Effective Appellate Advocacy: A New York Perspective from State to Federal Court

Donna L. Burden, Esq.
Sarah E. Hansen, Esq.
605 Brisbane Building
403 Main Street
Buffalo, New York 14203
(716) 849-6800
dlb@bhhattorneys.com
seh@bhhattorneys.com

This paper addresses appellate process and effective advocacy techniques with an emphasis on the New York State appellate process, including for cases brought in or removed to federal court in New York. This paper is not meant to be an all-inclusive analysis of the appellate process across the United States, and every practitioner should be aware that each state has its own court system and its own appellate process. Pay careful attention to the technical requirements, and in particular, the local rules that may be applicable. Technical errors and mistakes are not as easily avoided at the appellate level, so precision and attention to detail will serve any attorney well when handling appeals. We will also share tips for effective advocacy on appeals that will assist attorneys practicing in any venue.

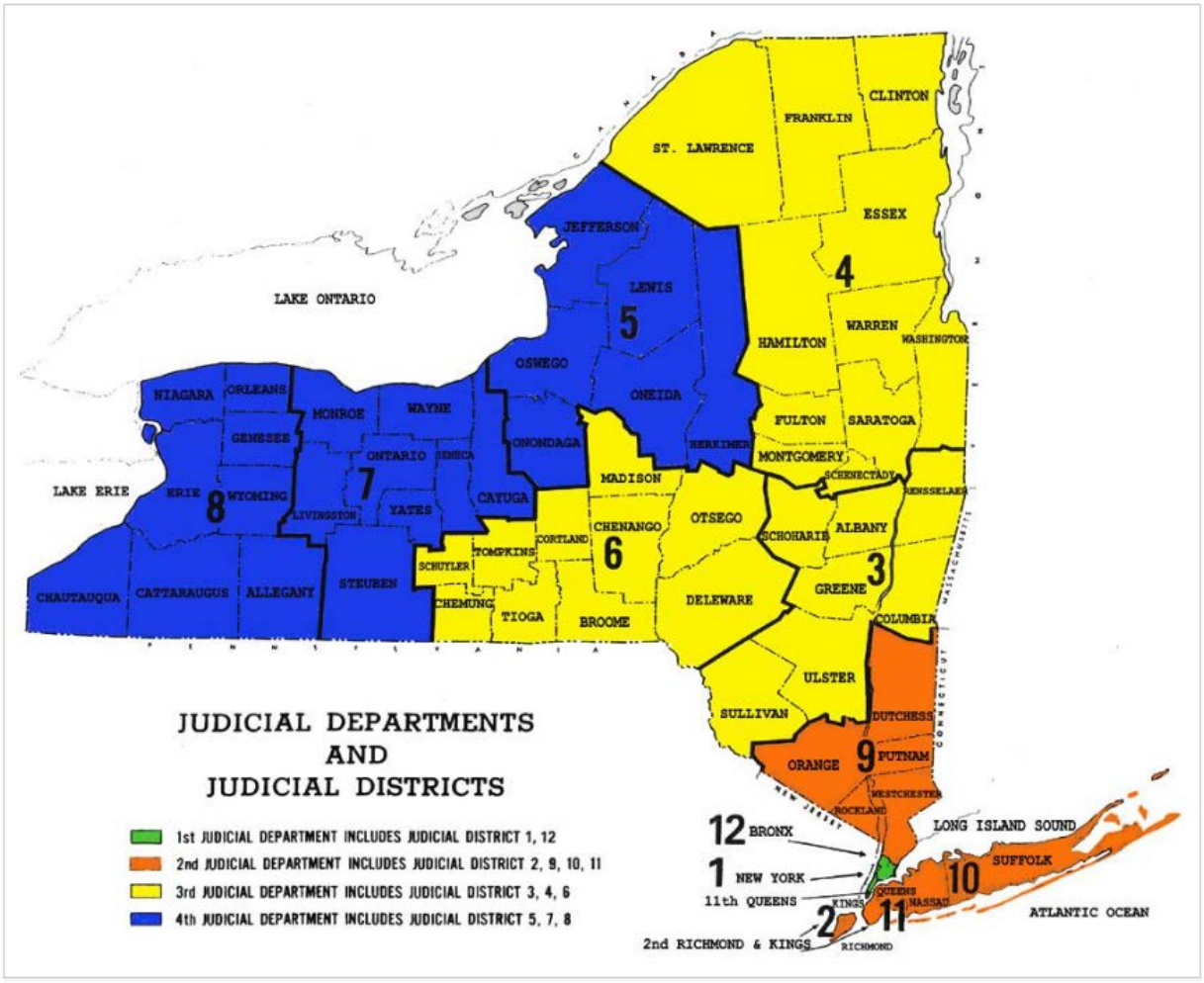
A. State Court

To provide some background information regarding the organization of our court system, in New York, the trial level court is called the "Supreme Court" (which can be confusing to many people, given that the highest level court in the federal system is the United States Supreme Court). In New York, the Supreme Court is the lowest level court of general jurisdiction. Each of the sixty-two counties in the State of New York has its own Supreme Court. Supreme Courts in New York are grouped into eight judicial districts for administrative purposes.

The first level appellate court in New York is called the "Appellate Division." There are Four Departments of the Appellate Division in New York. The First Department is comprised of only two counties with the largest dockets in New York, Bronx and New York County. The Second Department is comprised of the remaining counties in and around New York City and Long Island.

The Third Department includes lower New York, the Albany area and upper New York; basically, the eastern side of New York. Note that appeals from decisions reached by State agencies are always handled in the Third Department, such as workers' compensation appeals, or appeals from the findings of the New York State Division of Human Rights as to probable cause of discrimination.

The Fourth Department is comprised of Western New York, the Southern Tier and the counties along Lake Erie and Ontario. A map showing the Appellate Departments of New York is below:



From: https://www.nycourts.gov/courts/ad4/Court/Dept-Districts.html

Perhaps the most notable thing about appeals in New York State courts is that the scope of initial appeal from the Supreme Court to the Appellate Division is very broad. It is not limited to final decisions and orders (like federal court, see below). It includes interlocutory appeals, which are appeals from rulings by the trial court that are appealed while other aspects of the case are still proceeding. An appeal is described as "interlocutory" if it is made before all claims are resolved as to all parties.

