Appellate Practice

Litigation Basics

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Meet the Faculty

Panelists

Timothy Anzenberger - Adams and Reese LLP

Jeff Leon - Karon LLC

Scott H. Bernstein - Scott H. Bernstein LLC

Max Stein - Maxson Mago & Macaulay, LLP

Moderator

Steven Reingold - Saul Ewing LLP

About This Webinar

Appellate Practice

- When is an appeal permitted and when should a party take one?
- What rules and procedures govern appellate practice and how can a party best avoid technical and procedural mistakes?
- How are appellate briefs different from those filed with the trial court and what are some keys to making them successful?
- And how can a party best prepare for appellate oral argument?
- This webinar explores these questions and more with a panel of experienced appellate litigators.

About This Series

LITIGATION BASICS 2025

- This webinar series is one of several series that Financial Poise designed specifically for attorneys who are just starting to get involved in civil litigation, or who could use a refresher on some litigation fundamentals.
- The purpose is to introduce you to different components & phases of litigation:
  - ➢ Basic rules of civil procedure & evidence
  - ➢ Dispositive motions
  - ➢ Through trial
  - ➢ Appeal & post-judgment matters

Episodes In This Series

1. TROs and Preliminary Injunctions
   Premiere date: 1/28/25
2. Dispositive Motions
   Premiere date: 2/25/25
3. Discovery Practice
   Premiere date: 3/25/25
4. Anatomy of a Trial
   Premiere date: 4/24/25
5. Enforcement: Post-Judgment Proceedings & Collections
   Premiere date: 7/8/25
6. Appellate Practice
   Premiere date: 7/22/25

Episode #6
Appellate Practice

Each Financial Poise Webinar is delivered in Plain English, understandable to investors, business owners, & executives without much background in these areas, yet is of primary value to attorneys, accountants, & other seasoned professionals. Each episode brings you into engaging, sometimes humorous, conversations designed to entertain as it teaches. Each episode in the series is designed to be viewed independently of the other episodes so that participants will enhance their knowledge of this area whether they attend one, some, or all episodes.

Appellate Practice

- Nuts and bolts
- Appellate briefing
- Oral argument

Appellate Jurisdiction

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- Typically predicated on “final judgment” in district court
- Requires disposition of all claims involving all parties
- “Final judgment” is separate docket entry by clerk of district court

Appellate Jurisdiction *cont'd*

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- "Interlocutory" appeal = appeal prior to final judgment
- Allowed by 28 U.S.C. § 1292
- Interlocutory appeals as of right:
  - Order granting, denying, modifying an injunction
  - Order appointing or refusing to wind up receivership
  - Certain admiralty cases
- Interlocutory appeal on certification from district court that case involves "controlling question of law as to which there is substantial ground for difference of opinion" and immediate appeal may "materially advance the ultimate termination" of case
  - Requires approval from appellate court
  - District court's § 1292(b) finding does not stay litigation without separate order

Appellate Jurisdiction *cont'd*

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- Fed. R. Civ. P. 54(b) – allows entry of final judgment on some, but not all, claims, when there is "no just reason for delay"
- May arise in cases with defaulting defendants
- District court must expressly find "no just reason for delay" – analyzed by balancing test weighing needs of parties against judicial efficiency
- Appellate courts do not like having to hear cases multiple times; may scrutinize Rule 54(b) findings

Filing an Appeal

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- Done by filing Notice of Appeal with district court and paying fee (which district court will forward to appellate court)
  - Notice must identify party taking appeal and designate judgment or order being appealed from
- Must file within 30 days from entry of final judgment
- Time may be extended by motion
- Appellant's counsel must file Representation Statement per Fed. R. App. P. 12(b)
- Staying enforcement of judgment may require posting a bond (Fed. R. App. P. 8); bond may also be required to cover costs of appeal (Fed. R. App. P. 7)

Record on Appeal

- Per Fed. R. App. P. 10(a), record automatically comprises all papers and exhibits filed in district court and the “transcript of proceedings,” if any

- Parties must order any unfiled transcripts (e.g., district court motion hearing) and add to record

- District court clerk transmits record to appellate court but appellant responsible for ensuring transmittal

- CHECK CIRCUIT RULES for particular procedures and variations

Motions

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- Governed generally by Fed. R. App. P. 27 and Circuit Rules
- Substantive motions (most commonly, a motion to dismiss for lack of appellate jurisdiction)
- Motions regarding stay or injunction pending appeal (must typically be filed in district court first – see Fed. R. App. P. 8)
- Motions seeking additional pages or time on briefs typically granted within reason; research circuit practice if it is an unfamiliar circuit

