Table of Contents

CHAPTER 1. PHILOSOPHY OF APPEALS: THE ART, SCIENCE, AND TACTICS OF APPELLATE ADVOCACY

- § 1:1 The organization of this treatise
- § 1:2 A checklist for the appellate advocate
- § 1:3 How appellate advocacy differs from trial advocacy and non-adversary settings—Generally
- § 1:4 —How appellate judges decide issues and cases
- § 1:5 —Depth of research into points of law
- § 1:6 —Making hard choices about questions on appeal
- § 1:7 The appellate advocate's library—Basic research tools and computer-based research tools
- § 1:8 —The lore and literature of advocacy

CHAPTER 2. STRUCTURE OF THE APPELLATE COURTS

- § 2:1 Courts of appeals: Establishment, staffing, choice among courts
- § 2:2 The Federal Circuit and choice of circuit

CHAPTER 3. POST-JUDGMENT ISSUES

- § 3:1 Positioning the case for appeal in the district court
- § 3:2 Bond, supersedeas, and stay
- § 3:3 Bail pending appeal in criminal cases
- § 3:4 Special problems in indigent cases
- § 3:5 Special problems (and special opportunities) when the United States is a party

CHAPTER 4. THE SCOPE OF REVIEW AND IDENTIFYING PRESERVED ERROR

- § 4:1 Identifying preserved error
- § 4:2 Scope of review
- § 4:3 —Error preservation
- § 4:4 —Waiver, forfeiture and plain error
- § 4:5 —Collateral attack
- § 4:6 —Harmless error
- § 4:7 Grounds for appeal and standards of review—Waiver in criminal and civil appeals

CHAPTER 5. STANDARDS OF REVIEW

- § 5:1 Grounds for appeal and standards of review—Generally
- § 5:2 —Civil case fact issues

- § 5:3 —Civil case legal issues
- § 5:4 —Civil case procedural issues
- § 5:5 —Criminal case fact issues
- § 5:6 —Criminal case legal issues
- § 5:7 —Criminal case procedural issues
- § 5:8 —Civil and criminal case evidence issues
- § 5:9 —Administrative agency cases
- § 5:10 —Tax court cases
- § 5:11 —Constitutional issues

CHAPTER 6. THE DECISION TO APPEAL

- § 6:1 Identifying preserved error
- § 6:2 How to decide whether to seek appellate review—The Investment decision
- § 6:3 The rules and risk of sanctions
- § 6:4 Positioning the case for appeal
- § 6:5 Settlement as an alternative to appeal

CHAPTER 7. WHAT IS APPEALABLE

- § 7:1 The constitutional and statutory basis of federal appellate jurisdiction
- § 7:2 The "Final Judgment Rule" in Civil Cases: 28 U.S.C.A. § 1291
- § 7:3 The "Final Judgment Rule": Adverse
- § 7:4 The "Final Judgment Rule": Documented
- § 7:5 The "Final Judgment Rule": Final
- § 7:6 The "Final Judgment Rule": Particular Orders
- § 7:7 The "Final Judgment Rule": Difficult Applications
- § 7:8 The "Final Judgment Rule": Death Knell Doctrine
- § 7:9 The "Final Judgment Rule": Attorney's Fees
- § 7:10 The "Final Judgment Rule": Practical Finality
- § 7:11 Final judgments—Defendant's Appeals in Criminal Cases
- § 7:12 —Defendant's appeals in criminal cases: Special Concerns
- § 7:13 —Defendant's appeals in criminal cases: Ripeness
- § 7:14 —Defendant's appeals in criminal cases: Sentencing
- § 7:15 Exceptions to finality rule—Collateral Orders in Civil Cases
- § 7:16 Exceptions to Final Judgment Rule—Collateral Orders in Civil Cases: Collateral Order Defined
- § 7:17 Exceptions to the final judgment rule—Collateral Orders in Civil Cases: Immunity Claims
- § 7:18 Exceptions to final judgment rule—Collateral Orders in Civil Cases: Discovery Orders
- § 7:19 Exceptions to the final judgment rule—Collateral Orders in Civil Cases: Sanctions and Withdrawals
- § 7:20 Exceptions to the Final Judgment Rule—Collateral Orders in Civil Cases: Privilege
- § 7:21 —Collateral Orders in Civil Cases: Other Orders
- § 7:22 —Collateral Orders in Civil Cases: Abstention
- § 7:23 —Collateral Orders in Civil Cases: Transfer, Forum, and Venue

