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Managing Editor
Jim Donovan

Legal Assistant
Carmel Matin

Law Clerk
Jeremy Summerlin

Internet Address
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In This Issue

"May it Please the Court,"—Appearing on Behalf of the United States in Federal Appellate Courts

Kelly A. Zusman
Appellate Chief
United States Attorney's Office
District of Oregon

Last year, United States Attorneys' offices (USAOs) handled over 13,000 civil and criminal appeals. Appeals are a significant part of the work that we do, both in volume and import, because appeals yield precedent that may affect cases throughout a circuit. This issue of the United States Attorneys' Bulletin is dedicated to appeals, in part, to recognize the unique position that the United States plays in the federal appellate process.

Each year, the Department of Justice's (the Department) Annual Statistical Report begins with a quotation from Justice Sutherland in *Berger v. United States*, who explained the unique role of the United States Attorney:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

See, e.g., EXECUTIVE OFFICE FOR U.S. ATTORNEYS, DEP'T OF JUSTICE, U.S. ATTORNEYS ANNUAL STATISTICAL REPORT (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

While this quote references criminal cases, the role of the United States is no less significant and unique in civil cases: appellate judges rely on both civil and criminal Assistant United States Attorneys (AUSAs) to provide them with complete and accurate descriptions of the facts of a case and applicable law. This expectation of candor and reliability is at its apex in our federal courts of appeal where outcomes have the potential to create binding, circuit-wide precedent and even affect the direction of a particular issue for the entire nation. Many appellate judges first look to the government's brief. Therefore, that brief must be accurate, thoughtful, and helpful.

The United States is by far the most prevalent party in the federal courts of appeal. Last year, AUSAs closed 9,483 criminal appeals and 4,192 civil appeals, an average of 145 appeals per district. By contrast, USAOs tried 3,051 criminal trials last year, roughly 32 trials per office or less than one-third of the total number of appeals. In spite of this volume, our success rate over the years remains high. During Fiscal Year 2011, the United States Courts of Appeals ruled in favor of the United States in 93 percent of all criminal appeals and in 78 percent of all civil appeals.

The appellate workload varies considerably by district, but population is not an accurate barometer for volume. In fact, the offices with the three largest volumes of criminal appeals are, respectively, the Southern District of Texas, the Middle District of Florida, and the Western District of Texas. The Central District of California—that includes Los Angeles—ranks fourth, the Northern District of Texas ranks fifth, and the Southern District of New York ranks ninth. For civil appeals, the Middle District of Florida ranks first, followed by the Southern District of Florida and the Eastern District of North Carolina.

Who within the district offices is handling the more than 13,000 appeals? A 2010 survey conducted by the Appellate Chiefs Working Group (ACWG) to the Attorney General's Advisory Committee reveals that roughly two-thirds of the districts maintain separate appellate units with 1 to 13 AUSAs who are dedicated to either writing and/or reviewing all appeals. Roughly two-thirds of all districts have separate civil and criminal appellate supervision, with many offices assigning civil appellate review to a civil chief or deputy civil chief.

Appellate work is unique. The Department's annual report recognizes that appeals are generally "time consuming" and often "complex." EXECUTIVE OFFICE FOR U.S. ATTORNEYS, DEP'T OF JUSTICE, U.S. ATTORNEYS ANNUAL STATISTICAL REPORT 89 (1999). The trial record has been set and, in general, cannot be amended or supplemented following the judgment and notice of appeal. Appellate lawyers must make the most of the record they have, causing many offices to continue to adhere to the view that trial lawyers should, on the whole, handle their own appeals. Reviewing a trial transcript from a case that you have tried is instructive and, in many instances, humbling. It teaches you to be a better trial lawyer and strategic tactician.

By the same token, the unique aspects of appellate work also tend to support the notion that having appellate specialists is an efficient means of dividing up the workload. Most good appellate lawyers are effective because they are good writers and editors. The vast majority of federal appeals are decided on the briefs, without oral argument, thus placing a premium on the quality of the legal writing. Having the ability to take complex facts, lengthy transcripts, and vast numbers of exhibits and turn that material into an interesting and often compelling story is an art that most appellate AUSAs have mastered. Good writing requires focus, the absence of distractions, and sufficient experience to identify critical arguments. An appellate brief that might take a trial AUSA days to research and write, could take an experienced appellate AUSA a few hours. As the Department continues to work with budget cuts, hiring freezes, and staff shortages, some offices have been creating separate appellate sections or units.

Having an appellate AUSA handle an appeal from a case tried by another AUSA has the added benefit of giving the case a separate, objective, and fresh set of eyes. An appeal that may appear to be a "no-brainer" to the trial attorney, may in fact raise new issues or arguments that need to be squarely addressed. Even preserved issues may shift or sharpen on appeal in a way that makes the case more vulnerable than originally thought. Having the ability to view the case in a manner more akin to the way that a neutral appellate court judge might approach the case gives us a unique advantage.

At least two districts—the Eastern District of Pennsylvania and the Northern District of California—have opted for the multi-disciplinary approach in complex cases by creating trial teams that combine experienced trial attorneys skilled in examining and cross-examining witnesses and persuading juries, with appellate attorneys who are adept at preserving legal arguments and anticipating possible risks on appeal. Working together, attorneys with these skill sets make for a formidable team.

Ensuring that all government appeals, whether they are handled by trial or appellate lawyers, are of the highest quality and meet the highest ethical standards of truth and accuracy is and has been a critical part of the work that is carried out by the Solicitor General's Office, the Criminal and Civil

Appellate Divisions, the National Advocacy Center, and the ACWG. Lawyers throughout the Department have a wide array of resources that are available to support our appellate work. These include a Solicitor General brief bank, guidance memos from the Criminal Appellate Division, sample forms, briefs, an appellate manual produced by the ACWG, and links to a series of new appellate programs available for viewing through the JTN video library. In addition, the National Advocacy Center offers intensive week-long courses in appellate advocacy (written and oral) and appellate brief writing.

One of the most significant recent advances made by the Department to improve the quality of appellate work took place in 2010 with the amendments to the appellate section in the United States Attorneys' Manual. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 2-1.000 to 2-5.000 (2010). With these amendments, every USAO now must designate an appellate chief who supervises all criminal or civil appellate work. The chief's responsibilities include a rigorous review of the written brief, organizing moot courts, reviewing and reporting adverse decisions, and serving as the point of contact for the Department's Criminal and Civil Appellate Divisions. Michael Robinson, a Senior Trial Counsel with the Civil Appellate Division; Bob Zauzmer, the Appellate Chief in the Eastern District of Pennsylvania; and Joseph Karaszewski, the Appellate Chief in the Western District of New York, have contributed articles in this issue of the Bulletin that discuss principles of good legal writing and editing. Larry Sommerfeld, the Appellate Chief from the Northern District of Georgia, offers tips and insights on how to make the upcoming transition from WordPerfect to Word a smooth one. At times, a written brief is not necessary at all because a dispositive motion will resolve a case. Dave Hollar, the Appellate Chief from the Northern District of Indiana, and J. C. Andre, the Deputy Appellate Chief for the Central District of California, will address that situation and cover this helpful topic.

The new standards also recognize the importance of preparing for oral argument through moot courts. While the Second and Sixth Circuits still set argument in nearly all cases, many circuits, including the Fourth, Fifth, and Ninth Circuits, only set argument in a fraction of the cases, and only when the judges have questions or concerns. Particularly in those circuits where only 10 to 25 percent of the cases are actually set for argument, the need to ensure that the AUSA standing at the podium is well-prepared is paramount. Barbara Valliere, the Appellate Chief from the Northern District of California, describes her office's process for oral argument preparation and offers insights into how to make the most of those precious few minutes at the podium. Difficult questions, including questions about the Department's position on a certain point, must be well-vetted to ensure that we take consistent positions throughout the country.

While a number of terrific educational programs and reference manuals are available to support an AUSA's appellate work, the Department's human resources remain our greatest asset. The attorneys in the Solicitor General's Office are some of the brightest legal minds in the country, and the Solicitor General's track record in the Supreme Court is indicative of that quality. Nationally, the chance that a petition for certiorari will be granted by the Court is slightly less than one percent. When the Solicitor General petitions for certiorari, the odds increase to approximately 70 percent. The members of his staff have invested a tremendous amount of time and effort to build that kind of credibility with the Court. This issue of the Bulletin features articles from two long-serving Deputy Solicitor Generals, Michael Dreeben and Malcolm Stewart, who provide insights into the work that they do. The United States is equally well-represented by the Criminal and Civil Appellate Divisions that are headed by Patty Stemler and Barbara Biddle (currently acting on behalf of Doug Letter). Ms. Stemler and Ms. Biddle have contributed an article that describes how AUSAs must respond to reporting requirements and adverse district and appellate court rulings. Their article also describes how best to work with their offices to ensure consistency with department positions and to effectively prosecute appeals that are approved by the Solicitor General to be filed on behalf of the United States.

Representing the United States in the federal courts of appeals is both a challenge and a privilege. Justice Sutherland is not alone when he expressed the view from the bench that lawyers for the government should be "impartial[]" advocates. *See Berger*, 295 U.S. at 88. As true servants of the law, we must vindicate the interests of the United States while keeping candor and fairness at the forefront of everything we write and say. When we stand at the podium to announce, "May it please the court," and identify ourselves as appearing on behalf of the United States, that statement has meaning. The courts can and should trust that what we tell them is truthful, what we argue is helpful, and that our positions are well-considered. Win or lose, our goal is and should always be to leave the court with the impression that the United States was well-represented.❖

ABOUT THE AUTHOR

❑**Kelly A. Zusman** is the Appellate Chief for the District of Oregon and the Ninth Circuit's representative to the Appellate Chiefs' Working Group. She is a regular faculty member for the appellate courses that are offered at the National Advocacy Center, a coordinator for the JTN video series on appellate advocacy, and an adjunct professor for the Northwestern School of Law, where she teaches Appellate Advocacy and Evidence. Ms. Zusman was a law clerk to United States District Judge Malcolm F. Marsh and Ninth Circuit Judge Otto R. Skopil.✠

The Role of the Solicitor General in the Department of Justice's Appellate Process

Michael R. Dreeben
Deputy Solicitor General
Department of Justice

The Solicitor General speaks for the United States in proceedings before the Supreme Court. The Office of the Solicitor General (the Office) also approves government appeals from adverse decisions in the lower courts. While the United States has a special obligation to serve the broader interests of justice in every court, appellate lawyering offers an especially pure form of this duty. In appellate courts, the government is constantly balancing its interest in prevailing in an individual case with its broader interests in establishing sound rules of law that serve the national interest. The Office of the Solicitor General occupies a unique position in that process.

