Appellate Practice
Tips and Strategies

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1. Should I appeal?

Remember the standard of review. Not every adverse trial court ruling is an easy appeal. Appeals from trial court verdicts and evidentiary rulings are deferential to the trial court and the jury. The appellate courts are courts of law, not fact. If you lose at trial and the case does not raise any legal issues that might tilt in your direction, and you are left with factual arguments, *i.e*., sufficiency of the evidence, your chances for victory on appeal are relatively slim. Appellate courts are deferential to the factfinder's determination of the evidence at trial. But if the appeal challenges a bad jury charge or the trial court's erroneous application of a legal principle, the case is ripe for appeal. Trial courts have zero discretion to get the law wrong. Appeals are won and lost on the standard of review.

Fortunately for the appellate practitioner, most civil appeals involve challenges to the grant of summary judgment and motions to dismiss. The standard of review from these appeals is much more favorable to the losing party: *de novo*, a Latin phrase that, in the legal world, means the appellate court reviews the record with a fresh eye, without deference to the trial court's resolution of the issues, including factual determinations. Basically, a do-over in a different court. The following language from the Second Circuit is a useful guide for summary judgment appeals:

> "In determining whether the moving party is entitled to judgment as a matter of law, or whether instead there is sufficient evidence in the opposing party's favor to create a genuine issue of material fact to be tried, the district court may not properly consider the record in piecemeal fashion, trusting innocent explanations for individual

> strands of evidence; rather, it must 'review all of the evidence in the record.'" "And in reviewing all of the evidence to determine whether judgment as a matter of law is appropriate, 'the court must draw all reasonable inferences in favor of the nonmoving party,' 'even though contrary inferences might reasonably be drawn.'"
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> "Summary judgment is inappropriate when the admissible materials in the record 'make it arguable' that the claim has merit, for the court in considering such a motion 'must disregard all evidence favorable to the moving party that the jury is not required to believe.'"
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> Relatedly, "[w]here an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. . . . In sum, summary judgment is proper only when, with all permissible inferences and credibility questions resolved in favor of the party against whom judgment is sought, 'there can be but one reasonable conclusion as to the verdict.'"

Kaytor v. Elec. Boat Corp., 609 F.3d 537, 545-46 (2d Cir. 2010).

If you decide to appeal, your first priority is filing the notice of appeal on time. Courts are loath to grant you more time for this filing, and in the federal system, a timely notice of appeal is jurisdictional, which means the appeal will be dismissed even if opposing counsel waives a timeliness objection. And, while you have 30 days to file the notice of appeal in most courts, file it earlier than that, bearing in mind that (1) 30 days from January 15 is not February 15 (since January has 31 days, which makes February 15 the 31st day); (2) the 30th day may greet you with a horrifying glitch: the ECF system may not be working that day; (2) your hard drive may have some unanticipated problem; (3) your Internet connection may be down (due to a storm or some malfunction); or (4) there may be a password problem in accessing the ECF system. If something can go wrong, it will go wrong. As soon as you receive an adverse ruling that qualifies for possible appeal, start thinking about whether to appeal and, if that is your option, get your client's authority to file the notice of appeal as early as possible. Those 30 days can run quickly if you turn your focus to something else following the ruling.

2. Read the appellate court's rules of practice.

Every court has its own set of rules. Even the four Appellate Divisions in New York have variations on the rules. And the State Court of Appeals is a different world entirely. The Second Circuit also has its own way of doing things. Examples:

a. In the Appellate Division, you must include certain court forms in the brief and appendix. While they are simple to fill out and require limited effort, these forms are not well-known to less-seasoned practitioners, and the appeal will be rejected if you omit these materials. That means you will have to re-work the brief and/or record on appeal to correct the problem. The case will not be dismissed outright, but it will delay resolution of the appeal and require you to stop what you are doing to satisfy the court that your paperwork complies with the rules. The Second Department requires you to physically subpoena the lower court record to the Appellate Division. The First and Second Departments also do not let you know about the oral argument date. You have to check their websites religiously for that information.

b. In the Second Circuit, you have to set the briefing schedule, which generously offers you 91 days to perfect the appeal. If you are unaware of this requirement and fail to submit a briefing schedule, the court will set a schedule for you and only give you 45 days. In that court, appeals from the grant of Rule 12(b)(6) dismissals are placed on the expedited calendar, giving you only 45 days to perfect the appeal. In my experience, the court will entertain your motion to remove the case from the expedited calendar if the appeal is complex or your work schedule makes it difficult to meet that short deadline.

c. Most PDF submissions must be text-searchable and some have to be "bookmarked." In the Appellate Division, Second Department, you also must link the table of contents to the cases you cite in the brief, and that court even requires you to include copies of the cases as an appendix to your brief. This is time-consuming and represents yet another reason to start working on the brief early and not wait until the last minute.