- § 7:24 —Collateral Orders in Civil Cases: Bonds and Security
- § 7:25 —Collateral Orders in Civil Cases: Severance of Claims
- § 7:26 —Collateral Orders in Civil Cases: Review on Final Judgment
- § 7:27 —Collateral Orders in Civil Cases: Intervention
- § 7:28 —Collateral Orders in Civil Cases: Concluding Thoughts
- § 7:29 Exceptions to finality rule—Defendant's appeal of collateral orders in criminal cases
- § 7:30 —Defendant's appeal of collateral orders in criminal cases: Non-Merits Pretrial Orders
- § 7:31 —Defendant's appeal of collateral orders in criminal cases:
 Merits Orders
- § 7:32 —Defendant's appeal of collateral orders in criminal cases: Pre-Indictment Orders
- § 7:33 —Defendant's appeal of collateral orders in criminal cases: Other Orders
- § 7:34 —28 U.S.C.A. § 1292(a)(1): Grant or denial of preliminary injunction
- § 7:35 —28 U.S.C.A. § 1292(a)(1): "Practical Effect"
- § 7:36 —28 U.S.C.A. § 1292(a)(1): TRO's
- § 7:37 —28 U.S.C.A. § 1292(a)(1): Scope of Review
- § 7:38 —28 U.S.C.A. § 1292(a)(2): Receivership appeals
- § 7:39 —28 U.S.C.A. § 1292(a)(3): Admiralty appeals
- § 7:40 —28 U.S.C.A. § 1292(b): Appeals by permission
- § 7:41 —28 U.S.C.A. § 1292(a)(1): Appeals by Permission: Criteria
- § 7:42 —28 U.S.C.A. § 1292(a)(1): Appeals by Permission: Criteria Applied
- § 7:43 —28 U.S.C.A. § 1292(a)(1): Appeals by Permission: Procedure
- § 7:44 —Fed. R. Civ. P. 54(b): Partial judgment in case with multiple claims or multiple parties
- § 7:45 —Fed. R. Civ. P. 54(b): Multiple Parties
- § 7:46 —28 U.S.C.A. § 1292(a)(1): Partial Judgment
- § 7:47 —28 U.S.C.A. § 1292(a)(1): No Just Reason for Delay
- § 7:49 —18 U.S.C.A. §§ 3731 and 3742: Jeopardy, Dismissal, New Trial or Motion for Acquittal
- § 7:50 —18 U.S.C.A. §§ 3731 and 3742: Evidentiary Rulings
- § 7:51 —18 U.S.C.A. §§ 3731 and 3742: Bail Decisions
- $\S~7:52$ Appeals to the Court of Appeals for the Federal Circuit
- § 7:53 Review of United States Tax Court judgments
- § 7:54 Review in bankruptcy matters
- § 7:55 Other statutes conferring or denying appealability to particular orders
- § 7:56 Other statutes conferring or denying appealability to particular orders: Remands in Cases Removed to Federal Court
- § 7:57 Other statutes conferring or denying appealability to particular orders: Orders Concerning Arbitration
- § 7:58 Other statutes conferring or denying appealability to particular orders: Magistrate Judge-Decided Civil Cases

§ 7:59 Other statutes conferring or denying appealability to particular orders: Bail Decisions in Criminal Cases Other statutes conferring or denying appealability to particular orders: Direct Supreme Court Review § 7:60 Other statutes conferring or denying appealability to § 7:61 particular orders: Direct Circuit Court En Banc Review Review of administrative agency orders § 7:62 § 7:63 Pendent appellate jurisdiction § 7:64 Mootness § 7:65 Mootness: Examples § 7:66 Mootness: Capable of Repetition § 7:67 Standing to appeal

