

## TIPS FOR HANDLING FEDERAL CRIMINAL APPEALS

By Henry J. Bemporad  
Deputy Federal Public Defender  
Western District of Texas

Like any field of law, criminal appellate practice is an inexact science. No one approach or strategy can be applied in every case; no defense lawyer can be prepared for the varied, and often unique, issues that a particular case will present. Nevertheless, there are some general, practical suggestions that can improve the quality of representation in every appeal we handle. This article makes four such suggestions: (1) preserve your issues; (2) emphasize quality arguments; (3) get an editor; and (4) understand your client's needs.

### 1. Preserve Your Issues!

In many cases, the most important work on an appeal happens before the notice of appeal is filed. Unless you preserve an issue in the district court, it is unlikely that the court of appeals will even consider it, let alone reverse because of it. Lawyers who fail to preserve an issue below face the "heavy burden" of proving plain error before the court of appeals. *United States v. Webb*, 950 F.2d 226, 231 (5th Cir. 1990). As the Supreme Court held in *United States v. Olano*, an appellate court cannot consider an unpreserved issue unless the defendant shows (1) error (2) that was plain and (3) that affected substantial rights. 507 U.S. 725, 732 (1993). Even if all these requirements are met, the court can exercise its discretion to reverse only if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* (citation

omitted). The defendant carries the burden to make all these showings. *United States v. Vonn*, 535 U.S. 55, 62– 63 (2002).

How do you preserve your issues? There are two general requirements:

- (1) You must specifically request the desired relief, explicitly stating the legal basis for that relief. A general objection or an incomplete request may be found insufficient by the court.<sup>1</sup>
- (2) You must continue to make your request or objection until you obtain a square ruling from the district court.<sup>2</sup>

While these requirements are easy to state, they are often difficult to meet. Given the complexity and pace of federal hearings, trials, and sentencing proceedings, there may be times when you conclude in hindsight that, despite your best efforts, you did not fully preserve an issue. If so, move for reconsideration.<sup>3</sup> A motion to reconsider gives you another opportunity to spell out the issue for appellate purposes, and it might even convince a few district judges to change their minds.

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1. *See, e.g., United States v. Jolivet*, 224 F.3d 902, 906 (8th Cir. 2000) (court of appeals applies plain error review to appellate challenge to denial of continuance; while continuance was requested in district court, legal basis argued on appeal was not raised below).

2. *See, e.g., McKinney v. Estelle*, 657 F.2d 740, 742 (5th Cir. Unit A Sept. 1981) (under Texas law, defense counsel failed to preserve objection by neglecting to obtain ruling on it); *see generally* Hon. Robert S. Hunter, FEDERAL TRIAL HANDBOOK (CRIMINAL) § 39:8 (4th ed. 2004).

3. The federal rules provide many avenues for reconsideration. *See, e.g.,* FED. R. CRIM. P. 29(c) (post-trial motions for judgment of acquittal); FED. R. CRIM. P. 33 (post-trial motions for new trial); FED. R. CRIM. P. 34 (post-trial motions for arrest of judgment); FED. R. CRIM. P. 35(a) (post-sentence motion to correct sentence for clear error).

## 2. Emphasize Quality Over Quantity.

The courts of appeals face an ever-increasing caseload.<sup>4</sup> To move cases more quickly, most circuits assign staff attorneys to review criminal appeals; many of these appeals are chosen for summary disposition. The emphasis on speedy disposition means that the court will spend less time on your appeal. Attorneys need to respond by being more selective in choosing issues for appeal, and more direct in arguing the issues they do choose.

It is generally better to present a few strong issues in your brief. Weak issues reflect badly on the stronger points, and you want the limited time the court will allot to your case to be spent on your strongest contentions. As the Supreme Court has cautioned:

Most cases present only one, two, or three significant questions. . . . [I]f you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

*Jones v. Barnes*, 463 U.S. 745, 752 (1983) (quoting Robert L. Stern, *Appellate Practice in the United States* 266 (1981)).

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4. According to the Administrative Office of the U.S. Courts, the number of new appeals increased every year between 1994 and 2003, setting new records 8 years in a row. The number of criminal appeal filings is increasing faster than the number of civil filings. JUDICIAL BUSINESS OF THE U.S. COURTS, at 12 (2003). While civil appeals declined somewhat last year, criminal appeal filings continued to increase. JUDICIAL BUSINESS OF THE U.S. COURTS, at 10 (2004).