3. Putting together the record.

It is understandable that, upon receiving an adverse ruling from the trial court, you want to start writing the appeal right away and attack the trial court's reasoning. But hold off on that for now and focus on compiling the record. This is a thankless and mundane task, but you are better off proceeding in this sequence. One reason is that when you are drafting the appellate brief, you will need to cite to the factual record. Annotating the brief with a fully-prepared record on appeal is much easier while you are writing the brief. Having the record in front of you ensures that your factual assertions are more accurate, as you are reviewing the record as you work on brief-drafting. Your memory of what facts are in the record may be fallible, especially if you have not reviewed or studied the facts for several months. Never assume the record contains a particular fact or line of testimony. Having a fully-prepared record on appeal, with the pages properly numbered in sequence, makes it far more likely that your appellate facts will be accurate. Better to know what is in the record before you start writing the brief than to run through the record after you draft the statement of facts and discover that some of the factual assertions you were relying upon in your appellate legal arguments were not entirely accurate.

The printing companies will solicit you for the record on appeal. These services do a good job, but they are very expensive. You can save yourself and your client money by doing this work on your own. For this, learn how to work with the Adobe PDF program, which allows you to combine and manipulate PDF documents into a single record on appeal and then Bates-stamp the numbers consistent with the requirements of the appellate court. Again, this work is mundane and boring, but getting this task out of the way allows you to focus on the most important part of the appeal: brief writing.

4. Brief writing.

In New York, the appellate courts still hear oral argument in most cases. But most of the time, the brief will determine whether you win or lose the case. In my experience, the appellate court has a sense of where it is going with the appeal even before you appear for oral argument. The importance of a strong brief cannot be overstated. The following steps are recommended:

a. Start working on the brief early. Do not wait until the last minute. Last minute writing is never readable or persuasive, and you will not have time to make good edits or rework the arguments. An early start also allows you to think about the issues you want to raise on appeal. Which brings us to:

b. Issue spotting. In writing the brief, do not raise every issue that comes to mind. You may question any number of the trial court's rulings and orders. But, in most cases, a five-point brief is bulky, and the appellate court will assume that issues four and five are weaker than issues one through three. Go with the strongest issues. If you cannot prevail on the strongest issues, you will not prevail on the weaker issues. An appellate judge once wrote that if you raise too many issues on appeal, you are essentially telling the appellate court that the trial court lost his mind. But judges do not really lose their minds. Use discretion and run with your strongest arguments.

c. Brief writing. Appellate briefing is quite different from trial work or oral argument. Most judges are very good writers, and their opinions are usually devoid of typographical errors, invective, stylistic inconsistencies, poor case citations, and unnecessary verbiage. Give the appellate court a brief that meets the judges' standards. When I write a brief, I am trying to show the appellate judges what their opinion might look like.

The most important rule in appellate brief writing is clarity, clarity, clarity. Each sentence, and each paragraph, should be easy to read so that the judges will not have to read it twice to understand your point. Long sentences are a no-no. So are long paragraphs. Remember that the judges and their law clerks are overworked and will be reading your brief much more quickly than you think. Clear writing makes it easier for the judges to run through the brief, even if the brief is a long one.

d. In drafting the brief, think about your credibility and how the judges will view you as the brief-writer. They are judging the case and they are judging you. Do not write a brief that prompts the judge to take another look at the cover to see who wrote this garbage. Credibility means filing an honest brief that gives the court what it needs to decide the case. Silly arguments, *ad hominem* attacks, factual assertions that find no support in the record, poor formatting, typographical errors, and inadequate case citations will only raise eyebrows but

do nothing to advance your arguments or help your credibility. Ensuring this may require you to advise your client that certain arguments will not succeed on appeal, or that the client's suggestions are counterproductive.

e. Stay on top of legal developments. Attend CLE's on case law updates, read law blogs/websites, or follow the court to see what the judges are up to on particular legal issues. On many occasions, the appellate court, and even the Supreme Court, issues a ruling that is directly on-point to an issue that I am briefing at that moment. That ruling may help or hurt you, but either way it is good to know that precedent was just handed down, either to exploit it or to distinguish it.