I. Background on the Office of the Solicitor General

Congress created the position of Solicitor General of the United States in 1870, at the same time that it created the Department of Justice (the Department). The position was largely designed to free the Attorney General from the burden and distraction of having to represent the United States in the Supreme Court. Over time, the Office of the Solicitor General acquired substantial responsibilities for the conduct of government appellate litigation at all levels. By regulation and Department policy, the Solicitor General is responsible for approving a variety of appellate actions: government appeals, amicus filings in appellate courts, petitions for extraordinary writs, petitions for rehearing en banc, and petitions for certiorari. 28 C.F.R. § 0.20(b), (c); DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.100 (2011). By tradition, the Solicitor General also plays a decision-making role on many important questions of law that arise in appellate litigation, on which components of the government may have differing views. The Solicitor General's staff plays an important role in advising on legal positions in trial-level litigation and in appeals when the government is appellee, on proposed guidance memos issued by the litigating divisions, or on case-specific questions presented by a United States Attorney's office (USAO).

The Solicitor General's staff is small. Apart from the presidentially-appointed Solicitor General, it consists of four Deputy Solicitors General (three of whom are career attorneys and each of whom has a portfolio of specialties), sixteen Assistants to the Solicitor General, and four one-year Bristow Fellows. Its workload, however, is enormous, typically including briefing and arguing 40 or more cases on the merits in the Supreme Court each term, filing hundreds of briefs in response to petitions for certiorari, and reviewing thousands of adverse decisions to determine whether to appeal or to seek rehearing.

All of this means that the Solicitor General's Office has substantial and ongoing relationships with the litigating components of the Department and the USAOs. The Office depends on the talents and energies of the appellate attorneys in those components to sift the issues, conduct initial research, identify factors for and against appeal (or for and against a particular position), and prepare draft briefs. The Solicitor General's Office, with its greater detachment from the trial or first-level appeal, then contributes its own analysis. When potential areas of disagreement arise, they are discussed. For this

process to work, the attorneys in the Solicitor General's Office must be excellent listeners. The Solicitor General's Office must also be a clear communicator of the Office's decisions and their rationales, both within the Department and in briefs filed in the courts.

II. The ethos of the Solicitor General's Office: traditions and practices

The Office of the Solicitor General is steeped in tradition. For example, when the government is a party to a case, the Office almost invariably consents to requests by non-parties to participate as amici curiae in the Supreme Court—largely on the view that citizens should have the opportunity to be heard in the nation's highest court and that the government should not stand in the way of the Court hearing a different perspective. Similarly, the Office has a relatively open-door practice of listening to adversaries who request the opportunity to be heard before the government decides, for example, whether to appeal. And the Office's attorneys have a general tradition of wearing morning suits when arguing before the Supreme Court—a tradition that is not universally observed in the Office today, but that still serves as a symbolic reminder of the unique role of representing the United States in the Supreme Court and of the government's respect for the Court. With or without formal attire, however, it is impossible to forget that role: every lawyer in the Office who stands at the podium in the Supreme Court feels the weight of that responsibility and the obligation it imposes to adhere to the highest standards of integrity, candor, and accuracy when speaking on behalf of the United States.

The Solicitor General's Office operates within a complex web of relationships within the government. To identify its Executive Branch "clients"—USAOs, executive and independent agencies, components of the Department, the Attorney General, and the President—only illuminates part of its function. The Office also has special relationships with the other branches of government. The Solicitor General has a practice of "representing" Congress' legislative prerogatives, in almost all instances, by defending the constitutionality of federal statutes when reasonable arguments are available. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1083 (2001) (describing the practice and its most prominent exceptions). The Office also has a special relationship with the Supreme Court: it strives to provide the Court with complete, accurate, and candid portrayals of the law, policy considerations, and practical implications of the Court's decisions on the operations of government—as well as supporting the Court's institutional integrity by, for example, showing respect for the doctrine of stare decisis. These other branches of government are not literally the Solicitor General's clients, and the Constitution's separation of powers places limits on the force of any representational analogy. Nevertheless, the statutory obligation of the Solicitor General does invoke the same theme. The Solicitor General is to "conduct and argue suits and appeals in the Supreme Court . . . *in which the United States is interested*," 28 U.S.C. § 518(a) (2012) (emphasis added), and the Supreme Court has construed that obligation to encompass all three branches of government. *See United States v. Providence Journal Co.*, 485 U.S. 693, 701 (1988).

The Office's practices in deciding whether to appeal, participate as amicus, or seek certiorari provide a window into comprehending how it balances the diverse interests of the United States. Most appellate actions by the Solicitor General respond to legal, pragmatic, and institutional considerations that emerge from debate among interested parties. In arriving at the position of the United States on a particular issue, especially in Supreme Court litigation, all interested components within the government have an opportunity to be heard by the Solicitor General, through written memoranda and often through meetings. In those meetings, components press their particular interests and concerns. Attorneys from across the government argue over the boundary lines and ambiguities of existing precedent, and participants may float and refine compromises. Often, satisfying compromises can be worked out, especially during the briefing process. Other times, components may perceive themselves as "winners" or

"losers." In some cases, the intra-governmental "loser" appeals to the Deputy Attorney General, the Attorney General, or, in the case of inter-Departmental disagreements, all the way to the White House. But such appeals are rare, and rarer still are the instances in which the Solicitor General's decision is overturned. *See* John M. Harmon, *Memorandum Opinion for the Attorney General—Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1089, 1089 (1988) (Office of Legal Counsel Opinion). That may be in part because the decisional process seeks to give the Solicitor General's decision credibility, both within the government and in the Supreme Court. The Solicitor General's Office strives to win credibility within the government by respecting the judgments, policies, and discretion of others who represent the United States, including agencies and officials with specialized subject-matter expertise and legal responsibilities. And it strives to have credibility before the Court by ensuring that its arguments have legal and factual integrity on the pros and cons of a position.

As an example of the intra-governmental dispute-resolution process, in the late 1980s, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) became embroiled in a legal turf battle. The jurisdictional dispute arose over a new financial product called "index participations," which the SEC had approved under its power to regulate securities, but the CFTC believed was properly characterized as a futures contract subject to its exclusive jurisdiction. The Seventh Circuit ruled in favor of the CFTC, and the SEC wanted the Solicitor General to seek certiorari. After a series of meetings with both agencies—each of which claimed to be entitled to deference—the Solicitor General came down on the side of the CFTC and declined to authorize a certiorari petition. But the dispute did not end there. The stock exchanges filed their own certiorari petitions and the Solicitor General, representing the federal respondent, advised the Court to deny further review—contrary to the SEC's strongly held position. While it is safe to say that the SEC was deeply dissatisfied with that action, the government's brief took pains to present the SEC's viewpoint. In language that the SEC participated in drafting, the brief conveyed the SEC's belief that the decision would have an adverse impact on innovation in the financial markets and warranted review—before going on to explain why the Solicitor General had sided with the legal view of the court of appeals and did not believe further review was warranted. The Supreme Court ultimately denied review without comment. *Am. Stock Exch., Inc. v. Chicago Mercantile Exch.*, Nos. 89-1502, 89-1503, 89-1484, cert. denied, 496 U.S. 936 (1990).

While the Solicitor General does strive for balance, the Office's briefs are adversary submissions designed to persuade. The Solicitor General's Office will not, however, sacrifice its reputation for being an honest broker by engaging in close-to-the-line advocacy. This reputation for integrity serves the government's long-term interests: the trust and respect that the Solicitor General has built up in the Supreme Court likely enhances the Office's ability to have its certiorari petitions granted at a far higher rate than any private party. It also likely induces the Court to take seriously the concerns that the Office may express about the impact of a particular ruling (even if the Court does not always agree), for it is the longstanding position of the Office that, in representing the United States in the Supreme Court, "it is inevitably the Solicitor General's function to consider not only the immediate case, but also the collateral consequences of the position he may take in presenting it." Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 528 (1969).

III. The standards for authorizing appeals, petitions for rehearing en banc, and petitions for certiorari

The Solicitor General's decision on whether to authorize an appeal, a petition for rehearing en banc, or a petition for a writ of certiorari takes into account several key considerations, discussed in this part.

A. Appeals

The Supreme Court has recognized that the government carefully selects cases for appeal. "Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail," the Court observed, "the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal." *United States v. Mendoza*, 464 U.S. 154, 161 (1984). The strategic calculus that informs the decision whether to appeal varies from case to case. But the Solicitor General's review characteristically involves a number of screening tests that distinguish good prospects for appeal from cases that are better to let go. Among the basic screens are these:

- Is the proposed appellate argument reasonable?
- Was the issue preserved through a timely motion, objection, or argument?
- Is the case a favorable vehicle for developing the law?
- Are the adverse consequences from failing to appeal (for example, the suppression of evidence or dismissal of a case) severe enough to warrant whatever risk of generating adverse precedent that may exist?
- Is the case important enough to warrant the use of the appellate resources of the government and the judicial system?
- Is the proposed argument consistent with the position that the government has taken in other cases and with principles that are in the government's long-term interests?

Other considerations may also play a significant role in particular cases. These considerations may include deference to an agency's assessment of the programmatic importance of the case or consideration of whether the constitutionality of a federal practice or statute is at stake. Of course, statutory factors such as the existence of appellate jurisdiction and the satisfaction of other prerequisites, such as the requirement under 18 U.S.C. § 3731 that the United States Attorney certify that excluded evidence is substantial proof of a material fact, also play a role.

Some of the same considerations apply to specifying issues for appeal. Appellate lawyers know the axiom that it is vital to limit the number of proposed errors raised on appeal. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). That point has heightened importance for the government as appellant, which has a strong interest in developing an institutional reputation for restraint and selectivity. For example, in a particular case, it may seem that the district court seriously erred in finding the facts and that appeal should be pursued on that basis. But the government has a powerful interest as an appellee in preserving the force of the clearly erroneous standard of review that generally protects district court fact-finding against reversal. Too aggressive an attack on the district court's factual conclusions in one case may undermine the respect that appellate courts are characteristically inclined to give to such fact-finding

in other cases. That would poorly serve the government's overall interests. Accordingly, the Solicitor General may decide to forgo plausible, but weaker, arguments in order to strengthen the overall appeal.

B. Petitions for rehearing en banc

The en banc process imposes an additional set of screens. The Federal Rules of Appellate Procedure make clear that "[a]n en banc hearing or rehearing is not favored" and it generally will not be ordered absent an intra-circuit conflict or a question of "exceptional importance." FED. R. APP. P. 35(a). These requirements disqualify most adverse appellate decisions as serious candidates for further review. The Solicitor General's Office seeks to apply these standards with particular care so as to obtain the maximum impact when the government does petition for rehearing en banc. That a court of appeals' decision is considered wrong is far from enough to justify a government en banc petition. Even when a decision is wrong and the underlying issue is important, the Solicitor General may decline to authorize rehearing en banc for prudential reasons, such as when the case is an unattractive factual vehicle.

C. Certiorari

The process for selecting cases for certiorari is even more rigorous. The Supreme Court "relies on the Solicitor General to exercise . . . independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost in the courts of appeals." *United States v. Providence Journal Co.*, 485 U.S. 693, 702 n.7 (1988). A central consideration is whether the decision implicates a conflict in the circuits on an important question of federal law. The case must also be free from procedural impediments, such as an undeveloped record or a remand for further proceedings that could alter the legal issue's complexion. Of course, strategic considerations enter into the Solicitor General's analysis: is the case a factually attractive one for raising the issue? The classic certiorari petition explains why the decision below is wrong, conflicts with decisions of other courts of appeals, and presents a significant issue, with real, practical consequences. Exceptions exist, for example, for decisions invalidating a statute on constitutional grounds or for decisions that, by themselves, have enormous practical or financial consequences. But such exceptions are rare.

