Practitioner's Handbook for

# Appeals to the Court of Appeals

of the State of New York

Third Edition

**Hon. Alan D. Scheinkman**
**Professor David D. Siegel**

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ISBN: 1-17969-240-0
Product Number: 4017

## PREFACE TO THE THIRD EDITION

The First Edition of this *Handbook* appeared in the early 1980s and was followed by the Second Edition in 1991. The principal role in the preparation of the First Edition was played by Professor David D. Siegel, the leading authority on New York civil practice, and it was Professor Siegel who updated the *Handbook* through the Second Edition, which addressed some significant developments in the Court's jurisdiction that had occurred since the publication of the First Edition.

It has now been over 17 years since the Second Edition was issued, and it was my great privilege and pleasure to have been asked to prepare this Third Edition. In doing so, I have endeavored to retain, to the maximum extent possible, the structure—and the still-trenchant substance—of the First and Second Editions. The New York Bench and Bar owe a great deal to Professor Siegel for his myriad contributions to New York civil practice over his career. I, in particular, am grateful to him for his many kindnesses dating back more than 30 years when he was my teacher. I am honored to have my name associated with his. Professor Siegel and those who worked with him deserve much praise for the outstanding quality of the First and Second Editions; the responsibility for the revisions reflected in the Third Edition rests with me. I wish to acknowledge the efforts of those who came before me by including the Prefaces to both the Second and First Editions.

The Clerk of the Court of Appeals, Stuart M. Cohen, Esq., graciously reviewed the manuscript, as did members of his staff. Mr. Cohen, himself a former law clerk at the Court, has always been willing to give of his time to share his knowledge and insights with the Bar, speaking at many State Bar and other programs on Court of Appeals practice. While I am deeply grateful for the invaluable assistance provided by the Clerk and his staff, their participation in no way confers their imprimatur, or that of the Court, on this manual. The Court has its own handbook and other materials on its work available on its website, which should be consulted by any attorney with business before the Court.

I hope that this Third Edition will measure up to the high standards of its predecessors and that it will provide meaningful guidance to the attorneys appearing before the Court of Appeals—our state's court of last resort.

Alan D. Scheinkman
White Plains, New York
December 2007

## PREFACE TO THE SECOND EDITION

Much has happened in the decade since the first edition appeared. Court of Appeals procedures that were in only a preliminary or experimental stage have since become basic procedures in the Court. They are reflected in expanded treatment in the present edition. Among them is the "*Sua Sponte* Examination of Merits" procedure, which, with this edition, gets a division of its own (Heading IV). A new procedure adopted in the same interim is the Certification of New York Law Questions by Other Courts, also a distinct topic (Heading VIII). The certification procedure enables federal appellate courts and the supreme courts of other states to petition the Court of Appeals for an answer to a New York law question.

Court of Appeals jurisdiction also went through some striking changes in the 1980s. The appeal of right was reduced substantially and the appeal by permission concomitantly expanded as the Court became what is often referred to as a "certiorari" Court. These and other changes of the past 10 years, including a number of amendments in the Court's rules, are covered in this edition.

Many hands participated in the production of the first edition at the very beginning of the decade of the '80s. To acknowledge their contributions, I have had the preface to the first edition reprinted as follows, a continuing thank you to the many able people who took part in it. The revision that produces this second edition is mainly my own work, but with a broad thank you to the Clerk of the Court, Donald M. Sheraw, and to his staff, for their review of the manuscript and their many helpful comments and suggestions.

David D. Siegel
Albany, New York
March 12, 1991

## PREFACE TO THE FIRST EDITION

The impetus for this work came from the American Bar Association, which created a national committee to promote the preparation of appellate advocacy handbooks in each of the fifty States of the Union and named the Honorable Hugh R. Hones, Associate Judge of the Court of Appeals of the State of New York, and John Finger, Esq. of the California Bar, to serve as National Committee Co-Chairmen. At the instigation of that committee, the New York State Bar Association requested Denis McInerney of the New York Bar, chairman of its Committee on Courts of Appellate Jurisdiction, to serve as co-chairman of a state committee for that purpose. The Honorable Charles D. Breitel, then Chief Justice of the Court of Appeals, requested G. Robert Witmer, Associate Justice of the Appellate Division, Fourth Department, to serve as the other co-chairman of that state committee. The co-chairmen were authorized to select the members of the committee to assist in this work.