For example, in New York, an attorney can appeal from a decision on a motion to compel discovery, or a summary judgment motion. A Protective Order issued by a court is appealable. A party can appeal as of right from denial of a pre-Answer Motion to Dismiss, in which case, in most situations, the case moves forward while the appeal is still pending. It is important you check the law in your state's jurisdiction regarding interlocutory appeals to determine whether the order is appealable before you file an appeal.

The New York Civil Practice Law and Rules (CPLR) provides with only a few exceptions, that most orders are appealable as of right to the Appellate Division, as that provision permits appeal on any order that "involves some part of the merits" or "affects a substantial right." CPLR §5701(a). Exceptions include those set forth in CPLR §5701(b), which specifically lists three Orders that are not separately appealable:

1. an order made in an Article 78 proceeding;
2. an order that requires or refuses to require a more definite statement in a pleading; and
3. one that orders or refuses to order that scandalous or prejudicial matter be stricken from a pleading.

Certain other types of orders have been found by courts to not be appealable, including denial of a motion for reargument of a prior motion (although not a motion to renew, which is based on new evidence not available at the time of the initial motion), a motion that was not opposed by the appealing party, and orders made on consent or stipulation. Additionally, an appeal from an order granting or denying an application to compel a witness to answer questions propounded at an examination before trial will be dismissed, as it is considered to be an appeal from an order to review objections raised at the examination before trial.

Preliminary or pre-trial conference orders/scheduling orders, are not typically appealable. This because they are not made on motion, and the CPLR does not permit appeal of *ex parte* orders not made on a motion with a proper notice of motion.

In addition to the right of direct appeal from an intermediate order, where the order "necessarily affects the final judgment," it can also be reviewable on appeal from the final judgment itself, even if not separately appealed when made. CPLR §5501(a)(1). This has been hard for courts to define, but a workable definition of the "necessarily affects" requirement is "if the result of reversing that order would necessarily be to require a reversal or modification of the final determination" and "there shall have been no further opportunity during the litigation to raise again the questions decided by the nonfinal order."[1] An example would be a motion granting a new trial but restricting the scope of the issues involved in the retrial, or an order granting or denying a motion to amend a pleading to include a new cause of action or defense.