The Solicitor General's Office does not make the certiorari judgment in isolation, but, as described above, depends heavily on a deliberative process in which interested components of the government have a voice. Having a single decision-maker applying consistent standards serves a vital interest: "an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems." *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

D. A government appellate lawyer's obligation of candor to the Court

The ethic of candor is a norm applicable to any appellate lawyer. The ABA Model Rules of Professional Conduct obligate a lawyer to display "candor toward the tribunal." MODEL RULES OF PROF'L CONDUCT R. 3.3 (capitalization omitted). Government appellate advocates are held to an especially exacting standard: appellate courts expect lawyers for the United States to obey "higher standards" than the private bar. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46-47 (D.C. Cir. 1992). This obligation is at its zenith in the criminal law. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 comment 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). This understanding is reflected in the famous passage in *Berger v. United States*, 295 U.S.

78, 88 (1935), quoted in Kelly Zusman's introduction to this issue, reaffirming that the first obligation of a government lawyer is to justice.

That a "higher standard" is placed on the government is clear, but the precise content of that standard is not. One appellate judge, who had also served in the Department, suggested that the standard has five aspects: "competence, candor, credibility, civility, and consistency." Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 119-27 (Winter 1998). All of those aspects are fostered by the Solicitor General's role in reviewing adverse decisions before determining whether to authorize an appeal.

IV. Confessions of error

Perhaps the most dramatic example of the government's unique role in appellate litigation is when the Solicitor General confesses error in the judgment. In the Supreme Court, this is a practice that is almost uniquely the province of the Solicitor General's Office. *See* Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 96 (Spring 1998). And it most often occurs in criminal cases, where liberty is at stake and the integrity of the appellate process is vital to sustain the public's confidence in the criminal justice system.

A. Principles governing confessions of error

For generations, it has been a bedrock understanding that a prosecutor's function "can never be promoted by the conviction of the innocent." *Hurd v. People*, 25 Mich. 405, 416 (Mich. 1872). While doubts about guilt or innocence are not often an issue on appeal, on rare occasions, a serious legal error in the government's favor, sometimes at the government's own urging, may threaten a miscarriage of justice. As the Supreme Court has stated, "[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young v. United States*, 315 U.S. 257, 258 (1942).

Even when the lawyers in the Solicitor General's Office doubt the correctness of a lower court decision, confession of error is not undertaken lightly. Confessions of error draw strong feelings from courts that feel that the government has pulled the rug out from under them and from prosecutors who see convictions abandoned. Before confessing error, the Solicitor General takes into account the reasonableness of the view that prevailed below, any reliance interests of the government and the public, the impact on victims, the effect on the credibility of the United States, and other factors. *See* Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L. Q. 337, 342 (1981).

Members of the Supreme Court expect prosecutors to confess error in appropriate cases. Indeed, Justices have expressed incomprehension when prosecutors have failed to confess error in the face of conceded legal error, or have failed to waive "technical" defenses so that serious constitutional claims can be heard on the merits. *See* Tr. of Oral Argument in *Dretke v. Haley*, No. 02-1824 (S. Ct. Mar. 2, 2004), at 3; Tr. of Oral Argument in *Maples v. Thomas*, No. 10-63 (S. Ct. Oct. 4, 2011), at 41-42. Such courtroom fireworks leave an indelible impression of the Justices' high expectations of government appellate lawyers. This judicial expectation reflects an underlying reality of the government lawyer's role. "In criminal cases, in addition to being the government's lawyer, the prosecutor is the government's representative, and therefore must make the decisions that a client in litigation is ordinarily authorized to make." Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 238 (2000). Accordingly, "it is the prosecutor's responsibility to decide what it means to govern justly and to act on that understanding." *Id.* at 238. In government appellate litigation, especially at the Supreme Court level, it often falls to the Solicitor General to discharge these mixed duties.

B. Illustrations of confessions of error

Case-specific circumstances may prompt a confession of error. Last term, for example, the Solicitor General determined that a district court had committed a serious violation of Federal Rule of Criminal Procedure 11(c)(1) by improperly participating in plea negotiations. (Among other things, the district court said that it felt impelled to give the defendants "the chance of making a different type of decision" (that is, pleading guilty) in order for the court's "s[oul]" to be "at peace." The court added that the defendants might, because of peer pressure, "refuse to believe what your attorneys are telling you," but "you will be the ones spending the rest of your life, or a significant portion of your life in jail." The court finished by stating that "the time to consider the offer is now" because at sentencing "I can think the sentence is harsh, I can feel terribly sorry for your family and mother's crying here, but I won't be able to do something different.") (quoted in Brief for the United States, pp. 4-5, No. 11-8966, *Rebollo-Andino* v. *United States* (S. Ct. May 2012)). The government conceded the error in the court of appeals, but the court of appeals declined to correct it. When the defendant sought certiorari, the Solicitor General reiterated the prior confession of error and suggested that, although plenary review was not warranted, the Court should summarily reverse the decision below. The Supreme Court instead denied review. *Rebollo-Andino v. United States*, 2012 WL 628846 (June 25, 2012). Perhaps the Court regarded this case-specific request for error-correction as inconsistent with its function to resolve nationally important issues—or perhaps it agreed with the court of appeals that the district court had not erred. But the case illustrates that a confession of error may be based wholly on the particular facts of the case and the perceived adverse impact of a singular error on the integrity of the criminal process.

At the other end of the spectrum are confessions of error on broad areas of law. Last term, the Solicitor General confessed error in two criminal cases decided on the merits that involved significant legal issues: (1) *Dorsey v. United States*, 132 S. Ct. 2321, 2323-24 (2012) (involving whether the increased drug quantity thresholds for mandatory minimum sentences in the Fair Sentencing Act (FSA) applied to pre-FSA cocaine base offenses that resulted in sentencing after the effective date of the FSA), and (2) *Setser v. United States*, 132 S. Ct. 1463, 1465-67 (2012) (involving whether a judge could order a federal sentence to be served consecutively to a future state sentence). The Court agreed with the United States in *Dorsey*, *see Dorsey*, 132 S. Ct. at 2335-36, but disagreed in *Setser*. *See Setser*, 132 S. Ct. at 1473. Each confession of error reflected distinctive considerations. In *Dorsey*, the United States altered its position on the applicability of the FSA after its initial position had produced mixed results in the courts and the Attorney General reevaluated the legal merits. The Court's agreement with the Solicitor General's new argument in *Dorsey* gives credence to the appropriateness of the government's willingness to reconsider a legal position in light of new considerations. In *Setser*, although the government lost, its confession of error maintained fidelity to a longstanding view that protected the prerogatives of the Bureau of Prisons. In that instance, confession of error served the government's institutional interests—even though the Supreme Court eventually ruled in favor of judicial sentencing discretion.

One final example helps illustrate the Solicitor General's confession-of-error practice. In *Watts v. United States*, 130 S. Ct. 1134 (2010), a *pro se* defendant petitioned for certiorari from the court of appeals' denial of a certificate of appealability. The defendant sought to challenge his recidivist sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), which, he claimed, was improper in light of changed legal definitions of the requirements for a "violent felony." After careful study, the Solicitor General's Office determined that Watts had stated at least a debatable claim that his sentence exceeded the statutory maximum term and therefore violated due process. The Solicitor General ultimately suggested that the case be returned to the court of appeals for it to consider issuing a certificate of appealability. The Supreme Court did so, along with a similar case, *Hunter v. United States*, 130 S. Ct. 1135 (2010), in which the Solicitor General had recommended the same course. On remand, the

government acknowledged a constitutional violation and suggested that the court of appeals remand the cases to the district court for resentencing. The court of appeals did so, finding that precedent since the original sentencings "calls into serious question the constitutionality" of the above-the-statutory-maximum terms. Notably, the court went out of its way to "applaud the candor of the Government attorneys." *United States v. Hunter*, 449 F. App'x 860, 862 n.3 (11th Cir. 2011) (per curiam).

V. Conclusion

Candor, credibility, and fairness are core values throughout the Department of Justice—no less in the USAOs than in the Office of the Solicitor General. The vantage point and responsibility inherent in the Solicitor General's functions, however, give that Office a unique role in balancing competing considerations in government appellate litigation. The Solicitor General's Office seeks to bring its unique perspective to bear when it collaborates with the Department's attorneys in order to achieve shared goals.❖

ABOUT THE AUTHOR

❑**Michael R. Dreeben** is a Deputy Solicitor General in the Office of the Solicitor General, a position he has held since 1995. From 1988 to 1995, he was an Assistant to the Solicitor General. His primary responsibility involves criminal matters in the Supreme Court and federal appellate courts. He has argued 84 cases in the Supreme Court and has argued in all but one of the regional courts of appeals, including en banc appearances in 9 circuits. He has also served as a Special Assistant United States Attorney in the District of Maryland, taught as an adjunct professor at Georgetown University Law Center and as a visiting professor at Duke Law School, and served as a law clerk to Fifth Circuit Judge Jerre S. Williams.✠

United States Appeals: Strategic and Policy Considerations

Malcolm L. Stewart
Deputy Solicitor General
Department of Justice

I. The appeal-authorization process

Under Department of Justice (DOJ) regulations, the Solicitor General "[d]etermin[es] whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. 0.20(b) (2012). The Solicitor General typically makes his decision based on recommendations from his own staff and from one of the DOJ's litigating divisions. In cases where a United States Attorney's office or another federal agency has been actively involved in the formulation of the government's position, those entities usually submit recommendations as well. The packet provided to the Solicitor General often includes recommendations from a number of federal entities, sometimes expressing divergent views on whether an appeal should be authorized.

Centralizing the government's appeal decisions in a single DOJ official serves at least three important policy objectives. First, it helps to ensure that, if an appeal is taken and the court of appeals ultimately rules in the government's favor, the decision will be one that the Solicitor General is prepared to defend in the Supreme Court. Second, it promotes consistency in government litigation overall and reduces the likelihood that different DOJ lawyers will inadvertently take inconsistent positions in different lawsuits. Third, it ensures that an adverse district court ruling precipitates a fresh look at the government's litigating position by DOJ lawyers, including those who are not already invested in the case. District judges often make mistakes, which is why we have courts of appeals. Nevertheless, an adverse ruling by an Article III judge is a significant intervening circumstance that should cause government attorneys to re-examine the strengths and weaknesses of the government's position before seeking relief from a higher court. The appeal-authorization process helps to ensure that such rulings are given due weight and are not challenged lightly or reflexively.