Appellate Briefs – Nuts and Bolts

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- Numerous key technicalities set by circuit rules
- These include length, font, formatting, cover pages, tables, etc.
- May also include required sections, as well as corporate disclosure form
- Consider retaining firm that specializes in formatting and filing appellate briefs to ensure compliance with applicable rules
- Also check circuit rules re: courtesy and service copies

Appellate Briefs – Question Presented

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- Should be non-argumentative and as short as possible while referencing governing law and key facts
- Put in question form beginning with verb ("does," "is") or "whether"
- Put law first if possible ("Does the First Amendment permit . . . ")
- Carefully calibrate amount of factual detail – need enough to make question more than meaningless abstraction but not too much to render question unreadable; typically put facts after question and legal framework, sometimes introducing them with "when" or "where"
- Use separate questions presented for each legal issue or finding being appealed

Appellate Briefs – Statement of Facts/Case

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- May include separate sections for procedural history and factual background; check circuit rules
- With few exceptions, follow strict chronological approach
- Cite record (using format required by circuit rules) for every fact described
- Be persuasive (e.g., emphasize helpful facts, enforce theme) but not argumentative; must be credible
- Be concise and engaging – tell your story and avoid detours and needless detail
- Use neutral-sounding headings to "signpost" story (avoid going more than 4-5 pages without a new heading)

Appellate Briefs – Summary of Argument

- Do more than just repeat headings
- Summarize and connect arguments as simply as possible
- Do not include any points not in argument section
- Draft after argument section is complete

Appellate Briefs – Argument

- Lead with strongest argument if possible

- Each argument gets its own section, with subsections used to separate subsidiary points

- Use strict outline structure (e.g., no “A” without at least a “B,” etc.)

- Headings should be concise but substantive – neither just a statement of the topic (e.g., “Reasonable Reliance”) nor a generic (e.g., “The Complaint does not state a claim.”)

Appellate Briefs – Argument *cont'd*

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- For each primary argument, use IRA(C): Issue, Rule, Analysis, and, if appropriate, Conclusion
- Almost no reason to deviate from this approach; it tracks how courts understand and resolve legal disputes
- "Issue" may be contained/reflected in heading, but consider sentence or two right below heading to fully set up fight, especially if argument has sub-parts (e.g., "Corpco says it cannot be vicariously liable on Counts I-III. In fact, as explained below, (a) Corpco is vicariously liable under Illinois law; and (b) RICO imposes no additional barriers to vicarious liability.")
- Tie statement of "Rule" to language of cases and other authority, using as little of your own language as necessary while preserving flow of prose
- Include at least one sentence addressing purpose of rule; important to be on the right side of that purpose/policy

Appellate Briefs – Argument *cont'd*

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- Use deductive reasoning
- Accurately summarize and squarely rebut district court's and opponent's positions
- Do not just cite cases; analyze and apply them by describing their factual differences and similarities with your case, all while avoiding needless detail or excessive block quotes
- Avoid relying too heavily on cases with bad outcomes, if at all possible
- Explain why your victory serves purposes of rule and is otherwise fair and sensible

Appellate Briefs – Argument *cont'd*

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- Avoid sarcasm and hyperbole
- Write compactly, with concrete sentence subjects (e.g., "defendant," "the court") in close proximity to vivid, precise verbs
  - If a sentence gets out of hand, ask "who's doing what here" and re-build sentence around the action
- Avoid passive voice, nominalization, and excess or "noise" words
- Avoid excessive "alphabet soup" abbreviations

Oral Argument – Nuts and Bolts

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- Notify court of arguing attorney per circuit rule
- Timing and procedures (including key factors like the color and sequence of warning lights) vary by circuit; study circuit rules carefully
- If court believes oral argument not required, it will enter order; otherwise, order setting argument date will typically identify how much time each side will be permitted (usually 10-30 minutes)

Oral Argument – Goals and General Approach

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- First objective is to persuasively and concisely *answer the court's questions*
- Other objectives include:
  - Fill in gaps/respond to reply brief points (if you are the appellee)
  - Emphasize key arguments and policy points
  - Emphasize key elements of your story
- Approach argument as chance for conversation with court about its concerns
- Prepare for both "hot" bench that will pepper you with questions and "cold" bench, whose relative silence will require you to give prepared presentation
- Moot court prep sessions are essential; for any argument of substance, do at least two if not three or four sessions, beginning a couple weeks before scheduled argument