An appeal is taken in New York by filing a Notice of Appeal in the clerk's office of the county where the case is pending. New York has been expanding its e-filing initiatives, so that most, but not all, of cases can be electronically filed online now, making filing of a Notice of Appeal a simple process. Otherwise, a paper copy is filed in the clerk's office, either in person or by mail. There is a $45 fee involved with filing a Notice of Appeal.

In order for an appeal to be timely, **it must be filed within thirty days of service of a Notice of Entry of an Order** (basically, a document stating when the Order was signed and filed, served on the opposing counsel). If the Notice of Appeal is not filed within thirty days of service of Notice of Entry, then it is untimely and your opportunity to appeal has passed. It is important to adhere to these deadlines strictly.

---

[1] See Karger, Arthur, The Powers of the New York Court of Appeals, §9:5 (3d Ed. 2005).

The filing of a Notice of Appeal is not the last step, however, to ensure your appeal is timely. Under new rules effective September 17, 2018, an appeal must be "perfected" within six months of the filing of the Notice of Appeal, or it will be dismissed without further leave of court. Previously, under the old rules, an appeal was not dismissed as of course until nine months had passed within perfecting the appeal. A respondent could speed the process along, however, by filing a Motion to Dismiss the appeal as untimely after sixty days, in which case, the appellate courts often granted additional time to perfect the appeal and set a date certain for the deadline of briefs. The nine month period has been reduced to six months, without any provisions now for dismissal after sixty days.

Under the new rules, an extension can be sought of the time to perfect an appeal for a period of up to sixty days, now upon a request made by simple letter. Further motions may also be available to extend the time to perfect the appeal. However, if not otherwise perfected, and no extension obtained, after the six months, the appeal is simply deemed abandoned and dismissed without further action.

To "perfect" an appeal, the appellant must prepare and file the Record on Appeal and their appellate brief. This can be done by the "reproduced full record method" (CPLR §5528(a)(5)), by the appendix method (CPLR §5528(a)(5)), or, most frequently, through either an agreed statement in lieu of the record (CPLR §5527). Often, the parties stipulate to the contents of the Record on Appeal in a statement pursuant to CPLR §5527, although new rules permit a certification to be filed under CPLR §2105, confirming that the Record on Appeal was personally compared to the originals on file with the clerk's office and is the same (this is becoming easier to do with the use of e-filing).

There are very strict rules for reproduction of the Record on Appeal and briefs, which is why attorneys often use appellate printers to handle those issues. The Record on Appeal must contain a statement required by CPLR §5531, which typically contains information such as the case caption, whether any parties have been discontinued from the matter, and the nature of the controversy at the heart of the appeal.

The appellate brief must contain certain required segments, including, generally:

1. a table of contents, which shall include (i) a list of point headings and (ii) the contents of the appendix, if not bound separately;
2. a table of cases (alphabetically arranged), statutes and other authorities, indicating the pages of the brief where they are cited;
3. a concise statement, not exceeding two pages, of the questions involved, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken;
4. a concise statement of the nature of the case and of the facts which should be known to determine the questions involved, with appropriate citations to the reproduced record, appendix, original record or agreed statement in lieu of record;
5. the argument for the appellant, which shall be divided into points by appropriate headings distinctively printed; and

6. a statement certifying compliance with printing requirements under this Part, on a form approved by the court.

Typed briefs are required to be printed in 14 point font. Additionally, there are stringent word limits appliable to the briefs, unless leave of court for additional length is obtained. Generally, appellant's and respondent's briefs shall not exceed 14,000 words and reply and amicus curiae briefs shall not exceed 7,000 words, inclusive of point headings, footnotes, signature blocks, tables of content and authority, and certificates of compliance.

Upon filing of an appellant's brief, the respondent's brief must be filed within thirty days of the date of service of the appellant's brief (which includes five additional days if mailed, and one additional day of sent via overnight mail). Typically, this deadline is set forth in a Scheduling Order issued by the appellate court, which will also advise you of the "term" in which your appeal will be heard (i.e., the two week period during which your case may be argued). You will receive a further Scheduling Order with an exact date closer to the term.

A reply brief is due within ten days of service of the respondent's brief. Again, these deadlines are subject to requests for appeal, which under the new rules can be granted upon sending of letter (prior to the deadline lapsing) requesting additional time to respond. Appellate rules indicate that the contents of the reply brief are the same as the appellant and respondent's briefs, "without repetition." There is no need to restate your preliminary statement, questions posed or statement of facts if there is no new information in the reply brief.