Avoid clutter. This is how I do it:

1. Limit the footnotes to a handful per brief. You are not writing a law review article or some other scholarly work. Footnotes are for points that cannot be placed within the body of the brief, such as a long Internet URL citation or a quick aside. In my view, footnotes are not the place for legal argument. If you have a quick point that you want to make, incorporate it into a short subsection of the brief. I wonder if judges even bother reading long footnotes. Maybe they skim them, but long footnotes are a serious distraction, because once you are done reading the footnote, you have to reacquaint yourself with that portion of the brief again. If the judge did not think the footnote was even necessary, having to re-read that portion of the brief will only annoy them.

2. This is certainly a matter of style, but secondary case citations are unnecessary, in my view. They were useful prior to Westlaw and Lexis, when judges had access to some but not all caselaw volumes. In New York, the state-issued books had the official case citations, *i.e.,* 44 N.Y.2d 496 (1982). The West-published books gave us the secondary citations, *i.e.*, 486 N.Y.S.2d 27 (1986). If the judge had one of those books but not the other, then you had to offer both citations. That is no longer necessary because judges do not refer to books anymore. They use Internet research, like Westlaw and Lexis. Use the official citations. Secondary citations clutter the brief and the reader will struggle to complete the paragraph with multiple citations to the same case. And don't bother with "cert. denied." When the Supreme Court denies certiorari, that

decision has no precedential value and the "cert. denied" simply offers more unnecessary clutter.

3. Avoid string cites, *i.e.,* multiple citations for the same legal proposition without summarizing the holdings in those cases. If you articulate a non-controversial legal proposition, *i.e.*, the straightforward test for negligence or breach of contract, a single appellate ruling binding in your jurisdiction will do just fine. Not five cases that say the same thing.

4. Under no circumstances should you employ *ad hominem* attacks on counsel or the trial court or anyone else. Judges don't care how you feel about opposing counsel. Win the case with good arguments, not personal attacks. The appellate court will think less of you if you demonstrate such anger in the brief. If you hate opposing counsel, the best way to show them up is through good writing and persuasive arguments.

5. A lengthy standard of review in the brief may be unnecessary. The appellate court knows the standard of review. Keep it as brief as possible. I have seen briefs devote page after page to the summary judgment standard. Or the Rule 12(b)(6) standard. I wonder if the judges just skip over that portion of the brief and get right to the arguments. Of course, a standard of review is required in many briefs, especially in the Second Circuit, so find a way to make it as concise as possible.

6. The "introduction" or "preliminary statement" portion of the brief is just that, a preview of the arguments that will follow, like opening statement at trial with a twist of summation thrown in for good measure. I have seen briefs devote multiple pages to this. But then the court reads the same thing again in the summary of argument (if required under the court rules) and again in the formal argument. A good preliminary statement or introduction is a work of art, and remember that it's the first thing the judges read when they pick up the brief. A good start to the brief makes a good impression on the court. Think hard about how you plan to write it.

7. One last point about editing: if multiple attorneys are writing and editing the brief, make sure that one person does the final read-through. This ensures the brief reads like one person wrote it, and that it was not written by committee.

Each writer and editor has their own style, and conflicting styles during the brief are distracting. I once read a thorough discussion about the Supreme Court briefs in the Obamacare appeal that the Court resolved in 2012. It was clear that the Obama administration submitted a brief-by-committee. The attorneys challenging Obamacare submitted a brief that probably had multiple authors but was edited by one person; their brief was a much better read

More tips for strong brief-writing:

8. The most important part of the brief is the statement of facts. The appellate court knows the law; after all, those judges created the law through prior judicial opinions. The judges do not know the facts. Structure the facts in a manner that makes it clear, from reading that portion of the brief alone, why you deserve to win. A compelling statement of facts will start the brief in your direction. And every fact in the brief, statement of facts or otherwise, should be annotated by citation to the record, even if you are asserting that fact again later in the brief, such as during the legal argument. Nothing annoys a judge more than having to search around to verify that the fact is supported in the record.