In addition to informing the Solicitor General's decision whether to appeal, the memoranda prepared in connection with that process are often very helpful to the brief writers in cases where appeals are authorized. The memoranda may identify potential arguments, as well as potential pitfalls that are not apparent from the face of the district court's decision. In many cases, the goal of an appeal is not simply to produce a favorable appellate ruling on the facts before the court, but to produce favorable appellate precedent. Moreover, the memoranda may highlight the legal and practical considerations that are of greatest continuing concern to the federal entities involved. In cases where there is intra-government disagreement about whether particular arguments should be advanced, the memoranda produced in connection with the authorization decision help to ensure that those disagreements are identified at an early stage of the drafting process.

II. Assessing the government's merits arguments

When the Solicitor General decides whether to authorize an appeal, by far the most important consideration is the perceived strength of the government's position on the merits. The views of interested agencies can be important to the appeal decision, not only because they shed light on the government interests implicated by the case, but also because they may affect the likelihood that an appeal will be successful. Thus, if the potential question for appeal is one of statutory interpretation, and a federal agency has construed the relevant statutory language in a regulation that would be entitled to *Chevron* deference, the Solicitor General will take that fact into account in assessing the strength of the government's merits arguments. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984).

For purposes of this merits assessment, arguments that are wholly sound in the district court do not always provide viable bases for appeal. Perhaps most significantly, the Solicitor General very seldom authorizes appeals to challenge a district court's resolution of disputed factual issues. Even in cases where the government was on firm ground in urging the district court to adopt a particular view of the evidence, the deferential standard that governs appellate review of factual findings typically makes success on appeal unlikely. For similar reasons, the government very rarely appeals fee awards under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and 28 U.S.C. § 2412, when the sole potential ground for appeal is that the government's position in the underlying litigation was "substantially justified." Because the district court's resolution of substantial-justification issues in EAJA proceedings is reviewed only for abuse of discretion, even a strong argument on this issue is seldom sufficient to overturn an EAJA award.

In assessing the strength of potential merits arguments, the government takes existing circuit precedent as given. A particular merits argument, therefore, might be strong in one circuit and weak or hopeless in another. If a case is regarded as a plausible candidate for eventual en banc or Supreme Court review, however, the government may raise a claim on appeal that it knows to be foreclosed by circuit precedent (with an appropriate acknowledgment to the court of appeals) in order to ensure that the claim is properly preserved.

One category of suits in which appeals are typically authorized consists of cases in which the district court has declared an Act of Congress unconstitutional. This practice is not an invariable one, and circumstances occasionally arise in which the Solicitor General declines to appeal such rulings. Nevertheless, given the respect owed to a coordinate branch of government, an appeal to defend the constitutionality of the statute is generally viewed as the presumptive course of action.

III. Additional considerations that may bear on the appeal decision

While the perceived strength of the government's merits argument is the most important factor in the appeal decision, the Solicitor General sometimes decides against appeal for other reasons, even when that criterion for appeal is satisfied. Although a variety of factors may lead to that conclusion, one guiding principle is that an appeal should be taken only if the district court's ruling is likely to have some tangible adverse consequence for the government that can be rectified by an appellate reversal. When lawyers have fought hard and lost in an inferior court, their natural reaction often is to seek vindication, for the government and, perhaps, for themselves. Absent some real practical impact on the conduct of the government's business, however, the abstract errors of a district court's legal analysis are rarely, if ever, a sufficient justification for taking an appeal. In assessing the practical importance of a potential appeal, lawyers within the Office of the Solicitor General typically give substantial weight to the recommendations of interested agencies and litigating divisions. Lawyers in those units are well

positioned to evaluate the likelihood that a successful appeal would tangibly benefit the government in the case at hand and/or within the context of a larger agency program or course of litigation.

The Solicitor General sometimes concludes that, although the potential arguments for appeal might persuade the circuit court to reverse the decision below, such a ruling would be a disservice to the overall interests of the United States. Those cases arise infrequently because the government's initial formulation of its litigating position in the district court should, and typically does, reflect consideration of any divergent views within the executive branch. Nevertheless, an adverse district court ruling, and the intra-government deliberations that precede the decision of whether to appeal, may bring to light potential consequences of the government's position that had previously been under-appreciated. That process may lead the Solicitor General to reconsider whether successful prosecution of the suit would further the long-term interests of the government as a whole.

In other cases, the Solicitor General may conclude for more prosaic reasons that even a successful appeal would not likely produce any significant practical benefit for the United States. In cases (for example, tax deficiency proceedings) where the ultimate objective of the suit is to collect money from the opposing party, appeal will generally be unwarranted if it appears that any favorable judgment would not be collectable. Sometimes, it may be clear that a successful appeal would produce a remand for further district court proceedings rather than an outright win. If the course of the litigation up to that point indicates that the district court on remand would rule against the government on a factual or discretionary ground that would be difficult to challenge through a second appeal, that prospect may lead the Solicitor General to conclude that an initial appeal would be a pointless exercise.

A particular district court decision may be favorable to the government on some issues and adverse to the government on others. In that situation, the Solicitor General may determine that, although the adverse portions of the district court's analysis are legally questionable, any incremental gains from reversal of those holdings would, as a practical matter, be too modest to warrant appeal. Conversely, a district court may identify multiple grounds for entry of judgment against the government, any one of which, if sustained, would provide an independent basis for the court's adverse ruling. Even if some of those grounds seem suspect, there is ordinarily no point in challenging them unless the Solicitor General views the government's merits position on all the relevant issues as sufficiently strong to warrant appeal.

IV. Cases presenting legal issues of recurring importance

The decision whether to appeal can be particularly delicate when a case raises a legal issue that can be expected to recur in numerous other suits. A successful appeal in that circumstance is especially valuable because, in addition to whatever tangible benefits the appellate ruling brings in the case at hand, it will establish helpful precedent for future cases. For the same reason, however, a decision to appeal creates heightened risks. An unsuccessful appeal may leave the government worse off than it was before because the district court's unfavorable, but non-precedential ruling may be superseded by an unfavorable appellate decision that will be binding throughout the circuit.

In those circumstances, the government generally takes particular care to select favorable "vehicles" for appellate consideration of recurring legal issues. The best vehicles are cases in which the facts present the government's position in a favorable light, maximizing the likelihood that the government's view will strike judges as intuitively fair. When the government argues that the opposing party's conduct violates some federal statute, a good vehicle is typically one in which the alleged violation is substantial rather than merely technical—that is, a case in which the defendant's conduct will actually cause the types of harms that, on the government's view of the statute, Congress was attempting to prevent. If the government seeks to establish a jurisdictional or similar limitation on the authority of

courts to entertain particular types of claims, it may have a better chance of prevailing if the facts do not seem to cry out for relief. To be sure, judges are expected to decide cases based on dispassionate, legal analysis rather than on their intuitive conceptions of fairness, and it is sometimes appropriate to appeal even in cases involving "bad facts." When a potential appeal seems likely to generate an important precedent, however, and especially when alternative vehicles are likely to become available, the Solicitor General's appeal decisions typically reflect a preference for cases in which the government's position can be cast in its best light.

The appeal-authorization process itself, in which multiple government components may study a district court decision and provide recommendations to the Solicitor General, sometimes identifies strong arguments that the government would want to present in any appeal, but that were not asserted in the district court. Rules governing timely presentation of claims do not foreclose appellants from improving their district court submissions, and new insights sometimes are properly viewed simply as refinements to arguments that were made below. In some cases, however, there may be a substantial risk that the court of appeals would hold the new arguments to be forfeited if the government asserted them on appeal. Because the government often resists opposing parties' efforts to inject new issues on appeal, an appellate ruling that adopts an especially lax approach to requirements of timely presentation may itself disserve the government's long-term interests. Particularly when the underlying issue for appeal is a recurring one, it may be preferable to wait for an appellate vehicle in which our best arguments have unquestionably been preserved.

These sorts of prudential vehicle-related considerations are particularly important in cases that present a reasonable possibility of eventual Supreme Court review. If the government has lost an issue in one circuit, a victory in another court of appeals will by definition produce a circuit conflict and thus a plausible certiorari candidate if the opposing party chooses to file a petition. If some idiosyncratic feature of the case makes that an unattractive prospect, it may be appropriate to forgo an appeal.

V. Selecting issues for appeal

The Solicitor General's appeal-authorization decision is not always a binary one. Even when there is general agreement within the government that an appeal should be taken in a particular case, there may be substantial debate and deliberation regarding the specific grounds on which the district court's decision should be challenged. The considerations discussed above are generally relevant to the selection of appropriate issues for appeal, as well as to deciding whether to appeal at all.

In deciding whether a particular issue should be raised as part of a government appeal, the Solicitor General looks first and foremost at the strength of the government's merits argument with respect to that issue. The Solicitor General also considers the practical benefit that a successful appeal on the issue would provide and the extent to which the facts of the case put the government's position on that issue in a favorable light. In addition, in potential multi-issue appeals, the Solicitor General must consider the possibility that inclusion of additional challenges would make the government's presentation too diffuse and would thereby distract the court of appeals from the issues that are of primary importance to the government. Even with respect to an issue that would be sufficiently important to warrant appeal in other circumstances, the desire for a more focused appellate presentation may cause the Solicitor General to forgo appeal on the issue in such a case.❖

ABOUT THE AUTHOR

❑**Malcolm L. Stewart** is a Deputy Solicitor General in the Office of the Solicitor General, a position he has held since 2008. From 1993 to 2008, he was an Assistant to the Solicitor General. He has responsibility for a variety of civil matters in the Supreme Court and federal appellate courts. He has argued approximately 61 cases in the Supreme Court. He previously served as a law clerk to D.C. Circuit Chief Judge Patricia M. Wald and Supreme Court Justice Harry A. Blackmun.✠

Adverse Decisions

Patty Merkamp Stemler
Chief, Appellate Section
Criminal Division

Barbara C. Biddle
Deputy Director, Appellate Staff
Civil Division

What does the United States do when it loses in court? A specific protocol exists for cases decided adversely to the government. First, the trial attorney reports the adverse ruling to his Appellate Chief. The Chief, in turn, contacts the appropriate litigating Division in Main Justice. Ultimately, the adverse decision wends its way to the Solicitor General, who decides whether to authorize further review. Articles in this volume by Deputy Solicitors General Michael Dreeben and Malcolm Stewart explain the purposes served by the Solicitor General authorization requirement and the criteria used by the Solicitor General and his staff to decide when the government should seek further review. This article focuses on the roles of the United States Attorney's offices (USAOs) and the litigating Divisions in Main Justice.

Indeed, the USAOs and Divisions are indispensible to the process. A quick look at some numbers makes this point clear. There are nearly 9,000 attorneys in the USAOs and the seven litigating Divisions (Criminal, Civil, Tax, Civil Rights, Antitrust, Environment and Natural Resources, and National Security). In contrast, there are only 25 attorneys in the Office of the Solicitor General (OSG). The attorneys in the OSG depend on the USAOs and Divisions to identify each adverse decision, prepare a package of relevant materials, summarize the facts, analyze the issues, and advise them on the need for further review. Last year, the OSG received 1,755 adverse decision packages.