Do not be put off that oral argument may be scheduled several months away from when all of the papers have been submitted. It is typical that your appeal will be scheduled for an appeal anywhere between six to eight months after the time that the appeal is perfected. You should take this into account, as it may impact the processing of your case, and you may want to consider the applicability of stay pending appeal, as discussed below. Once your case is argued, expect it may be one to two months, or more, until you have a decision issued. Decisions are released on pre-determined release dates, usually posted on the court's website.

You should also consider whether there is a basis for a stay pending your appeal. The State or other political subdivisions are ordinarily entitled to an automatic stay under CPLR §5119(a)(1). Additionally, according to CPLR 5519, an automatic stay, without a court order, exists upon filing of the Notice of Appeal where:

> the judgment or order directs the payment of a sum of money, and an undertaking in that sum is given that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed.

In order to take advantage of the automatic stay provision in New York State courts, an undertaking must be filed in the sum which would have to be paid if the order is affirmed. An undertaking is effective when it and any required affidavit, is filed with the clerk of the court in which the action

is triable and a copy is served on the adverse party. CPLR §2505. An undertaking is either cash deposited with the clerk of court or posting of a bond.

The undertaking is an absolute requirement in order to take advantage of the automatic stay pursuant to CPLR 5519(a). The other option would be to seek a stay pursuant to CPLR 5519(c), which is the discretionary stay upon court order and does not require an undertaking. In the absence of a basis for an automatic stay pending appeal, there is also a discretionary stay provision. CPLR 5519.

Note that unlike the Appellate Division, appeals to the Court of Appeals, the next highest court, are not as of right. Instead, a party seeking to appeal an unfavorable decision at the Appellate level can only appeal as of right if there are two dissenting judges. In the absence of two dissenting judges, permission to appeal must be obtained either from the Appellate court or the Court of Appeals itself.

B. Federal Court

Attorneys practicing in New York may also have cases pending in federal court. Courts in the federal system work differently in many ways than state courts, including the appellate process. The primary difference for civil cases is that the federal courts can only hear specific kinds of civil cases. Federal courts are courts of limited jurisdiction. They can hear cases authorized or arising out of the United States Constitution or federal statutes. In addition, cases that are entirely based on state law can be brought into federal court under "diversity of citizenship jurisdiction."

Diversity jurisdiction allows for a case that is not otherwise covered by federal jurisdiction (often called a "federal question" case) to be heard where all defendants reside in a different state, and where the "amount in controversy" exceeds $75,000. A plaintiff in one state can file a lawsuit in federal court directly when all defendants are located in different state(s). Additionally, a defendant can seek to "remove" the case from state to federal court based on their citizenship in another state from the plaintiff.

For example, if a Plaintiff who resided in New York State brought a case in New York State court against a Defendant who lived in Mississippi, the Defendant could move the case out of New York State courts and into federal courts. Differences in the two jurisdictions may (and often does) make the federal court system a beneficial place to defend the case.

For this reason, it is important for New York State attorneys to understand the federal appeals system, as it is very different than the state appeals system. In the federal court system in New York, the lowest court is the District Court, which is divided into the Southern District Court and Eastern District Court (both encompassing, in total, the New York City/Long Island area), the Northern District (Upstate New York) and the Western District (Western New York/Southern Tier).[2] Appeals are taken to the Second Circuit Court of Appeals. The highest court for appeals in the federal system is, of course, the United States Supreme Court.

[2] A full breakdown by county is available at: https://www.archives.gov/nyc/finding-aids/district-courts.html#ny.

The first major distinction between federal appeals and New York State appeals is that the Second Circuit Court of Appeals has jurisdiction conferred and is strictly limited by statute, as follows:

1. Appeals from final orders, pursuant to 28 USC §1291. A decision is considered "final" if it "ends the litigation on the merits and leaves nothing for the court to do to exercise the judgment" *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983)(citing *Catlin v. United States*, 324 US 229, 233 (1945)). An example would be a motion for summary judgment that disposes of the case in its entirety, or an order denying a new trial.

2. In a case involving multiple parties or multiple claims, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under FRCP §54(b). Note: this does not apply if the only remaining issues were collateral matters such as attorney's fees and costs. See *Budinich v. Becton Dickinson*, 486 US 196, 2010 (1988).