At an early date co-chairmen McInerney and Witmer decided that because of the many differences between the procedures in the Court of Appeals on the one hand and the four Appellate Divisions on the other, the project should be bifurcated. Accordingly, a *Practitioner's Handbook for Appeals to the Court of Appeals* was first prepared, and it was published early in 1979. By that time a new Chief Judge of the Court of Appeals, the Honorable Lawrence H. Cooke, had assumed office, and a new Administrator of the State Office of Court Administration, Mr. Justice Herbert B. Evans, had been appointed. Chief Judge Cooke redesignated G. Robert Witmer to continue as co-chairman of the New York Committee for the Preparation of the *Handbook for Appeals to the Court of Appeals*, and the Chief Judge with Chief Administrative Judge Evans renewed the State's commitment to cooperate with the New York State Bar Association on this project. Denis McInerney continued to serve as co-chairman on behalf of the New York State Bar Association.

The co-chairmen selected the committee for this *Handbook* with the objectives of having it consist of lawyers thoroughly acquainted with the presentation of appeals in the Court of Appeals in the State of New York and of keeping the committee small enough to be functional so that each member would feel responsible for the required effort. The following were appointed to the committee:

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| Joseph W. Bellacosa | Clerk of the Court of Appeals |
| Herald P. Fahringer | Practicing Attorney |

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|---|---|
| Arthur Karger | Practicing Attorney and Co-author of Cohen and Karger on *Powers of the New York Court of Appeals* |
| John J. Mathews | Consultation Clerk of the Court of Appeals |
| Thomas R. Newman | Practicing Attorney |
| Michael F. McEneney | Director of Management & Planning of the State Office of Court Administration, serving as Administrative Member of the committee |

The committee requested Professor David D. Siegel of Albany Law School, who is well recognized for his expertise and scholarship in the field of New York practice, to suggest the format and to supply the initial draft, which he graciously agreed to undertake. In doing so, he used a format which largely follows that of the *Practitioner's Handbook for Appeals to the Appellate Divisions*, in which Professor Siegel had a similar role. While each member of the committee has made substantial contributions to this *Handbook*, we wish to note especially the work of committee member Thomas R. Newman, who undertook the drafting of particular sections assigned to him. The committee also wishes to acknowledge the able assistance of P. Kevin Castel and Vincent E. Gentile, Esqs. of the New York Bar in the preparation and editing of this work for publication.

The *Handbook* is intended to present an overall view of appeals to the New York Court of Appeals, from taking and perfecting the appeal right through arguing it, and of motion practice in that Court. It also presents a glimpse of how the Court performs its work. For in-depth study of the jurisdiction of the Court, reference is made to the monumental work of Cohen and Karger on the Powers and Jurisdiction of the Court of Appeals. For nuances of practice not covered in this *Handbook*, the practitioner is advised to write or call the office of the Clerk of the Court of Appeals, where prompt and friendly advice may be obtained.

The committee hopes that this *Handbook* will assist practicing attorneys and aid in the expeditious administration of justice in the Court of Appeals of the State of New York.

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# ABOUT THE EDITOR

## HON. ALAN D. SCHEINKMAN

Alan D. Scheinkman is a Justice of the Supreme Court, Ninth Judicial District, assigned to the Commercial Division, Westchester County. He also has been assigned as an Associate Justice of the Appellate Term for the Ninth and Tenth Judicial Districts. Prior to his ascension to the Bench, he was in private practice in White Plains, New York, devoting much of his practice to litigation and appeals. Justice Scheinkman received his undergraduate degree from George Washington University and his J.D. from St. John's University School of Law, where he was notes and comments editor of the *Law Reivew.*

Justice Scheinkman clerked for Judge Matthew Jasen at the New York Court of Appeals. He has also served as Westchester County Attorney, Associate Counsel at the New York State Temporary Commission on the Recodification of the Family Court Act, Associate Minority Counsel of the New York State Senate, and as a reporter for the *New York Pattern Jury Instructions—Civil*.

He is the author of *New York Law of Domestic Relations* and *McKinney's Practice Commentaries to the New York Domestic Relations Law.* He has lectured on appellate practice for the New York State Bar Association and previously co-authored with Professor David D. Siegel the Second Edition of the *Practitioner's Handbook for Appeals to the Appellate Divisions of the State of New York*, published by the Bar Association in 2005. He has lectured frequently on civil practice for bar and judicial groups. He is a member of the Judicial Hearing Officer Selection Committee for the Ninth Judicial District, a trustee of the Supreme Court Library at White Plains, and an Adjunct Professor of Law at St. John's University School of Law.