I. Solicitor General authorization

The Solicitor General's authority to determine when an appeal should be taken is derived from three sources. First, under the Code of Federal Regulations, the Solicitor General has the authority to "[d]etermin[e] whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs)." 28 C.F.R. § 0.20(b) (2012). The phrase "and to what extent" is significant. It grants the Solicitor General the power not only to decide whether to appeal, but also to decide which arguments the government will advance on appeal. The attorney handling the appeal must hew to the Solicitor General's specific directives. Second, the United States Attorneys' Manual also specifies that Solicitor General authorization is a prerequisite of further review. *See, e.g.*, DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 2-2.121–2.124 (2001) (requiring approval for all appeals by the government to all appellate courts, [including petitions for rehearing en banc, but not for petitions for rehearing by the panel] and for all petitions to such courts for extraordinary writs and all amicus briefs, as well as for petitions for a writ of certiorari in the Supreme Court). *See also* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.170 (2008) (specific to criminal appeals). Finally, 18 U.S.C. § 3742, which governs sentencing appeals, bars prosecution of a sentencing appeal "without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General."

II. Actions requiring approval

Department of Justice (DOJ) attorneys need approval anytime they want to jump from the district court to the court of appeals, from a panel of the court of appeals to the en banc court, or from the court of appeals to the Supreme Court. They also must seek Solicitor General approval if they want to file an appellate amicus brief, seek the recusal of a court of appeals judge, or ask that a case be assigned to a different district judge on remand.

Once an appeal has been authorized, an attorney must obtain Solicitor General authorization to dismiss the appeal or to settle the case. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 2-1.000 ("If the Solicitor General has authorized an appeal to [a circuit court], a division may settle a case only if the Solicitor General advises 'that the principles of law involved do not require appellate review in that case.' ") (quoting 28 C.F.R. § 0.163 (2012)).

III. Decisions that must be reported

The reporting requirement only applies to "adverse" decisions—that is, decisions made over the objection of the United States. If the government urged the court to rule in a particular manner, or consented to the ruling, the decision is not "adverse."

A. Criminal cases

District Court: Prosecutors must report all adverse district court rulings that can be appealed under the first two paragraphs of 18 U.S.C. § 3731. Those paragraphs permit the government to appeal orders dismissing all or part of an indictment, granting a new trial, setting aside a guilty verdict, or suppressing evidence constituting substantial proof of a material fact. The reporting requirement for adverse sentencing decisions is narrower. Prosecutors must report an adverse sentence only if it is outside the statutory limits or if the sentence was based on a prohibited factor, such as race, religion, or national origin. For all other sentencing errors, a prosecutor needs to report only if he would like to appeal. Prosecutors must also report an order vacating a criminal judgment on collateral review. *See* 28 U.S.C. § 2255 (2012) (providing for an appeal from a final order disposing of a federal collateral challenge to a conviction or sentence).

If a prosecutor wants to seek mandamus review of a non-appealable order, to seek a stay in the court of appeals, or to challenge a district court order releasing a defendant pending trial, he must report the ruling to the appropriate litigating Division and obtain Solicitor General authorization. *See* 18 U.S.C. § 3731, para. 3 (2012) (granting the government authority to appeal a release order). If an emergency stay is required, the OSG can often grant authorization before the appeal request is fully processed, subject to advising the court of appeals that the Solicitor General is considering whether to authorize an appeal.

There is one caveat, however. The government may not appeal where the Double Jeopardy Clause would bar the relief that the government seeks. Thus, the government may not appeal a not guilty verdict or a court order acquitting the defendant before the case is submitted to the jury or after the jury announces that it is unable to reach a verdict. The reporting requirements for criminal cases are set forth in the United States Attorneys' Manual. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.170 (2008).

Finally, if a court of appeals issues a preliminary order requiring the United States to address the basis for appellate jurisdiction, the response should be reviewed and approved by the relevant litigating Division and the OSG before it is filed.

Court of Appeals: In the courts of appeals, prosecutors must report all published adverse decisions. In cases in which the government appealed, prosecutors must report the decision even if unpublished.

B. Civil cases

District Court: In civil cases, all adverse final decisions must be reported, with the exception of individual Social Security cases (which must be reported only if there is a recommendation in favor of an appeal). Appealable, non-final decisions must be reported if any interested component wants to appeal. Such decisions include, for example, preliminary injunctions or denials of qualified immunity in individual liability cases.

Court of Appeals: In civil cases, all adverse decisions must be reported, whether published or not, including adverse Social Security decisions.

C. Criminal or civil

Finally—and this point is important—prosecutors must always report when a judge, including a magistrate judge, declares a statute, rule, or regulation unconstitutional, in whole or in part, on its face or as applied. In most cases, the Solicitor General will authorize further review and defend the constitutionality of the provision. If he does not, however, the Attorney General must report to Congress and explain why the Solicitor General refrained from defending the provision's constitutionality. *See* 28 U.S.C. § 530D (2012). Especially in light of this reporting requirement, the Solicitor General must be given ample opportunity to review any decision declaring a law unconstitutional.

IV. When to report

A. Appeal

Assistant United States Attorneys (AUSAs) should notify the USAO Appellate Chief promptly whenever a district court rules against the government in an appealable order. Together, the AUSA and the Appellate Chief, in consultation with an attorney from one of the Main Justice Appellate Sections, can discuss whether to seek reconsideration in the district court before filing a notice of appeal. In criminal cases, the government has 30 days to file a notice of appeal. *See* 18 U.S.C. § 3731, para. 4 (2012); FED. R. APP. P. 4(b)(1)(B). Although no criminal rule expressly authorizes the government to seek reconsideration of an adverse ruling in the district court, Supreme Court precedent establishes that the government may file a motion to reconsider within the 30-day appeal period and that a timely motion renders the original judgment nonfinal. *See United States v. Ibarra*, 502 U.S. 1, 6 (1991) (per curiam); *United States v. Dieter*, 429 U.S. 6, 8 (1976) (per curiam). Accordingly, the time for filing a notice of appeal will run from the date on which a timely motion to reconsider is resolved. Note, however, that AUSAs should not seek reconsideration of a sentence. Federal Rule of Criminal Procedure 35(a) gives a district court only 14 days to "correct a sentence that resulted from arithmetical, technical, or other clear error." *See* FED. R. CRIM. P. 35(a). A district court may not alter a sentence for any other reason, and it may not correct even a "clear error" outside the 14-day window. *See United States v. McGaughy*, 670 F.3d 1149, 1157 (10th Cir. 2012) (collecting cases). For this reason, an AUSA should file a motion to correct a sentence promptly and, if the sentence is not corrected within the 14-day period, the AUSA should file a notice of appeal within 30 days from the date on which judgment was entered or the date on which the defendant filed a notice of appeal, whichever is later. FED. R. CRIM. P. 4(b)(1)(B)(i)-(ii).

In criminal cases, USAOs should send their recommendation and supporting papers to the Criminal Division's Appellate Section liaison at least 60 days before the government's opening brief is due. The Criminal Division must, in turn, complete its own recommendation and transmit the package to the OSG at least 30 days before the brief is due. If there is a change in the briefing schedule, AUSAs should notify the Appellate Section. Likewise, attorneys should apprise the Section of any proceedings in the district court that may affect the appeal.

In civil cases, the government has 60 days to file a notice of appeal. *See* FED. R. APP. P. 4(a)(1)(A). A timely motion for reconsideration under several rules will toll that 60-day period. *See* FED. R. APP. P. 4(a)(4). The AUSA should consult with the Appellate Chief and with the Main Justice trial and appellate sections regarding whether the case would benefit from seeking reconsideration before filing a notice of appeal. Notably, the government now has 28 days to file a Rule 59 motion. *See* FED. R. CIV. P. 59(b).

In civil cases, AUSAs should notify the respective Appellate Section (Civil, ENRD, Civil Rights, Tax, Antitrust, NSD) as soon as the adverse decision comes out, without waiting to formulate a recommendation. The recommendation should follow between the 21st to the 30th day. The Appellate Sections must, in turn, complete its own recommendation and transmit the entire package to the OSG at least 30 days before the brief is due.

Because the authorization process takes time, AUSAs do not need Solicitor General authorization to file the notice of appeal. It is the responsibility of the USAO to file the notice on time, even if no decision has yet been rendered on whether to take an appeal. If no one urges appeal, the adverse decision process can typically be completed within the respective 30-day or 60-day appeal period. If, however, the Solicitor General has not completed his review by the deadline for appealing the order under review, the USAO should preserve the time by filing a protective notice. If the Solicitor General eventually declines to authorize appeal, the USAO will withdraw the notice. Although an AUSA may file a protective notice of appeal without Solicitor General authorization, he may not file the government's opening brief until the Solicitor General authorizes him to do so. If the issue is particularly sensitive or important, the OSG may want to review the brief before it is filed.

B. Rehearing en banc

When the government loses a case in the courts of appeals, the reporting procedure is the same, but the deadlines are much shorter. In criminal cases, the government has only 14 days to seek rehearing. FED. R. APP. P. 40(a)(1). If a case is a plausible candidate for en banc review, the AUSA should promptly seek a 30-day extension of that 14-day period. If the extension is granted, the USAO's recommendation is due two weeks from the date of the decision, Criminal Appellate's recommendation is due two weeks later, and the OSG has approximately two weeks to reach a decision. Adherence to these deadlines is critical.

Note that two circuits have opted out of the short, 14-day deadline. The D.C. Circuit gives the government 45 days to seek rehearing in all cases, criminal or civil. D.C. CIR. R. 35(a). The Eleventh Circuit gives the government 21 days to seek rehearing in a criminal case. 11TH CIR. R. 40-3. Prosecutors practicing in the Eleventh Circuit should seek extensions of the rehearing time in any case possibly warranting en banc authorization.

In civil cases, the government has 45 days to seek rehearing. FED. R. APP. P. 40(a)(1). Even so, the USAO's recommendation is due two weeks after the decision, the respective Appellate Section's

recommendation is due two weeks later, and the OSG has approximately two weeks to reach a decision. These are critical deadlines due to the shortness of time for seeking rehearing.

C. Certiorari

The time for filing a certiorari petition is more generous. A petition is due 90 days after the court of appeals renders its decision or denies rehearing. SUP. CT. R. 13(a). Once again, the DOJ divides this period into thirds. The USAO must submit its recommendation within the first 30 days. The litigating Division has the next 30 days to submit its recommendation. The OSG gets the final 30. If additional time is needed, the Solicitor General will move for the extension. Likewise, if certiorari is authorized, the petition will be drafted in the Division's Appellate Section and reviewed and filed by the OSG.

V. Where to report

The reporting procedures for criminal cases are set forth in the United States Attorneys' Manual. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.170 (2008). Prosecutors must report all appealable adverse decisions to the Criminal Division's Appellate Section unless the case falls within the purview of one of the specialized litigating Divisions. A Criminal Appellate Section liaison is assigned to each USAO, and prosecutors should report their adverse decisions directly to that liaison. An AUSA should email his liaison the following: (1) the adverse order, (2) the indictment and all other relevant pleadings and transcripts, and (3) a memorandum from the USAO recommending for or against appeal and providing supporting reasons. It is especially important that the USAO explain in the memorandum the impact of the ruling on its case. For example, if only one of ten counts was dismissed, the USAO should explain how the loss of that count hurts the case. If evidence is suppressed, the USAO should explain the significance of the evidence. The USAO should not only provide reasons supporting its recommendation, it should also give a candid assessment of any deficiencies in the record or other factors that may weigh against an appeal.