CHAPTER 8. EXTRAORDINARY WRITS: THE ORIGINAL JURISDICTION OF THE COURTS OF APPEALS

ALI	EALS
§ 8:1	Basis and background of writ practice
§ 8:2	Writ availability liberalized
§ 8:3	The newer approach
§ 8:4	Mandamus and prohibition in civil cases—General principles
§ 8:5	—Complex cases and novel issues
§ 8:6	—Discovery disputes
§ 8:7	—Transfer orders
§ 8:8	—Disqualification of judge or counsel
§ 8:9	—Constitutional issues
§ 8:10	—Identifying issues appropriate for review by extraordinary
	writ
§ 8:11	—Situations inappropriate for mandamus relief
§ 8:12	—Situations appropriate for mandamus relief
§ 8:13	*
0011	principles
§ 8:14	<u>.</u>
§ 8:15	<u> </u>
§ 8:16	
§ 8:17	How to seek or oppose a writ: General principles

CHAPTER 9. PERFECTING THE APPEAL

§ 9:1	Time for appeal
§ 9:2	Perfecting an appeal as a matter of right—Contents for notice of appeal, generally
§ 9:3	—Notice of appeal in civil cases
§ 9:4	—Notice of appeal in criminal cases
§ 9:5	Perfecting an appeal as a matter of discretion or permission— Petition for permission to appeal under 28 U.S.C.A. § 1292(b)
§ 9:6	—Bankruptcy appeals
§ 9:7	Perfecting an appeal as a matter of right or discretion—Tax court appeals

§ 8:18

—Drafting the writ

§ 8:19 —Opposing the writ

- § 9:8 Perfecting an appeal as a matter of discretion or permission— Habeas corpus cases § 9:9 Review or enforcement of administrative agency orders
- § 9:10 Cross-appeals and protective cross-appeals
- Bond, supersedeas, and stay—Revisited § 9:11

CHAPTER 10. MOTIONS PRACTICE IN COURT OF APPEALS

- § 10:1 Role of motions in appellate practice
- § 10:2 Informal motion practice
- § 10:3 Timing
- § 10:4 Motions decided by the clerk of the court of appeals
- § 10:5 Motions heard by a single judge
- § 10:6 Motions heard by panel of the court
- § 10:7 Prehearing conference
- § 10:8 How to write a persuasive motion
- § 10:9 When and how to oppose a motion
- § 10:10 Moving for voluntary dismissal

CHAPTER 11. THE RECORD OF AN APPEAL

- General overview of the Federal Rules of Appellate Procedure § 11:1
- § 11:2 Circuit-specific rules regarding the record on appeal
- § 11:3 The importance of assembling and transmitting the record
- § 11:4 Variations among circuits in record handling—Joint appendix
- § 11:5 —Deferred joint appendix
- § 11:6 —Record excerpts
- Digesting and indexing the record § 11:7
- § 11:8 Ordering the transcript
- § 11:9 Assembling the record in district court, tax court, or agency
- Appeals on agreed statement or when record is unavailable § 11:10
- § 11:11 Correction or modification of record
- Supplementation of record § 11:12

CHAPTER 12. THE BRIEFS ON APPEAL: TIMING AND CONTENT

- Function of the brief on appeal § 12:1
- § 12:2 Time limits for filing briefs
- The mechanics of brief-writing—The notebook approach to § 12:3 brief-writing
- —Using word processing and other computer programs in § 12:4 appellate practice
- § 12:5 —Assembling and printing the brief
- How to persuade judges—Rule-oriented versus party-oriented § 12:6 writing
- —Good writing is persuasive writing § 12:7
- Appellant's or petitioner's opening brief—Selecting issues and § 12:8 order of presentation
- § 12:9 —Statement of subject matter and appellate jurisdiction