3. Appeals pursuant to 28 USC §1292(a), for specific types of orders, including:
    a. Orders granting, continuing, modifying, refusing or dissolving injunctions;
    b. Orders appointing receivers or refusing to wind up receiverships; and
    c. Orders determining the rights and liabilities of parties in admiralty cases.

4. Appeals pursuant to 28 USC §1292(b) and FRAP 5: Appeal by permission of Court.

5. Appeals pursuant to judicially created exceptions to the finality rule. Discussed in cases including but not limited to *Cohen v. Beneficial Indus. Loan Corp*., 337 US 541 (1949); *Gillespie v. United States Steel Corp*., 379 U.S. 148 (1964); *United States v. Helmsley*, 864 F.2d 266 (2d Cir. 1988); *Parkinson v. April Industries*, 520 F.2d 650 (2d Cir. 1975).

Interlocutory appeals are not typically permitted, even by permission pursuant to FRAP 5, unless they satisfy the collateral order doctrine, as discussed in the United States Supreme Court decision of *Lauro Lines S.R.L v. Chasser*, 490 US 495 (1989). That case indicates that appeals are permitted only if:

1. the outcome of the case would be conclusively determined by the issue;
2. the matter appealed was collateral to the merits; and
3. the matter was effectively unreviewable if immediate appeal were not allowed.

Otherwise, an order may not be appealed until after a trial, when all interlocutory orders can be appealed together. For example, an order denying discovery to a defendant would not be appealable, nor would a motion seeking to keep information sealed under the attorney-client privilege.

Additionally, a decision granting summary judgment on certain claims and denying them on others (or dismissing certain claims pre-Answer) would be interlocutory and normally the party would have to wait after a trial on the merits to appeal the decision. A denial of summary judgment as a whole is considered interlocutory. Attorneys should be aware, however, that there is a pending

circuit split as to whether questions that are "purely legal" can, or must, be appealed after decision, or if they are held until after a full judgment on the merits. See *Ortiz v. Jordan*, 562 U.S. 180 (2011).

The appellate process for hearing of appeals before the Second Circuit is governed by the Federal Rules of Appellate Procedure ("FRAP") and the Second Circuit's local rules.[3] According to FRAP 3, an appeal is taken from a decision upon filing of a Notice of Appeal and payment of the appropriate fee. The contents of the Notice of Appeal must:

> (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
>
> (B) designate the judgment, order, or part thereof being appealed; and
>
> (C) name the court to which the appeal is taken.

At the time of filing, the appellant must furnish the clerk with enough "copies" of the notice to enable the clerk to comply with Rule 3(d). The District Court clerk then serves the Notice of Appeal on the other parties. This is done by mail to the parties' attorneys or, now, by electronic filing pursuant to Local Rule 3.1.

Per FRAP 4, the Notice of Appeal must be "filed with the district clerk within **30 days after entry of the judgment or order appealed from**." FRAP 4(5) permits a party to move for extra time to file a Notice of Appeal for good cause. If granted, the maximum additional time permitted is 30 days.

Note that FRAP 8 governs motions for stays of a judgment or order pending appeal. They can only be made to the Second Circuit upon a showing that it would be impracticable to first seek a stay from the District Court, or if already made to the lower court, that it was denied.

FRAP 10 sets forth the contents of the Record on Appeal which must include:

> (1) the original papers and exhibits filed in the district court
>
> (2) the transcript of proceedings, if any; and
>
> (3) a certified copy of the docket entries prepared by the district clerk.

It is the appellant's duty to order the Record on Appeal from the District Court Clerk within 14 days of the filing of the Notice of Appeal. This includes ordering the transcript from the court reporter, although there is a process for a statement indicating that no transcript was taken which must be signed by all of the parties. It is the appellant's obligation to assist the District Court

[3] Available at http://www.ca2.uscourts.gov/clerk/case_filing/ rules/rules_home.html.

Clerk in facilitating filing of the Record on Appeal. It is the District Court Clerk's duty to file the Record on Appeal with the Second Circuit when it is complete pursuant to FRAP 11. In the alternative, FRAP 10(d) permits the parties to fashion an "Agreed Statement" as the Record on Appeal. This is done when the parties:

> Prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the courts resolution of the issues. If the statement is truthful, it -- together with any additions that the district court may consider necessary to a full presentation of the issues on appeal -- must be approved by the district court and must then be certified to the court of appeals as the record on appeal.