Writing for the Assistant Attorney General of the Criminal Division, the Appellate Section liaison will prepare a recommendation. If the USAO and liaison agree on whether to appeal, Criminal Appellate will send the complete package to the OSG, usually without involving Criminal Division leadership. If, however, Criminal Appellate and the USAO disagree, Criminal Division's Front Office will review Appellate's draft recommendation. This review process typically takes several days and may necessitate a revision of the Criminal Division memorandum before it is submitted to the OSG.

In civil cases, the process is much the same, but all recommendations go through the Divisions' Front Offices unless they are unanimously against further review. AUSAs should send the relevant orders and judgments, along with the most relevant papers, such as summary judgment briefs or appellate briefs. The Appellate Sections will send the USAOs a copy of their recommendations when the package goes to the OSG.

VI. Standards for authorizing further review

During the past year, the Criminal Division's Appellate Section sent 611 adverse decision packages to the OSG. Most recommendations were unanimous and resulted in no further review. Out of the 611 reported adverse criminal decisions, the Solicitor General authorized approximately 113 appeals, 7 petitions for rehearing en banc, and 4 certiorari petitions. As these stark numbers show, it is significantly easier to get authorization to appeal a district court decision than it is to get authorization for further review of an adverse opinion from the court of appeals.

In deciding whether to recommend appeal, the Division Appellate Sections consider a number of factors, including appealability, claim preservation, standard of review, what is at stake, the risk of adverse precedent, and the merits.

Authorization to seek rehearing en banc is granted infrequently because Federal Rule of Appellate Procedure 35(a) sets the bar high:

> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

FED. R. APP. P. 35(a). The Appellate Sections adhere to these standards. They also consider circuit practice. Some circuits are more likely to sit en banc than others, and that can tip the scale in a close case.

The bar for Supreme Court review is higher yet. Supreme Court Rule 10 defines the "compelling reasons" that will induce the Court to take a case. For federal cases, there are two criteria: (1) a square circuit conflict on an important matter, or (2) the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of [the Supreme Court's] supervisory power." SUP. CT. R. 10(a). The Appellate Sections will hone in on whether a square circuit conflict exists. Mere tension among decisions is not sufficient and conflicts that have no effect on the outcome are unlikely to warrant the attention of the Supreme Court.

Above all, it cannot be stressed enough that although the ultimate decision whether to seek further review in the appellate courts rests with one person, the Solicitor General, the adverse decision process is a truly collaborative one throughout. The USAO's views, and the views of implicated agencies and Main Justice trial sections, are critical to the process and highly respected. The dialogue is ongoing from the moment the adverse decision is rendered until the final decision of the Solicitor General, and AUSAs have the opportunity for input throughout, even after written recommendations are submitted. This collaborative process is an extremely valuable tool in giving the government an edge in putting its best foot forward in the appellate courts, and all should welcome the opportunity to be part of the process.❖

ABOUT THE AUTHORS

❑**Patty Merkamp Stemler** is the Chief of the Appellate Section of the Criminal Division. She entered the Department in 1976 in the Attorney General's Honors Program, and has served as Chief since 1992. Ms. Stemler has argued in every circuit and in the United States Supreme Court, and she is a regular faculty member for appellate and other courses offered at the National Advocacy Center.✠

❑**Barbara C. Biddle** is the Deputy Director of the Appellate Staff of the Civil Division. She entered the Department in 1984 after six years of private practice, became an Assistant Director in 1989, and has been Deputy Director since 2007.✠

Rule 28 Brief Writing Basics

Joseph J. Karaszewski
Chief, Appellate Division
United States Attorney's Office
Western District of New York

I. Introduction

Trial advocacy and appellate advocacy are fundamentally different. The trial lawyer's task is to assemble the testimony and other evidence and present it in a way that will persuade the jury or judge to conclude that something happened, that one version of the events is more plausible than another, or that a particular legal result is warranted. Bound only by the rules of evidence, the trial Assistant United States Attorney (AUSA) must convince the trier of fact that the light was red and not green; that the police officer, and not the defendant, testified accurately about the traffic stop; or that the defendant deserves a sentence within, and not below, the guidelines range.

The appellate lawyer's task is different—sometimes easier, sometimes more challenging. The first step in tackling the job of writing an effective appellate brief is to understand that the battles that are fought and won in the district court differ from those that are fought on appeal. Assuming that a favorable finding or decision resulted in the district court, a deferential standard of review will often apply on appeal. Thus, the advocate need not "re-convince" the appellate court of the district court's findings. Rather, the advocate must only demonstrate to the appellate court that the record contains evidence from which the fact finder reasonably concluded that the light was red, that the district court permissibly chose to believe the police officer rather than the defendant, or that the sentence, while not the only one the court could have imposed, was within the range of permissible decisions. In this regard, the government's burden is not as daunting because the scope of the task is narrower, and perhaps easier. On the other hand, the undertaking may be more challenging because, unlike a trial lawyer, the appellate advocate is stuck with the record and cannot make on-the-fly decisions designed to patch up holes in the government's case.

The attorney writing an appellate brief must understand and internalize the unique appellate perspective at the outset in order to produce a brief that is clear, concise, and helpful to the appellate court. Most circuits severely circumscribe the instances in which oral argument is heard. Therefore, in many cases, the brief will be your first and only opportunity to present the government's position. Furthermore, the quality of your appellate advocacy has ramifications beyond your own case. While a district court decision generally affects only the case or district in which it was rendered, an appellate court decision binds each district court and United States Attorney's office in the circuit, and may have even wider implications, for example, where the opinion creates a circuit split. Accordingly, it is especially important to ensure that the legal positions set forth in your brief are correct and comply with Department of Justice (DOJ) policy.

This article will provide you with an overview of some of the things you should be thinking about when getting organized to write an appellate brief, and while you are researching, writing, reviewing, and editing it. The ideas presented in this article are arranged roughly in terms of their importance, rather than the order in which Federal Rule of Appellate Procedure 28 states the brief should be organized. This article is not, nor could it be, comprehensive.

First, I would like to share some broad principles about appellate brief writing. Rule 28 sets forth the formal requirements for the brief. If you have never written an appellate brief, you should read Rule 28 before you begin. Rule 28(a) lists those matters that the appellant's brief "must contain," organized in the order in which they should appear in the brief. Rule 28(b) applies to the appellee's brief, cross-referencing Rule 28(a), but stating that an appellee's brief need not include the jurisdictional statement, the statement of the issues, the statement of the case, the statement of the facts, or a statement of the standard of review. As a government attorney, you may safely proceed as if the exceptions in Rule 28(b) did not exist. With the possible exception of the jurisdictional statement in cases where jurisdiction is not an issue, it is inconceivable that, as the appellee, the government would be satisfied with the appellant's statement concerning any of the matters specified in Rule 28(b). The government's brief should stand alone. It should contain all the information, factual and legal, that the appellate court will need to decide the case.

II. Standard of review

Rule 28 does not mention the standard of review until subsection (a)(9)(B). It appears first here, however, because it is the most important legal concept to understand and embrace if your brief is to be effective. Without exaggeration, the various standards of review should inform the manner in which you address each aspect of your appellate task. As you begin, your first step should be to isolate the issues and ascertain the applicable standards of review for each (not taking your opponent's word for it if you are the appellee). Keep the standards straight in your mind and in the forefront as you review the record, assess your opponent's arguments, draft the fact section of the brief, formulate your issue statements, and craft your arguments. As the appellee, you should hammer home a favorable standard of review at every opportunity. As the appellant, you must fully understand and articulate in your brief the limits of any deference the applicable standard of review affords the district court and then convince the appellate court that the district court erred by straying outside the bounds of that deference.

A. Clear error

Appellate courts afford great deference to a district court's findings of historical fact and will reverse only if the finding is clearly erroneous. An important practical reason for this deference is that trial courts enjoy the institutional advantage of actually presiding over testimony. Recognition of this fact appears in Federal Rule of Civil Procedure 52(a)(6), which states that findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6). This standard of review further requires the appellate court to review the evidence in the light most favorable to the prevailing party. Therefore, the Supreme Court has said that if there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

A criminal defendant challenging, for example, the denial of a suppression motion, may on appeal revisit every bit of testimony that was adduced at the suppression hearing, including that which the trial judge did not credit, in a back-door effort to relitigate the propriety of the district court's findings of fact. Resist the urge to go there. You have already convinced the district court that it should disbelieve, for example, the defendant's testimony that the police beat him to gain his confession. You need not argue credibility again on appeal. Rather, after identifying the record evidence that shows that the police conducted the interrogation by the book, you need only acknowledge that the defendant testified differently, the district court did not believe him, and that the appellate court cannot find clear error in that finding.

A similar, although legally distinct, standard of review is applied to challenges to the sufficiency of the evidence in criminal cases. Although the standard of review is de novo, the appellate court views the evidence in the light most favorable to the government and asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Again, the institutional superiority of the district court, here the jury, to view witnesses and weigh the evidence entitles it to deference by the reviewing court. In other words, you have already convinced the jury to believe your witnesses. An appellate court oversteps its bounds if it tries to revisit the jury's province in this regard.

A scene from the movie *12 Angry Men* demonstrates vividly the difference between what happens at trial and, conversely, what cannot happen on appeal. In the film, deliberating jurors are assessing the credibility of an eyewitness who testified that she saw the defendant commit the murder for which he is on trial. The jurors' determination of her veracity ultimately hinges on her physical appearance on the witness stand. Specifically, they note that although she did not wear glasses while testifying, and while no mention of her eyesight was made at all, she had deep impressions on the sides of her nose that could only have been made by a pair of eyeglasses. Because she testified that she saw the murder through a window in her apartment at a distance while she was in her bed trying to fall asleep, the jurors inferred that she could not have been wearing her glasses and discounted her testimony.

This bit of drama simply could not happen in an appellate court. Had the jury in the film convicted the defendant, his appellate challenge to the sufficiency of the evidence almost surely would have failed. The record contained testimony from a witness who said she saw the defendant commit the crime. That there were reasons to doubt her testimony or that there was evidence to the contrary would simply be beside the point for appellate purposes. Accordingly, you need not repeat your closing argument in responding to a sufficiency challenge. Simply hew to the standard of review, point to record evidence establishing the elements of the offense, and remind the court that any evidence to the contrary or flaws in the witness' powers of perception were insufficient to create reasonable doubt in the eyes of the properly instructed jury.

B. Abuse of discretion

Myriad decisions made by the district court during the course of pre-trial, trial, and sentencing proceedings are subject to review on appeal for abuse of discretion. By definition, a court imbued with discretion is not required by law to make a particular decision. Rather, that court must choose a course of action that lies within a range of permissible decisions. Your job in defending the district court's decision on appeal is simply to show that the court did not stray outside the range. Do not broaden your task by endeavoring to demonstrate that the decision was "correct," or "right." You need only show that it was permissible.