	FEDERAL APPEALS JURISDICTION AND
§ 12:10	—Statement of issues presented
§ 12:11	—Statement of the case and statement of facts
§ 12:12	—Summary of argument
§ 12:13	—Argument on issues presented
§ 12:14	Appellee's or respondent's brief—Counterstatement of issues
§ 12:15	—Counterstatement of the case and counterstatement of facts
§ 12:16	—Arguing in defense of the judgment or order below
§ 12:17	Reply brief: When and what to file
§ 12:18	Special problems—Cross-appeals
§ 12:19	—Multiple parties
§ 12:20	Amicus curiae participation on appeal
§ 12:21	Informing the court about supplemental authorities
§ 12:22	Referring to unpublished opinions or orders in briefs
CHAI	PTER 13. ORAL ARGUMENT
§ 13:1	Benefits of oral argument
§ 13:2	Obtaining oral argument when the court of appeals rations it
§ 13:3	How the court of appeals schedules oral argument
§ 13:4	Obtaining additional argument time
§ 13:5	Preparing for oral argument—Research and study
§ 13:6	—Focusing on the panel that will hear the case
§ 13:7	—Making an oral argument notebook
§ 13:8	—Practicing the argument
§ 13:9	Effective argument strategy—Appellant's or petitioner's opening argument
§ 13:10	—Appellee's or respondent's argument
§ 13:11	—Rebuttal argument
§ 13:12	Special problems in multi-party and multi-lawyer cases
§ 13:13	En banc oral argument
§ 13:14	Arguing to a distant court by phone or internet
CHA	PTER 14. DECISION: JUDGMENT,
	DATE, VACATUR, AND REHEARING
§ 14:1	How the court decides after argument
§ 14:2	How the court decides non-argued cases
§ 14:3	Opinion, judgment, and mandate
§ 14:4	Interest, costs, and sanctions
§ 14:5	Vacatur
§ 14:6	Difference between rehearing and rehearing en banc
§ 14:7	Procedural steps before seeking rehearing: Stay of mandate, motion to recall mandate
§ 14:8	When and how to write a petition for rehearing
§ 14:9	When and how to write a petition for rehearing en banc
§ 14:10	How the court decides rehearing and en banc petitions
§ 14:11	Further review—Collateral attack

CHAPTER 15. APPEALS OF ADMINISTRATIVE AGENCY DECISIONS

- § 15:1 The difference between administrative proceedings and judicial proceedings
- § 15:2 Overview of the considerations affecting administrative appeals
- § 15:3 Appealable administrative decisions
- § 15:4 Perfecting the appeal
- § 15:5 Decisional process
- § 15:6 Further appeals

CHAPTER 16. SUPREME COURT REVIEW

- § 16:1 Practice before the Supreme Court
- § 16:2 Supreme Court jurisdiction
- § 16:3 Timing
- § 16:4 "Certworthiness"
- § 16:5 Processing certiorari petitions
- § 16:6 Drafting the petition for certiorari
- § 16:7 Responding to the petition for certiorari
- § 16:8 Reply by petitioner
- § 16:9 Amicus curiae practice

APPENDICES

- Appendix A. Federal Rules of Appellate Procedure
- Appendix B. Federal Rules of Civil Procedure 23(f), 46, 50, 51, 52, 54, 58, 59, 60, 61, 62.1
- Appendix C. Federal Rules of Criminal Procedure 30, 37, 38, 51, 52
- Appendix D. Crimes and Criminal Procedure, 18 U.S.C.A. §§ 3143, 3145, 3595, 3731, 3742; 21 U.S.C.A. § 848 (concerning capital case counsel and resources)
- Appendix E. Judiciary and Judicial Procedure, 28 U.S.C.A. §§ 1291, 1292, 1294, 1295, 1296, 1631, 1651, 1915, 2106, 2107, 2112
- Appendix F. Where to Appeal: The Twelve Regional Circuits and the Federal Circuit

Table of Laws and Rules

Table of Cases

Index