Upon receipt of a copy of the Notice of Appeal, the Circuit Court dockets the appeal pursuant to FRAP 12(a). According to FRAP 12(c), once the Circuit Court receives the record from the District Court Clerk, they must file it and immediately notify all parties of the filing date.

Also within 14 days of the filing of the Notice of Appeal, the appellant must serve a "representation statement" identifying counsel and the parties represented pursuant to FRAP 12(b). Local Rule 12.1, specific to the Second Circuit, also requires appellant's counsel to file "Form C, Civil Appeal Pre-Argument Statement, along with the addenda required by this form; and Form D, Civil Appeal Transcript Information Form." This must also be done within 14 days of the filing of the Notice of Appeal. **Failure to do so can result in dismissal of the appeal.**

Note that Local Rule 12.3 also requires that all counsel for parties to an appeal must file an Acknowledgment and Appearance Form within 14 days of filing of the Notice of Appeal. **Failure to do so can result in a party being barred from being heard on the appeal.** It cannot be emphasized enough how important it is for an appellate attorney to know not only the FRAP, but also the local rules of the appellate court, which may contain additional requirements and which are often stringently applied.

The methods of computing time for filing or service is set forth in FRAP 26. Days are counted excluding the day one which the action was triggered but include the last day of the period, including weekends or holidays, except if the last day lands on a weekend or holiday, it bumps it to the next business day.

FRAP 31 sets forth the time periods for filing of briefs. According to FRAP 31, the appellate must serve and file a brief within **40 days after the record is filed**. The appellee then must serve and file an opposition brief within **30 days after the appellant's brief is served**. The appellant is then permitted to serve and file a reply brief within **14 days after service** of the appellee's brief, except you cannot file a reply less than seven days prior to argument unless permitted.

FRAP 31 requires filing of **25 copies** of the appellate brief and service of two copies of the brief on each party. Briefs must be compiled in a certain manner (similar to New York State appellate courts with red cover, blue cover, gray cover).

An appellant's or appellee's principal brief must be no more than 30 pages in length and reply briefs are limited to 15 pages per FRAP 32(a)(7). Moreover, the principal brief is only acceptable if it contains no more than 13,000 words, and a reply brief can contain "no more than half" of that number of words, or no more than 6,500 words. Certain things are excluded from the page limits, such as cover pages, tables of contents and citations, signature blocks and certain other statements and addenda. The brief must be accompanied by a certificate signed by the attorney filing the brief that it meets these requirements and stating the word count in the document.

If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission. FRAP 31(c).

FRAP 28 sets forth the contents for briefs. An Appellant's Brief must include:

> (1) a corporate disclosure statement if required by Rule 26.1;
>
> (2) a table of contents, with page references;
>
> (3) a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;
>
> (4) a jurisdictional statement, including:
>
> > (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
> >
> > (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
>
> (C) the filing dates establishing the timeliness of the appeal or petition for review; and
>
> (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;
>
> (5) a statement of the issues presented for review;
>
> (6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(a)(7).

The appellee's brief follows the same style but does not need to include a jurisdictional statement, statement of the issues, statement of the case or statement of standard of review, unless you disagree with the substance of the appellant's statement to that effect.

A reply brief must contain a table of contents, with page references, and a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the reply brief where they are cited. Other than this, there is no specific form for reply briefs.

There are also specific rules set forth in the Federal Rules of Appellate Procedure and local rules relative to argument, once the Record has been settled and the briefs filed. FRAP 34 governs oral argument. It states that any party may file a statement explaining why oral argument should be permitted or is not needed**.** Local Rule 34.1 for the Second Circuit, however, requires the filing of a "Oral Argument Statement Form" within 14 days after the filing of the last appellee's brief. Failure to timely file the Oral Argument Statement Form signifies that the party does not seek oral argument. **Even if the parties request argument, the Second Circuit can decide to hear the case on submission only.**

Oral argument must be allowed in every case unless three judges review the briefs and agree it is unnecessary because (1) the appeal is frivolous; (2) the dispositive issue has been "authoritatively decided" or the facts and legal arguments would not be significantly aided by argument. The clerk advises the parties when oral argument is scheduled. Motions to postpone or allow longer argument must be filed reasonably in advance of the date. Appeals can be heard on submission only upon request, but the court can require argument if it deems fit in that circumstance.