For example, the district court's evidentiary decisions are frequently the object of appellate challenge. Many of them, particularly those under Rules 403 and 404(b) of the Federal Rules of Evidence, involve a balancing exercise that in many cases could have gone either way. However, the district court was in the best position to decide what was unduly prejudicial, cumulative, confusing, or a waste of time. Challenges to these determinations should rarely succeed on appeal by operation of the standard of review alone. Likewise, in criminal cases, the district court enjoys wide sentencing discretion, which an appellate court cannot lightly disregard. It can be particularly liberating to tell an appellate court directly (but respectfully) that it lacks the power to vacate a sentence simply because it disagrees with it.

C. De novo

Legal determinations by the district court, such as the dismissal of a civil claim under Federal Rule of Civil Procedure 12(b)(6), conclusions of law reached in deciding a suppression motion, or instructions administered to a jury, are subject to de novo review. Although this standard of review implies no deference whatsoever, a district court decision in the government's favor may nonetheless provide you some subliminal traction as the appellee. Therefore, describe it as "carefully reasoned," "thoughtful," or "comprehensive." As the appellant, de novo is the best standard of review you can get. Nonetheless, most appellate judges are not eager to reverse their colleagues if they can help it. Thus, when challenging a legal decision as the appellant, do not satisfy yourself with merely demonstrating that the district court was "wrong." Rather, gently nudge the appellate court away from its natural reluctance to overturn a fellow jurist by respectfully showing that the decision was "contrary to binding precedent," "unprecedented," or that it "overlooked pertinent facts which were not in dispute."

D. Plain error

An error that was not raised before the district court may be reviewed on appeal only for plain error. This standard is the most deferential standard of review that exists, and rests on the premise that a district court should not be reversed for an error that was not brought to its attention and that it did not have an opportunity to correct. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (setting forth the parameters of plain error review). Do not pass up the opportunity to advocate for this standard, which can raise the bar considerably for the appellant. The appellant's brief may gloss over the fact that an error was not preserved and fast-forward to its analysis under the otherwise-applicable standard of review. Thus, part of your review of the record should be to ensure that trial counsel preserved the issues that are being raised on appeal and, if not, to point these issues out forcefully in your brief.

III. Statement of facts

A. "Just the (relevant) facts."

Federal Rule of Appellate Procedure 28(a)(7) calls for a "statement of facts relevant to the issues submitted for review." FED. R. APP. P. 28(a)(7). Your emphasis should be on the word "relevant." Not everything that happened or that was litigated before the district court or at trial need be included in your recitation of the facts. Only those facts that are legally relevant and that the appellate court needs to know to decide the appeal should be included. For example, a defendant may have lost pretrial motions in which he alleged that police officers lacked probable cause to arrest him and that his post-arrest statements to the police were involuntary. If his appellate challenge is only to the district court's ruling on the statements, there is no need to belabor the circumstances of his arrest in your statement of the facts. This is clutter and the judge will be annoyed when he realizes that the two paragraphs of facts about the arrest have no appellate significance. Simply say, for example, "Officer Jones arrested Smith and placed him in the back seat of her patrol car." This statement succinctly gets you where you need to be to discuss the facts that are relevant to the defendant's statement.

Use dates judiciously, recognizing that the precise date on which an event occurred, an indictment was filed, or a hearing was conducted, is often irrelevant. Unless the issue is the statute of limitations or the timeliness of service, do not try the judge's patience by making him or her expend energy memorizing dates that appear in your statement of facts, only to realize later that they are unimportant to the issues on appeal. Rule 28(a)(4)(C) contains the lone requirement for specifying dates.

The rule provides that the jurisdictional statement must include "the filing dates establishing the timeliness of the appeal or petition for review." FED. R. APP. P. 28(a)(4)©.

B. Include record cites

Every fact set forth in your statement of the facts section must be supported by a citation to the record. Do not rely on your memory of the trial or other district court proceedings, or on the memory of the trial attorney. If it does not appear in the record, it did not happen.

C. Tell the story clearly and accurately, without repetition and without argument

Set forth the facts chronologically in narrative form, not witness-by-witness. The latter results in a disjointed presentation that does not flow logically from one point to the next. Further, this method will dispose your statement of the facts to repetition. While it may be sound trial technique to present three different witnesses, all of whom testify that the defendant was wearing a red shirt, and to drive home to the jury the relevance of this fact again and again, repeating yourself in an appellate brief is a distraction. Say it once, point the court to the place or places it can find the fact in the record, and move on. Avoid agency nomenclature and acronyms.

Remember, too, that as the appellee in a criminal case, you may tell the story in the light most favorable to the government. While you must be even-handed, you need not attenuate your reader from the action by the trial or qualify your narrative with attribution to a particular witness. If a witness testified to it, you may state it as a fact. Do not say, "Jones testified that he saw an individual wearing a red shirt, whom he identified in court as the defendant Smith, running away from the bank." Rather, state, "Smith, wearing a red shirt, ran from the bank." (Record, at __ (Jones's testimony)).

In some instances, however, attribution of evidence to a particular witness will be necessary, most often when you must set forth "procedural" facts. For example, if a defendant challenges on appeal the accuracy of the testimony of the government's DNA expert, it will likely be necessary for you to recite the expert's testimony in detail, perhaps even verbatim, and include any objections that were lodged and the district court's rulings on them.

Your recitation of the facts also must be scrupulously accurate and free from argument. Ensure accuracy by double-checking every record cite to the actual testimony, pleading, or document to which it refers. While the use of colorful language is acceptable, make sure that it does not exaggerate or distort the record. Do not say that the defendant "dashed from" the bank, when any fair reading of the record reflects only that he "walked." It takes only one such discrepancy for the court to view everything else you say with scepticism and to be diverted from the real issues in the case. Likewise, avoid using adverbs unless the witness used them. Save your argument for the "Argument" section of your brief.

D. Use headings

Use headings to organize your narrative. If you must tell the story of a drug conspiracy that spanned five years, the investigation of which involved controlled purchases of narcotics, followed by wiretaps, seizures of narcotics, search warrants, and a roundup, followed still by instances of witness intimidation, it may help to break it up into distinct, manageable bites.

Headings are also helpful if you must distinguish "historical" facts that occurred outside the courtroom, from "procedural" facts that occurred during court proceedings or in relation to the litigation. Some appeals may involve only procedural facts. For example, if the only issue on appeal is whether the district court abused its discretion by dismissing the plaintiff's employment discrimination complaint for

failing to serve the United States properly, the facts relevant to the issue on appeal are purely procedural, relating only to the litigation. The historical facts underlying the claims of discrimination need only be addressed peripherally in the fact section, if at all.

More often, however, you will need to acquaint the court with both historical and procedural facts. For example, a criminal defendant may challenge on appeal the sufficiency of the evidence, various evidentiary rulings, and the failure of the district judge to dismiss a juror who saw the defendant in handcuffs. One way to handle this situation is first to set forth the historical facts that form the basis for the defendant's guilt and then tackle the procedural facts, introduced by headings such as "The District Court's Evidentiary Rulings," or "A Juror Sees Smith in Handcuffs." In these "procedural" fact sections, you should set the scene to establish what the district court was asked to rule upon, including the specific evidentiary objection made (or not made) or the manner in which counsel suggested the court should handle the situation, the district court's ruling or the course of action it pursued, and any cautionary or limiting instructions it gave. Another way would be to include only historical facts in the formal "Statement of Facts," and then include the relevant procedural facts under the pertinent argument point, introduced by a heading such as "Additional Relevant Facts." If you chose this route, however, it is best to warn the court at the start of your official "Statement of Facts" section that this layout is how the facts will be organized.

IV. Issue statements and argument headings

Rule 28(a)(5) states that the brief should contain "a statement of the issues presented for review." FED. R. APP. P. 28(a)(5). Your issue statement should incorporate the standard of review and give the court some context. For example, where the issue on appeal is the propriety of the district court's exclusion of evidence, it does not materially advance the government's case, or help to inform the appellate court, to frame the issue as "Whether the district court's decision to exclude evidence was erroneous." Rather, the issue statement should express the standard of review, and give the appellate court at least a glimpse of what the district court considered in reaching its decision. Thus, "Whether the district court abused its discretion by excluding the defendant's proffered evidence because its potential to confuse the jury outweighed its probative value" is a better issue statement. It alerts the court that it will be dealing with a category of district court rulings that are traditionally afforded wide deference, and that the district court at least weighed the proper factors.

Better still, the rule does not say that the issue statement is limited to one sentence, or that it must begin with the word "whether." Thus, although most writers do not do it this way, the following is a perfectly acceptable issue statement that provides the court with even more context:

> Smith sought at trial to introduce evidence that, seven months after the events alleged in the indictment, his brother-in-law sold drugs near the apartment in which the police found the drugs Smith was charged with possessing. The district court excluded the evidence, finding that its probative value was outweighed by its potential to confuse the jury. Was this finding an abuse of discretion?

If you are the appellee, do not be bullied by the manner in which your opponent has framed the issues. You are not bound by that formulation, and you should examine it carefully to ascertain whether the appellant has accurately described the issue and stated the appropriate standard of review. It may be that the appellant's claim of a legal error, when stripped to its essentials, is really only a challenge to an adverse finding of fact upon which the district court's legal conclusion was based. If you can fairly recast the issue and avail yourself of a more favorable standard of review, you have made your task easier.

These considerations should also help you to draft effective argument headings by which the argument section of your brief is organized. These headings, which take the form of statements rather than questions, likewise should incorporate the standard of review and give enough context to provide the judge with a roadmap of sorts when he or she looks through your brief for the first time or consults the table of contents. Like the issue statements, your argument headings need not mirror those of your opponent, and you should feel free to reformulate or consolidate argument headings that can fairly be lumped together if doing so makes your brief clearer, more concise, and more forceful.

V. Argument

A. Standard of review

Rule 28(a)(9) sets forth the requirements for the argument section, including "for each issue, a concise statement of the applicable standard of review." FED. R. APP. P. 28(a)(9). Although this section is the only place where you are required to set forth the standard explicitly, it should not be the first time the court hears of it. Cite a Supreme Court case or a controlling case from your circuit to support your statement of the standard, preferably one that is factually or legally similar to your case. Hundreds of cases exist that state that an appellate court reviews evidentiary decisions for abuse of discretion. Any of these cases may be appropriate, general authority for the standard of review. However, if you cite one that interprets the same hearsay exception or the same opinion witness rule that is applicable to your case, you give the court a signal that you are not just cutting and pasting from your office's brief bank.

B. Controlling law

Set forth the standard of review and controlling law under a separate heading, followed by a "Discussion" section in which you apply your facts to the law. Rule 28(a)(9)(B) says that you may state the standard of review in your discussion, or under a separate heading "placed before the discussion of the issues." *Id.* The latter is a good practice. It is also good practice to set out a statement of the controlling law under this same heading before you launch into your argument. The court often looks to the government's brief for an accurate and detached exposition of the law. It is easier to be dispassionate in fulfilling this need if you at least temporarily isolate the purely legal discussion from a discussion of the result you are advocating.