Oral Argument – Prepared Presentation

- Typically begins with a very brief factual and/or thematic summary to orient court toward the case
- Body should address two to four discrete points, which you can preview in "roadmap" in introduction
- Be prepared to pivot off of presentation to answer questions but then transition back into it
- Prioritize points in case questions do not leave you time to address each one
- DO NOT MEMORIZE OR READ PRESENTATION – deliver in conversational, explanatory style

Oral Argument – Answering Questions

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- Do not evade questions or even delay answering until after you have finished point – drop what you are doing and answer squarely and immediately
- Key challenge in preparation: develop crisp, tight answers to tough questions, along with a pivot back your outline or an affirmative point you want court to consider; have multiple strategies to get “in and out” of tricky spots
- Be very careful with demands for concessions, unless it is a point you know you are willing to concede
- Recognize softballs and swing at them accordingly

Post-Decision Issues

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- Was the appeal unsuccessful? Three options:
  - Get on with life
  - Motion for panel or *en banc* rehearing (check circuit rules; HIGHLY disfavored and difficult to obtain)
  - Petition for *certiorari* to United States Supreme Court (even more difficult to obtain)
- Jurisdiction returns to district court following issuance of "mandate," which typically directs disposition consistent with opinion

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Questions or Comments?

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Meet The Faculty

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Timothy Anzenberger - Tim.Anzenberger@arlaw.com

Tim Anzenberger is a commercial and bankruptcy litigator, pursuing the interests of financial institutions and other creditors in bankruptcy cases and litigating on their behalf in state and federal courts. Tim is also an experienced appellate litigator in financial-services cases, handling all stages of an appeal—from post-trial motions through oral argument.

His experience includes representing lenders in commercial restructuring and bankruptcy cases; defending preference actions; defending lender-liability claims; prosecuting objections to discharge; pursuing fraudulent transfers; and defending creditors in adversary proceedings.

Tim is an active member of the American Bankruptcy Institute and frequently writes for the ABI Journal and its committee newsletters. He currently serves as Co-Chair of the ABI's Business Reorganization Committee and sits on the Advisory Board for the ABI Southeast Bankruptcy Workshop.

Read More

Jeff Leon - jleon@karonllc.com

A veteran trial attorney with decades of experience handling complex litigation matters, Mr. Leon has specialized knowledge in the areas of antitrust, class actions and international litigation, including claims against foreign sovereigns under the Foreign Sovereign Immunities Act. He has deep experience handling shareholder suits, non-competition clause litigation, breach of contract, trademark infringement litigation and various types of employment disputes. In addition, he has litigated some of the largest-ever consumer class action lawsuits, obtaining settlements totaling nearly $1 billion. He both prosecutes class actions and defends companies against class action lawsuits.

Mr. Leon has written and spoken extensively. He has lectured on antitrust law at the Kellogg School of Business at Northwestern and has guest lectured at Columbia University's School of Law and at IIT Chicago Kent School of Law. He has published several articles on antitrust law and, during his five-year tenure as co-chair of the Class Action Committee of the ABA Section of Litigation, helped organize the largest annual class action conference in the country.

Scott H. Bernstein - scott@scottbernsteinlaw.com

Scott handles all types of litigation and creditors' rights matters. His civil litigation practice entails a wide variety of commercial collection, post-judgment collection, and commercial litigation matters in Pennsylvania, New Jersey, New York, and Connecticut including those pertaining to construction law, closely-held corporate entities and other types of contract disputes. Scott has significant experience in bankruptcy, reorganization, foreclosure and insolvency matters.

Scott's legal career commenced as a law clerk to the Honorable Robert E. Gerber of the United States Bankruptcy Court for the Southern District of New York. Prior to starting his own law firm, he was affiliated with national and regional law firms, including McCarter & English, LLP, Stradley Ronon Stevens & Young, LLP, Hunton & Williams, LLP, and Kasowitz Benson Torres & Friedman, LLP. He has authored articles pertaining to litigation, bankruptcy, consumer finance, tax lien law and real estate law, and has lectured on those topics. Read More