9. Do not write a defensive brief. If you get a bad ruling from the trial court, your instinct might be to open your arguments with an attack on what the lower court did. But that is a defensive posture. Divide the argument into two parts: the first section will address, in an affirmative manner, why you have a good case, *i.e*., plaintiff meets all the elements of the cause of action and defendant did not produce enough evidence to support judgment in its favor. The second portion of the brief is then devoted to what the lower court did wrong and why the appellate court should reverse.

10. Likewise, if you are the appellee or respondent, do not write a defensive opposition brief. Start your brief off with affirmative arguments about why you have a strong case, and why you prevailed in the lower court. The second portion of argument should respond to the appellant's points and why their arguments are not good enough for reversal. There is a story I read in the American Bar Association's Litigation magazine many years ago. It involved someone working in the Solicitor General's office. That office represents the federal government in the U.S. Supreme Court. The Solicitor General asked one of his assistant lawyers if he had started writing the opposition brief in a case where

the Solicitor General was defending a lower court ruling. The assistant said, "I have not started writing the brief. We have not yet received the appellant's brief." The Solicitor General responded, "What's the problem, don't we have a case?" The point was the assistant was able to start writing the brief even without receiving the appellant's brief, because he was still able to write the argument in favor of the U.S. Government's position.

11. Use active verbs. Any appellate practice seminar or treatise will emphasize this, but it always bears repeating. The passive voice is weak. The active voice is strong. "Plaintiff entered the meeting room to find three male supervisors sitting at the table," is much better than "three male supervisors were sitting at the table when Plaintiff entered the meeting room."

12. As for case citations, here is my stylebook. For any legal proposition, if you can help it, cite from the appellate court that is binding in your jurisdiction. If you are in the Second Circuit, cite a Second Circuit case, and so on. Do not cite a district court case for a proposition that can be found in a Second Circuit ruling. If there is no Second Circuit ruling on point, use cases from another Circuit or a district court ruling from the Second Circuit, but then cite the decisions that that non-binding ruling relies upon; that technique shows that the case you are citing is not the only authority on that issue, or it lets the appellate court know from where the non-binding ruling is drawing inspiration. I see way too many S.D.N.Y. cases in Second Circuit briefs for well-settled propositions. While that district court ruling may be accurate, you are still forcing the court to Shepardize it to ensure it remains good law, and if the district court ruling is not well-known (and most are not), the judge will have to pull up and read the case to ensure that it's a reliable authority and not *dicta*. Bear in mind that appellate courts rarely cite trial court rulings in support of their holdings; there is a reason for that: an appellate precedent is more proper.

13. Devote as much time to editing as possible. For a 40-50 page brief, editing may take most of the day, especially if I edit by hand and then incorporate the changes into the computer. I once had a creative writing instructor tell us to edit our work as if we had to pay for each word. Remember what I said about clarity, clarity, clarity? Also remember: concision, concision, concision. When I edit a brief, I am often surprised at how much repetition I find in the draft. While editing, remember you do not have to repeat yourself in the brief. At least three

or four people in the judicial branch are reading it: the judge and their two or three law clerks. On appeal, with a three-judge panel, that's 10 or more people reading the brief. If your point is in a well-written brief, the judge will know about it. If you make the same point two or three times, the judge will think you regard them as stupid. I was once at oral argument in a case and the judge told a repetitive lawyer, "you only have to say it once, and I heard you the first time." The same philosophy applies in brief-writing. And remember what Stephen King said about adverbs: the road to hell is paved with them. Adverbs are often the first candidate for omission during my editing process.

One veteran appellate judge gave her perspective on lengthy briefs, and it bears repeating here:

> The more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes. In my 19 years on the court we have by judicial fiat first shortened main briefs from 70 to 50 pages, then put a limit of 12,500 on the number of words that can go in the brief, and in complex, multi-party cases our staff counsel threaten and plead (we get into the act ourselves sometimes) with co-counsel to file joint or at least nonrepetitive briefs. It's my view we can, should and will do more to stem the paper tidal wave. Repetition, extraneous facts, over-long arguments (by the 20th page, we are muttering to ourselves, "I get it, I get it. No more for God's sake") still occur more often than capable counsel should tolerate. In our court counsel get extra points for briefs they bring in under the 50-page limit. Many judges look first to see how long a document is before reading a word. If it is long, they automatically read fast; if short, they read slower. Figure out yourself which is better for your case. Our politicians speak often of judicial restraint; I say let it begin with the lawyers whose grist feeds our opinion mills.

Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 9, 10 (1999).

The best way to edit is to put the brief aside for a few days or even a few weeks (time permitting) and sit down with the brief again and an editing pencil and read the brief carefully without any distractions. You will be surprised how

the brief you once thought was well-written actually requires multiple edits, not only for spelling and grammar but for organizational structure. Yet another reason to get started on the brief well in advance of the deadline.

An overlooked component of editing is stylistic consistency. If "plaintiff" is capitalized on page 4, it should be capitalized on page 24. If you like to capitalize "Court," then capitalize that word throughout the brief. Again, write the brief like the judges write their opinions. They rarely violate their own stylebook. Adopt a stylebook of your own and stick to it.

As you write and edit the brief, remember this: the appellate judges are high-functioning people. Even if you dislike a given judge's legal philosophy or the President who appointed them, these judges have professional backgrounds that required them to submit professional briefs. The United States Attorney's office files excellent briefs. The state attorneys general also submit professional briefs that omit typographical and other careless errors. The judges also often supervised brief-writing when they were practicing lawyers. They would never have written a brief at the last-minute or submitted one with careless errors. Meet the judges at their level.

14. Reply briefs should be surgical in nature: respond to what the appellee asserts in their brief, all the while reiterating your main points. At the same time, the reply brief should not look like the opening brief again. This takes self-restraint, as you are striving to remind the appellate court of the strengths of your case without excess repetition. But the main effort is to respond to the appellees' argument. I see the reply brief as a prelude to oral argument. That is the document that addresses all the contested issues. When I prepare for oral argument, I often start by reading the reply brief. In many ways, a good reply brief is the strongest summary of the issues on appeal.

Do not raise new arguments in the reply brief. The appellate court will ignore those arguments and deem them waived if they were not first presented in the opening brief. You can cite additional cases in the reply to reiterate your legal arguments, but don't even think of adding a cause of action or an entirely new legal concept in the reply. That new material will stand out like a sore thumb and the court will think you are an amateur.

5. Oral argument

As I have already stated, many cases are probably decided prior to oral argument. By the time oral argument rolls around, the judges will have absorbed your case and gone through the record. They have law clerks who assist in that regard. At the Appellate Division, First Department, the presiding judge sometimes tells the lawyers to start off with their best legal arguments and that they know the cases thoroughly, "perhaps even more thoroughly than you would like." That line always gets a laugh, but the judge is correct. I am always amazed at how well-prepared the judges are for each oral argument, even in the Appellate Divisions, which sometimes hear 15 cases a day.

One judge on the Second Circuit said years ago that oral argument has never changed his mind. Others on that court have said oral argument can make a difference. You should prepare for oral argument like it can make a difference. My belief is that oral argument can make a difference, especially in close cases, and a good oral argument may convince and remind a sympathetic judge that your case really has merit.

Here is an example of what can happen at oral argument. I lost the appeal but I was able to see with my own two eyes how argument can affect the court's ruling. I was waiting for my turn at the podium. I had unknowingly sat next to law clerks for one of the judges that morning. One of the clerks had a stack of papers on her lap. I looked over at the papers and saw that the court ruling in my case had already been written and that I had lost the appeal! I glanced over a few seconds longer and saw the reason why I had lost. At argument a few minutes later, I focused heavily on that reasoning without letting the court know that they had already adopted that reasoning in ruling against me. I ended up losing the appeal -- but I lost for different reasons than the ones set forth in the draft ruling.

The lawyer who is most familiar with the lower court record should argue the appeal unless the appeal solely focuses on a legal issue that you are best capable of handling. The reason for this is that most appellate arguments focus on the facts, not the law. I rarely observe oral arguments focusing on what the precedents stand for. The appellate courts, in my experience, are usually focusing on the record, what the evidence means, and what reasonable inferences may be drawn from that record. Whoever argues the appeal should know the record cold.

At the same time, oral argument is not the trial. There are no appeals to emotion. The judges will expect you to get right to the point. They don't need background evidence. And they won't care how angry you are about the lower court ruling. So your opening comment may be something like this: "Your Honors, this court should reverse the grant of summary judgment because the jury may find that plaintiff was falsely arrested, without probable cause or any reason to believe that he committed any crime." Then proceed to your strongest factual point or make brief mention of a relevant legal principle before expounding on your factual arguments.