How do you choose your strongest issues? As already noted, preservation is a key consideration in determining the strength of a particular point. Other important questions to ask include:

- (1) Did the error have a specific, harmful effect on your client's case, or can it be easily argued that the error was harmless?
- (2) Will the issue be reviewed de novo by the appellate court, or will deference be accorded the trial judge (e.g., by application of the "clearly erroneous" or "abuse of discretion" standards or review)?
- (3) Is your argument well-grounded in settled law, or will it require that current precedent be extended or overruled?<sup>5</sup>

Once you choose the issues for appeal, similar considerations can help you make your arguments on each issue. Because the court will spend limited time on your case, you should make your brief as concise and direct as possible. Absent special circumstances, arrange your issues in order of their strength. On each issue, drop weak or tenuous arguments in favor of developing the stronger ones.

Two special kinds of argument can help strengthen your issues on appeal: **fairness** arguments and **policy** arguments. Fairness arguments may be either substantive (e.g., the defendant is innocent, or has been punished too severely),

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5. There is an important caveat to consider in answering this last question. If you decide not to raise an issue because the law is settled against you, your decision may very well procedurally default the issue in a later collateral challenge if the law changes. *See Bousley v. United States*, 523 U.S. 614, 621 (1998). The fact that circuit precedent is clearly contrary to your position will usually not excuse the default. *Id.* at 623.

or procedural (e.g., the defendant didn't get an opportunity to present his side of the story). Such arguments can lead the court to sympathize with your client, which is the first step towards convincing it to rule in his favor. Policy arguments explain why the result you seek will be beneficial to criminal legal practice or the judicial system as a whole (e.g., ordering suppression of evidence will deter future Fourth Amendment violations). In addition to supporting your contentions, policy arguments can emphasize that the case has significance beyond its effect on the parties.

### **3. Find an Editor.**

Much of what trial lawyers do in court is spontaneous; while witness examination and jury argument can be prepared in advance, trial attorneys by necessity must respond quickly and argue extemporaneously in the courtroom. The rough and tumble of trial practice may bring surprise benefits for your client; it may also lead to inadvertent errors that can only be bemoaned in hindsight.

Surprises are less common in appellate practice, where the main argument is made in a written brief. Many federal criminal appeals are decided without a hearing; in these cases, the brief will be the only argument you get to make. Written arguments limit spontaneity, but they also give appellate lawyers the chance to fix their errors before they occur, through editing.

After drafting your brief, find someone to read it. Preferably, you should go to a lawyer with experience in the area, but any literate person will do in a pinch. They can tell you if a brief seems persuasive or far-fetched, logical or confused,

pithy or laborious. They may be able to make specific suggestions for improving clarity, removing convoluted legalism, or dealing with bad facts. Given the importance of the brief on appeal, it is unwise to forego the chance to have someone review your contentions before the court does.

#### **4. Understand Your Client's Needs.**

Of all the things you must do as an appellate lawyer, perhaps the most essential is to find out why your client wants to appeal. Defendants appeal because they are unhappy with the events in the trial court, either with their convictions or with the severity of their sentences. However, you should not assume that a defendant who appeals wants to challenge his conviction and sentence on any possible ground. The defendant may have appealed for reasons that have little to do with the relief a court of appeals can order.

If you did not handle the case before the district court, try to contact your client as soon as you are appointed on appeal. Find out what he believes went wrong, and what relief he wants. In some cases, you will be able to avoid extensive work on a potential issue that your client should not raise, and has no interest in raising. On other occasions, you will be able to do something to benefit your client that has little to do with the appeal (helping him deal with the Bureau of Prisons, for example).

In advising your client, you must always consider the danger of adverse consequences if your appeal is successful. For example, if a defendant's sentence is vacated and the case remanded by the court of appeals, the defendant

may sometimes face a higher sentence at resentencing (particularly if the probation officer, prosecutor, or court made an error in the defendant's favor the first time).<sup>6</sup> Similarly, a successful appeal from a defendant's guilty plea could lead the Government to withdraw from a favorable plea agreement when the case is remanded to the district court.

If the appeal risks a higher sentence or additional convictions on remand, you should discuss these risks thoroughly with your client. You should obtain your client's consent before you make what could be a risky argument. If there is a serious danger that remand could lead to a worse result, you may want to dissuade your client from proceeding on appeal.

As in the trial court, rapport with your client is essential on appeal. When you make the strategic decision to raise some issues rather than others, a good relationship with your client can lead to better understanding and acceptance. Remember that the vast majority of federal criminal appeals result in affirmance; if you can do nothing else for your clients, discovering and responding to their needs will help them feel that someone cares about them and is fighting for their rights. Although their cases may present common problems, our clients are unique. We serve them best when we afford them the individual dignity they deserve.

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6. *See, e.g., United States v. Schmeltzer*, 960 F.2d 405, 408 (5th Cir. 1992) (defendant appeals 39-month sentence as improper departure above guideline range; Fifth Circuit remands for imposition of a mandatory minimum *five-year* sentence).