.
- Sample Memorandum: *Bell-Wesley v. O'Toole*.
- Sample Briefs: *Bell-Wesley v. O'Toole*.

Herbert Monte Levy, *How to Handle an Appeal* (4th ed. 1999 & Supp. 2001) **KF9050 .L4**.

Describes how to keep an appeal running smoothly, from filing the right papers to following through on post-decision responsibilities. Geared towards an advocate familiar with the general process.

Richard K. Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* (4th ed. 2001) **KF250 .N48 2001**.

See Appendix G for appellee's brief.

Edward D. Re & Joseph R. Re., *Brief Writing & Oral Argument* (9th ed. 2005) **KF251 .R4**.

See Part Three: *Appellate Brief Writing*.

Lynn B. Squires et al., *Legal Writing In A Nutshell* (2d. ed. 2006) **KF250 .S6**.

Chapter 9 entitled “*Argumentative Memoranda and Persuasive Writing*,” details how to write effective questions, statements of the case, point headings, summaries and conclusions.

Myron Moskovitz, *Winning an appeal: a short, readable, step-by-step explanation of how to prepare and present your case efficiently, with sample briefs* (4th ed. 2007)
KF9050 .M67 2007.