Your opening comment at the podium about your case may be the last time the court allows you to speak without any obstructions. Before you know it, the judges will start asking questions. This may seem like stream-of-consciousness theater, as three (or more) judges will have their own focus. That will require you to jump around from issue to issue. This can be disorienting. But that's how it goes at oral argument. This is why thorough preparation is important.

How to deal with hypotheticals? They always seem like a trap that can doom the case if you give the wrong answer. Don't remind the judge that she is asking a hypothetical. They know it's a hypothetical, and they ask these questions to see how far your logic will take the case.

You may also have to concede a few points. No case is perfect. Conceding a point may give you credibility with the court. Resisting an obvious concession may hurt your credibility, especially if the court knows that you are aware that a concession on some point is in order.

How do I prepare for argument? I prepare a notebook of about 4 or 5 pages with talking points and citations to the record. The points are in logical order and I edit these typewritten notes during the week prior to argument so it becomes more concise and I know where these points are in the outline. The pages are tabbed by issue so I can flip to the right page when a judge asks a particular question and the answers are in front of me. Of course, you will have no idea what the judges will ask, and they always seem to ask a question that no one anticipated. You will have to think on your feet to answer those unanticipated questions. But if you prepare thoroughly, you should know what is coming and what constitutes the best answer.

Another way to prepare for oral argument, especially if you are not familiar with the appellate court or the panel that will hear your case, is to attend an oral argument a few days prior to your argument to get a feel for the courtroom and the judges' style. Each judge is different. Many are pleasant and ask questions respectfully. Some are unpleasant. It is always a shock to encounter a difficult judge. Prior to argument, it is worth the effort the call other lawyers who know the court or have insight in the particular judges.

The judge's questions usually focus on what is important to them. You should welcome these questions. Listen carefully to what the judge wants to know, and provide an honest answer. This may seem obvious, but in your advocacy mode, you may try to push the answer beyond any reasonable boundaries. Remember that, in all likelihood, the judge is asking the question because they need to know the answer. Don't lead them astray.

6. Lower court strategies that will help you on appeal.

a. Make sure you have a complete record on the motion for summary judgment in the district court. If your case someday finds its way to the appellate court, you cannot add to the trial court record in preparing the record on appeal. I have seen missing deposition pages or exhibits that were inadvertently omitted from the summary judgment motion, pieces of evidence that were cited in the summary judgment brief that cannot be cited on appeal. There is a way to supplement the record so you can have a full record on appeal, but that requires a ruling from the trial court, and such motion practice is time-consuming, annoying, and may not even be successful. If the latter result befalls you, the appeal will be weaker because you cannot cite to all the relevant evidence. The best way to ensure the lower court record is sufficiently comprehensive is to prepare that record long in advance of the motion deadline. Someone will have to go through the brief and affirmations to ensure that all the exhibits cited therein are put before the trial court on the motion. That is a time-consuming and mundane chore, but doing it wrong cannot be an option if the case reaches the appellate court. And remember that any case can reach the appellate court. You may think your case is so strong that no judge in their right mind will dismiss it, but five months later, you may find yourself with a negative decision. This happens from time to time.

b. Many appeals rely on deposition testimony. Remember that our clients sometimes do not give comprehensive testimony at deposition, either because the opposing lawyer did not ask precise questions, or the client did not give a full answer. While incomplete answers can be fleshed out in an affidavit, preparing such an affidavit in connection with the summary judgment motion will constitute one of the many tasks on your plate in handling that motion, and it may be overlooked or given a low priority, or done at the last minute. Also, opposing counsel and the judge will scrutinize the summary judgment affidavit to ensure it is consistent with the deposition testimony. (If the affidavit contradicts the deposition testimony, the court will not consider that portion of the affidavit). The better option, in my view, is to the ask your client a few questions at the end of the deposition to ensure the record really has the testimony you need to avoid summary judgment or to prevail on appeal in the event summary judgment is granted against you. Appellate courts sometimes scrutinize deposition testimony more carefully than the juries scrutinize your client's sworn testimony at trial. An incomplete answer, or one that is not clear as to your client's recollection, could be a killer. I once had an oral argument where the judges and I obsessed over a few deposition answers to determine if our client had a case. Make sure the sworn testimony contains the facts you need to prevail in the event the case reaches the appellate court.

