

This is your Release #17 (November 2016)

How to Handle an Appeal

Fourth Edition

by **Herbert Monte Levy**

Herbert Monte Levy has updated his treatise with the latest useful information on appellate practice and procedure. Highlights of this Release #17 include:

The Need to Make a Record. If something is to serve as groundwork for appeal, it must appear in the record. Recent cases from the Second and Seventh Circuits illustrate two different ways appellate courts have ruled **when the record is bereft of any evidence on which to examine the ruling below.** See § 1:6.

Writ of Mandamus. The availability of common law writs such as mandamus should be investigated as a technique for handling an appellate matter. In the federal courts, the All Writs Statute permits mandamus in certain cases. See the discussion in § 3:4, which has been updated with numerous recent supporting appellate cases that address, among other things, **non-availability of mandamus** to remedy even egregious delays in administrative or executive actions; jurisdiction over a mandamus petition arising from a **patent infringement action**; availability of mandamus on patent discovery matters; and whether a circuit court's Bankruptcy Appellate Panel has jurisdiction to consider a mandamus petition.

What Is Appealable. The coverage in § 3:5 has been expanded with several recent cases addressing, among other things, a **conflict in the circuits** as to whether an appeal taken to the wrong federal court of appeals may or must be transferred to the correct court; a conflict as to whether an order denying leave to proceed anonymously is immediately appealable; in **immigration cases**, whether federal appellate courts have jurisdiction to review discretionary **denials of adjustment of status** or of a fraud waiver, and the reviewability of **revocation of visa petition approvals.**

Appealability of Stay Order. The Eleventh Circuit recently ruled that it lacks jurisdiction to entertain an appeal from a stay entered by a

(continued on reverse)

Practising Law Institute
1177 Avenue of the Americas
New York, NY 10036
#172979

district court, particularly when the stay is designed to effect a referral to a federal agency. *See* § 4:4.1[H].

Determining the Standard of Review. There is a conflict among the circuits as to the proper standard of review in ERISA cases. Recent rulings from the First, Second, Fifth, and Seventh Circuits illustrate four of the approaches. *See* § 6:5.2[D][1].

Deference to Agency Interpretations (*Chevron* Deference). As held by the Supreme Court in a 2016 case involving Department of Labor regulation, an agency's interpretation does not warrant deference where the agency fails to follow the correct procedure in issuing the regulation or fails to provide even a minimal level of analysis. *See* § 6:5.2[D][3].

Using New Arguments, Points Not Raised Below on Appeal. A unanimous 2016 decision in the U.S. Supreme Court accentuates a recent tendency toward raising or not raising matters in the lower courts. *See* discussion of *Musacchio v. United States* in § 7:3.4[H].

Thank you for subscribing to *How to Handle an Appeal*. If you have questions about this product, or would like information on our other products, please contact customer service at (800) 260-4PLI.

FILING INSTRUCTIONS

How to Handle an Appeal

Fourth Edition

**Release #17
(November 2016)**

**REMOVE OLD PAGES
NUMBERED:**

- Title page to 4-25
- 6-1 to 7-62
- T-1 to I-31

**INSERT NEW PAGES
NUMBERED:**

- Title page to 4-25
- 6-1 to 7-62
- T-1 to I-31

Practising Law Institute
1177 Avenue of the Americas
New York, NY 10036
#172979