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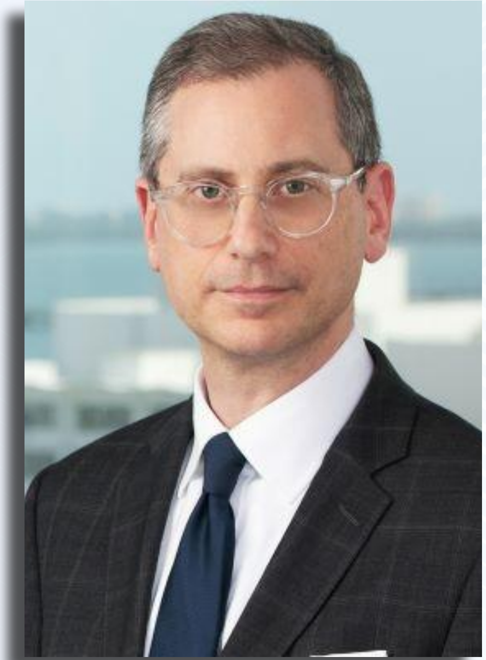
Steven Reingold – Steven.Reingold@saul.com

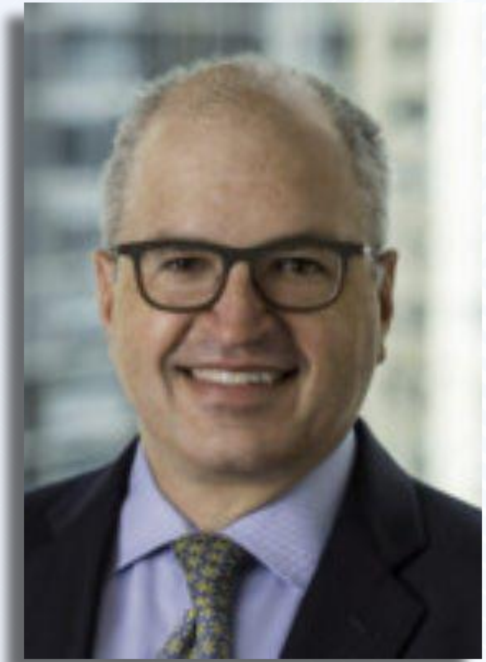


Steven Reingold represents companies and their owners, executives, directors, and officers in complex disputes involving a wide variety of different industries.

Drawing on more than two decades of experience as a litigator in cases across the country, Steven handles claims involving contracts and loan documents and has deep experience with shareholder litigation and partnership disputes. Clients also look to Steven for assistance with matters involving breaches of fiduciary duty. Steven is an experienced bankruptcy litigator and regularly represents liquidating trustees and litigation trustees, as well as other parties, in Chapter 11 cases.

While Steven is a veteran in the courtroom, he is mindful that litigation is not the only way a client may wish to resolve a dispute. He is equally experienced at bringing matters to a conclusion through negotiation, mediation and arbitration. He also counsels clients on avoiding and managing litigation risks that may arise in their businesses. Read More

Max Stein – MStein@tottislaw.com



Max works with clients to cost-effectively solve problems. Usually that means litigating, where Max has wide-ranging experience in state and federal courts. Sometimes it means finding creative solutions to their disputes. What it also means, though, is giving practical advice for their businesses.

Over the years Max has litigated and resolved contract disputes, trademark & trade secret cases, partnership & shareholder disputes, civil RICO & securities fraud claims, legal malpractice cases, bank & loan-related claims, and consumer fraud matters. He also has represented parties in commercial real estate disputes, including both landlords & tenants, and on issues relating to condominium associations. In addition to his extensive trial and appellate experience, Max regularly advises clients on a wide array of legal and business issues outside the courtroom. Read More

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- Assignee Directory - A comprehensive directory of experienced assignees for the benefit of creditors (no charge).
- Auctioneer Directory - A directory of auctioneers in the "distressed & surplus" asset space (no charge).
- Distressed Deal Data - A weekly newsletter & online database of distressed investment opportunities.

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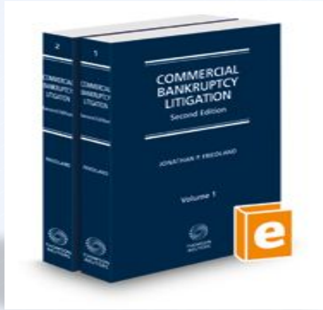

Commercial Bankruptcy Litigation, 2d, 2025 ed. is a must-have resource for any non-bankruptcy attorney who is involved in a chapter 11 bankruptcy case. It is also a handy "take on the road" treatise for the experienced chapter 11 professional. This 2,000-plus page treatise, updated yearly, & with contributions from some of the country's most respected practitioners from top firms across the U.S., covers topics from general bankruptcy & procedure to appeals.

Strategic Alternatives For And Against Distressed Businesses, 2025 ed. is one of a kind. It is the only resource that provides comprehensive state-by-state comparisons of assignments for the benefit of creditors & receiverships. This alone makes the book a must-have for every insolvency professional.

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