Note that pursuant to Local Rule 34.1(e), after a case has been set for oral argument, it may be postponed only by order of the court on a showing of extraordinary circumstances, and not by

stipulation of the parties. Engagement of counsel in another tribunal (other than the U.S. Supreme Court) is not an extraordinary circumstance. **Put another way, there are no adjournments when you have a case scheduled to be argued at the Second Circuit.**

Another thing to bear in mind is that FRAP 39 provides that **costs are awarded in every circumstance**. If the appeal is dismissed, costs are taxed against the appellant unless the parties agree otherwise. If the appeal is affirmed, costs are also taxed against the appellant. If the judgment is reversed, costs are taxed against the appellee. If the judgment is affirmed in part or reversed in part, modified or vacated, costs are only taxed as the court deems fit. This includes the costs of copying of appellate records and briefs, which can be expensive, and the filing fee for the appeal. Attorney's fees are not normally taxed as part of costs. It is still a consideration that should be evaluated when a decision is made whether to appeal from a determination, since the award of costs is not discretionary.

C. Effective Advocacy Tips and Tricks

Regardless if you are practicing in state or federal court, there are certain effective brief writing and argument tricks that will serve you well in your practice. Keep in mind that your job is to help persuade the court to reach your desired result. All actions should be taken in furtherance of persuading the court, and in to present them from being distracted by other factors. There is also an expected level of decorum in the appellate court that should be recognized.

With respect to brief writing, keep in mind that your role is to be succinct and persuasive. Judges are inundated with reading material, so it is important to make sure that your brief stands out in their mind, and the best way to do that is to have it be absorbing, interesting, and to address the legal issues in a clear, direct and logical manner. Avoid things that are distracting, such as excess verbiage, poor grammar, incorrect citations, and spelling errors. Bear in mind that your appellate court may have specific rules about font size and type, margin size, and footnotes/endnotes.

If your jurisdiction has page or word number limits (like New York), be mindful of those requirements. In New York State courts, most attorneys use legal printing services to prepare briefs, given the specific printing requirements pertaining to binding, cover color, etc. However, it is still critical that you confirm your brief meets the word or page number limit. You do not want to spend all of your time (and client's money) into preparing a brief just to have it rejected. You also do not want your appellate printer to come back to you with revisions to be made to bring it into compliance at the last moment, with a deadline looming.

It is important in drafting your brief that you hold the attention of the judge, establish credibility, and persuade the judge that your position is the right one. This is done through concise, simple argument and clear citations to the record. They are not going to spend the time to dig through an appellate record that may be hundreds, or even thousands of pages in length, to find a piece of evidence that you argue is critical to their determination. Make it easy for the Court to grasp your point and move on.

Make sure your brief is fully thought out before you start writing. If possible, draft out an outline. If you do not have the time, at least ensure you know what points you intend to make and how you intend to get there. This will keep you brief from being disjointed or rambling.

Your statement of facts should read like a clear, and engaging, narrative. Bear in mind that while you may have been living with your case for many years, the judge is hearing this for the very first time. Explain terms that may not be familiar to them, especially if you have a case which involves industry-specific or scientific terms or phrases.

State the facts without any legal jargon and tell it as a story. Emphasize those facts that support your position and consider preemptively addressing those facts which do not help you but are unavoidable. Citations to the record should be clear and listed after every factual statement. Consider utilizing direct quotes when effective but avoid using long or drawn out quotes. Avoid string citations.

Be aware that you cannot rely on facts that are outside the papers, or "dehors the record." This is a serious breach of appellate decorum and such a fundamental rule of practice that doing so will be a glaring error and will likely prejudice your submission. You must also avoid relying on an argument not made before the lower court, and which is not preserved for appellate review. You are limited to the record evidence and if you suddenly insert a new argument on appeal, your opposing counsel will likely jump all over it. Even if they neglect to do so, the court will notice, and it will not help your position.

Use party designations that are easy to follow and understand, like "the plaintiff," "the buyer," or "the wife." Do not make the court have to figure out who the "appellant-respondent-respondent" is. And whatever you do, be ***consistent*** throughout your brief.

Utilize subheadings when facts or arguments are length to help focus and direct the reader's attention. Avoid repetition whenever possible. Start with your strongest arguments first. You may be tempted to put in arguments that are not strong just to include "everything." Be wary of a "everything and the kitchen sink" approach. Having a baseless/meritless argument impacts your credibility. Concentrate on your strong points and jettison weak and potentially frivolous arguments.