c. If your case makes it trial, ensure that you are not waiving anything. Preserve your objections, and submit the jury instructions that you think will help you (and articulate a non-conclusory objection during the charge conference if the trial court rejects a particular jury charge). If you believe you are entitled to judgment as a matter of law, assert that motion during trial. Defendants usually seek this relief. In federal practice, it is not enough to simply ask the trial court to dismiss the plaintiff's case mid-trial; you must provide a comprehensive argument during trial in support of that relief. The trial judge may not want to hear an extended argument on this point, but the appellate courts require it. Many post-trial challenges to the plaintiff's verdict fail because defense counsel did not preserve their client's rights under Fed. R. Civ. 50(a), which lays out the rules governing judgment as a matter of law. If you challenge the jury instructions or seek JMOL for the first time on appeal, the standard of appellate review is "manifest injustice," which means the trial was infected by colossal judicial error. Such appellate arguments almost never win.

d. Some cases do not reach discovery because the trial court dismissed the complaint under Rule 12 or the state-law equivalent. In federal practice, the Supreme Court revised the standard of review for motions to dismiss in *Ashcroft v. Iqbal*, 556 U.S. 622 (2009), which requires the plaintiff to assert a plausible, nonconclusory claim. In the past, it was sometimes enough to recite the elements of the claim. Now, under *Iqbal*, to avoid dismissal, you often feel as though the complaint must read like a summary judgment brief. Trial courts frequently dismiss the complaint because it advances conclusory allegations. That was not commonplace pre-*Iqbal*. The best way to avoid this, and to improve your chances for success on appeal in challenging such dismissals, is to put as much meat on the allegations in the complaint as possible.

7. I lost the appeal, now what?

You win some, you lose some. Losing is terrible, but enduring the shock of losing still means you have some decisions to make. Should I move for re-argument? What about *en banc* review? If you are in the state system, is an appeal to the state's highest court worth the effort?

Appellate courts are not inclined to grant a motion for reconsideration or reargument. I recently had one case where the Appellate Division, First Department, granted a reargument motion to clarify the ruling, but the appellee still lost the appeal.

Rather than move for reargument, consider seeking review from the state's highest court. In New York, you can ask the appellate court to certify the case for view by the New York Court of Appeals. If that effort fails, you can still petition the New York Court of Appeals for the same relief. Such a petition is not expensive, and you can format the petition in your office without hiring a professional printer (which you must do for a petition to the U.S. Supreme Court). Your best bet is to show that the different appellate divisions around New York have issued competing rulings on the same issue and that the Court of Appeals must take on the case to iron out these distinctions. Or you can argue that the appellate ruling is so incorrect or illogical that the Court of Appeals must take the case simply to set the issue straight. I once filed a petition with the Court of Appeals even without a split in the four Appellate Divisions, but the Court of Appeals, to my surprise, accepted the case anyway because the First and Second

Departments were holding firm on a nonsensical pleading rule that the Court of Appeals ultimately rejected unanimously.

In the federal system, remember that the Second Circuit almost never hears cases *en banc*, which involves all active judges on the court hearing the case. That court grants *en banc* review maybe every other year, and only for the most ground-breaking, compelling legal issues. Routine issues are almost never heard *en banc*. Other circuits are more open to *en banc* review, but the Second Circuit is not one of them. An *en banc* petition may allow you to vent your frustrations to the Court of Appeals, but they most likely will not grant the petition. That is simply the culture of the Second Circuit.

You can always submit a certiorari petition with the Supreme Court, but remember this: (1) the Court only hears about 75 cases per year, and many of them are criminal cases, so its civil docket is even more limited, (2) you have to identify a split in the circuits on the identical legal issue (we call them "circuit-splits"), and (3) the printing and formatting requirements may render a certiorari petition cost-prohibitive. If you think you have a cert-worthy issue but do not have the time or the money to research circuit splits or write a comprehensive certiorari petition, consider calling one of the law school clinics that maintain a Supreme Court practice, where they take on worthy cases without charge (on condition that they will write the brief and argue the appeal in the Supreme Court). Remember that certiorari petitions often look nothing like the appellate brief because the main focus is demonstrating a circuit split. If the Supreme Court decides to hear the case, your second round of briefing will cover the merits of the appeal.