While it may go without saying, your brief should be written in a professional tone. Sarcasm, jokes, personal attacks, and accusations should be avoided. Rely on the facts that support your position and the legal support that best enhances your arguments, and you will fare far better.

It is equally important to be aware of proper protocol and effective techniques for arguing your case once you reach the appellate division. In preparing, ensure you that you know the record on appeal from cover to cover. You do not want to be in front of the judges and misstate a fact in the record. Your arguments should be clearly outlined and it is beneficial to practice in front of the mirror (or even while driving to argument, if you are going a long distance) on several occasions so that your argument comes naturally when you are before the appellate court.

That being said, you should expect that in most situations, you may not be able to cover all of the material you have prepared for argument. Do not just read a "script" (from paper or memory) but engage the court. Depending on whether you have a "hot bench" (one where the judges have lots of questions) or a "cold bench" (one where not many questions are asked at all), you may or may not be able to get through all of your points. So hit the ones that are the strongest first. Keep in mind that the court will likely be well prepared, so a "statement of the facts" is not needed.

Be prepared to jump around (and prepare your notes in a manner so that you can jump around, without losing track of where you are). Have enough material to get your point across but be aware that you may not get through your very first sentence before you are cut off and asked a question. Therefore, knowing your record evidence is critical. You will not likely have enough time to argue every issue in your brief and should not try to do so. Instead, focus on one or two of your strongest points.

If a judge asks you a particular question, you should acknowledge the question and answer it. It does not help to deflect or say that you will get to that point later—they want to know now so it is obviously important! Make sure to answer the question that was posed. And answer candidly. If the court asks you about a case that you do not know about, be honest and say so ("I apologize, Your Honor, but I am not familiar with that case.") Be civil and professional, referring to the court as "Your Honor."

Dress appropriately! Looking professional is one of the easiest things you can control when arguing at the appellate court. Your best dark colored suit is likely your best option. Stick to conservative attire (i.e, funeral wear) with modest footwear (this is not the time for six inch high heels or thigh high boots). Be clean, put together and polished. You do NOT want to stand out for the wrong reasons!

Also, be prepared and be ON TIME. In many appellate courts, if you are not there in a timely fashion when the appellate session starts, your appeal will be deemed submitted and you will not be permitted to argue. Leave plenty of time to account for last minute issues, such as weather, parking problems and traffic issues. Best practices are to be at the appellate court no later than at least 30 minutes before argument, which will give you enough time to check in, review your notes and be ready to argue, whether your case is called first or last.

Adhere strictly to court rules on technology. If the court rules say to turn your phone off, it should be off, not just on vibrate. Check in advance to see if your appellate court even permits you to bring phones with you to court, because the last thing you need is to have to run back to your car to deposit your cell phone when security will not let you in with it.

Be cognizant of the Court in which you are arguing. Not all appellate courts are the same. Know the specific rules of decorum of the court where you intend to argue, before you get there. This could include looking up the judges on your appellate panel in advance. Also, review their local rules, talking with other attorneys who have practiced before that appellate court, and even watching argument in advance (many courts now live stream argument for the public to watch). It may be considered a big "no, no" to do such innocuous things as bringing a water bottle into court.

One huge rule to respect is strict adherence to time limitations. In some courts, such as the Court of Appeals in New York, the court has a light (similar to a traffic signal) that turns colors to tell you when you are running low on time, and then goes "red" when your time is up. When that light turns red, you stop talking. Do not even finish your sentence. Your time is up. Do not try to keep going in spite of the time limit being exhausted. It will not be appreciated.

Once again, if you have not argued in front of a particular appellate court, we cannot stress how important it is to see it done first. Check to see if your court permits rebuttal in advance and, if so, if you have to request rebuttal prior to the opening of argument. Make sure you are seated on the correct side of the podium if one side is reserved for appellant versus respondent. When arguing, stay behind the podium and speak to the judges while maintaining good eye contact with not just the presiding judge, but all of the judges on the panel.

Advanced preparation is key to appellate argument, no matter what court you are in. The more comfortable you are with the specific rules and practices of your jurisdiction, the more time you can spent effectively drafting your brief and preparing for argument, which will make you a more successful appellate attorney.