In this initial law section, confidently tell the court what the controlling law is without overstatement. Acknowledge contrary controlling authority, even if your opponent has missed it. Do not overstate the holding of any case. Although it may ultimately be your legal position that the court should extend a previous holding to reach the facts of your case, your statement of the existing law is not the place to advocate for this extension. Strive to be concise, using direct quotations from the cases when you can. However, avoid using block quotes, which readers tend to skip over. If a legal concept is so nuanced or a court has defined a legal precept so precisely that only a block quote will do, warn the judge that you are about to do it and state why he or she should pay attention. For example, "This Court carefully delineated the contours of [the legal concept] in *United States v. Smith*, in which it stated: [insert block quote]." After the block quote, review it and explain its import.

You should generally avoid the use of string cites in your initial statement of the law, but they may be useful in limited situations. For example, if your circuit has not addressed an issue but numerous other courts of appeals have, a string citation to those authorities may be effective. It also works as a concise way of setting out the bounds of a circuit split.

C. Discussion

This part is where you can finally apply the facts of your case to the law and convince the court, if you are the appellee, that the district court's decision was correct, was a sound exercise of its fully-informed discretion, was not clearly erroneous, or does not present a plain error that the appellate court needs to correct. While your initial statement of the law should be a concise statement of the controlling legal principles, it is here that you may wish to discuss and distinguish the most relevant cases in greater detail. Keep in mind, however, that an attempt to discuss and distinguish every case your opponent cites will quickly grow cumbersome. Use your good sense in choosing which cases to discuss at length. If your opponent relies heavily on a case, or if a case exists that is potentially dispositive either way, it probably deserves a few paragraphs of discussion.

Consider a "lump and dump" strategy to undercut the court's reliance on the cases that your opponent cites. If you can lump cases together that are all distinguishable for the same factual or legal reason, do so and indicate parenthetically the specific factor that distinguishes it.

While you should not feel bound by the structure of your opponent's brief in deciding how your own argument should flow, you must ensure that you ultimately refute each and every one of your opponent's claims. Thus, you should at some point in the performance of your appellate task—preferably when you first read your opponent's brief—compile a complete tally of the appellant's claims. When you have completed your brief, you should quite literally check your brief against your tally to make sure you have addressed everything.

Finally, if you determine as the appellee that the district court has committed an error that is not harmless and that you cannot defend, or if the decision of the district court is contrary to an official litigating position of the DOJ, you should investigate whether it is appropriate for the government to confess error. While such concession should not be done blithely, the candor you owe as an officer of the court and, in particular, as a government attorney, demands it. Seek guidance from your office's Appellate Chief, and consult with your office's liaison in the Appellate Section of the Civil or Criminal Division. Ultimately, approval of the appropriate Appellate Section is required to confess error.

VI. Conclusion

Appellate judges are desperate for briefs that are clear, concise, and that help them decide the case correctly. Chief Justice Roberts has described the experience of navigating poorly written appellate briefs as "hacking through the jungle with a machete." Interview with John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States, SCRIBES JOURNAL OF LEGAL WRITING (Mar. 2, 2007). Working with that metaphor, strive to make your brief the machete that will enable the court to hack through a complex case. The court will be grateful.❖

ABOUT THE AUTHOR

❑**Joseph J. Karaszewski** has been an Assistant United States Attorney in the Western District of New York since 1992 and Chief of his office's Appellate Division since 2006. He is currently an at-large representative on the Appellate Chiefs' Working Group of the Attorney General's Advisory Committee. He has also served on the faculty for the Effective Brief Writing course at the National Advocacy Center.✠

Writing Nuts and Bolts for Appellate Briefs

Robert A. Zauzmer
Chief of Appeals
United States Attorney's Office
Eastern District of Pennsylvania

I. Introduction

Make it clear. Make it compelling and persuasive. Use good grammar and common English. Present your writing in a clean and readable format, and be consistent in the use of style conventions. Maintain a respectful tone toward the court and adversaries and present facts and arguments honestly, befitting representation of the United States.

These statements constitute the basic rules of proper and effective writing for appellate briefs—and indeed with respect to pleadings before any judicial body—on behalf of the government. Through clear, effective, and presentable writing, you not only will increase your chance of prevailing in your case, but will also build credibility with the court and a reputation for helpful, truthful advocacy.

Beyond these precepts, no strict rules of organization, style, or presentation exist that must be followed in legal writing. The essential purpose of any brief or other written argument is to engage and persuade the reader. In each case, the writer should use whatever approach and organizational structure that accomplish that goal.

A helpful way to think about it is to contemplate telling the same story aloud to a colleague or friend. To be most comprehensible and convincing, what facts would you include? What facts are extraneous? In what order would you tell the story? If explaining a legal problem, would you begin with a description of the legal precept so the listener can focus on what is material when you later recount the facts? Or, would you grab the listener's attention with the arresting facts or a compelling anecdote before proceeding to define the legal question that must be answered? A single, right answer to such questions simply does not exist. The writer must choose the approach that appears to be the most persuasive for the issue at hand and not get trapped (except to the extent required by applicable court rules) in stilted traditions.

This article will highlight writing conventions that conflict with the goals described above. Hopefully, these points will aid the novice writer and provide a helpful refresher to everyone else. (Note that my experience is as a criminal prosecutor and the examples I present may lean toward that direction, but the principles at issue warrant universal application.) Following these rules should help considerably in maintaining the clarity and flow of a brief.

II. Building your brief

A. Telling the story: facts and organization

Consider this example of poor writing of the facts:

The officers exited their police cruiser on the unit block of Front Street. They saw two African-American males standing on the highway.

This language is an example of "cop speak" that creeps into a remarkable number of drafts. Though it may be easy at the outset of a criminal case to copy the relevant police reports to present the basic facts, this practice leads to poor writing. People do not "exit" a car; they get out of a car. Only an officer would describe the first block of a street as the "unit block" or refer to any street, however humble, as a "highway." Moreover, while officers always report the race of an individual, that fact has absolutely no place in a government pleading unless race is at issue in the case (for example, in a suit for discrimination, or where the identity of a perpetrator is disputed). The writer, instead, must present the facts in clear English:

The officers responded to the call and soon arrived at the residence on Front Street. Upon getting out of their car, they immediately came upon two men standing in the street, one of whom was the defendant, John Smith.

These observations apply to any type of case. Every industry and endeavor have idiosyncratic jargon, and a writer should not fall into the trap of using it at the expense of normal English.

Furthermore, the writer should use an active voice and seek to be compelling, not boring. Consider this plodding account, for example:

On May 2, 2010, a male accosted a postal worker in Bayonne, New Jersey, when the worker was delivering the mail. The perpetrator hit the mailman with a flashlight, then grabbed the mailbag and ran. Later that day, defendant John Smith was arrested based on a description provided by the victim mailman.

The above language should be replaced with the following:

On May 2, 2010, John Smith committed the brutal robbery of a postal worker who was delivering mail in Bayonne, New Jersey. Smith hit the mailman with a flashlight, then grabbed the mailbag and ran.

Similar thought should be applied in organizing the brief. The facts and the argument should be clearly organized and should judiciously employ headings and subheadings for the convenience of the reader. Longer documents, and every appellate brief, should also include a table of contents.

At the outset of the pleading, clearly state the issue, the opponent's position, and the government's conclusion. In other words, provide a preview of the entire pleading, usually in one paragraph:

Defendant John Smith has filed a motion to suppress all of the evidence obtained during a search of his residence on March 3, 2011. He asserts that the warrant authorizing the search was not based on probable cause and that the failing of the warrant is so apparent that application of the good faith doctrine is inappropriate. He is incorrect in both regards. The affidavit seeking the warrant in fact set forth ample probable cause that evidence of criminal activity would be found in Smith's home, and the officers surely relied in good faith on the approval of the warrant.

Any formal introduction to a document or passage should be erased. Begin, instead, with declaratory sentences, always keeping in mind the basic goal of engaging and persuading the reader. Consider the common introductory sentence: "Comes now the United States, by its attorneys, and responds to the defendant's motion to suppress evidence." No one in real life would write this way. Rather, the first sentence should state: "The defendant's request that the court suppress the evidence seized from his apartment should be denied."

Also, as newspaper writers say, do not bury the lead. That is, do not begin with extraneous facts before reaching the actual point of the pleading.

Bad:

> *Defendant John Smith engaged in a fraud. He spent years developing his relationship with the victim and then persuaded her under false pretenses to create a will leaving him all of her assets. Charged with fraud, he proceeded to trial and presented a vigorous defense, but was convicted of all counts. He argues that the loss calculation in the presentence report is excessive.*

Better:

> *Defendant John Smith argues that the loss calculation in the presentence report, assessing the amount of money he stole from the victim he cheated, is excessive. He is incorrect.*

Then, once in the heart of the discussion, continually inform the reader where you are and where you are heading. Each paragraph, if possible, should begin with a topic sentence:

> *In this case, the evidence is clear that the conspirators employed a wide variety of sophisticated means to enable their fraudulent schemes to succeed and also to evade detection for so many months. First, they created a number of subsidiaries of Jones Corporation, funneling corporate funds to these subsidiaries. Second, the subsidiaries purchased expensive goods for the defendants' personal use, in transactions not readily apparent to the corporation's auditors.*

Use transition sentences to advise the reader on what has been established and what comes next:

> *Thus, it is apparent that Smith was not seized until after he ran from the police and discarded the drugs. The quantum of reasonable suspicion is therefore assessed as of the time he was finally detained. By that time, the officer unquestionably had reasonable suspicion to seize the defendant*.

Finally, at the conclusion of the pleading, state the relief sought:

> *For all of the reasons stated above, the defendant's appeal should be denied and the judgment of the district court should be affirmed.*

Throughout the brief, facts should be presented chronologically and logically, not divided by witness. The goal is to tell a story in an ordinary, narrative manner, without excessive length, just as you would convey the story aloud to a friend.

Bad:

> *Jane Monroe testified. She said that she saw Smith run into the bank. She was suspicious, so she looked inside, where she saw Smith raising a gun and yelling at the bank patrons. Tr. 316-20. Rebecca Blaine also testified. She said that when Smith walked on the sidewalk outside the bank, he already had a gun in his hand, and then he began running into the bank. Tr. 354.*

Better:

Smith, with a gun in his hand, ran into the bank, and then immediately raised the gun and began yelling at the patrons. Tr. 316-20, 354.

B. Words and phrases to avoid

Legalese: As every writing instructor has stated in recent decades, legalese should be banished. The following phrases, among others, should be abolished from written legal arguments:

- aforementioned
- aforesaid
- forthwith
- hereinafter
- herewith
- on or about
- said (as in "said rule")
- such (as in "the court denied such motion")
- the case at bar
- the instant case
- thereto
- wherefore
- within (as in "the within document")
- "infra" and "supra" (use only in citations, never in text)

Such words and phrases simply suck the life out of a piece of writing and distract the reader, rather than maintaining his or her attention.

Bad:

Thereafter, the defendant was presented with the contract. He took said document and affixed his signature thereto, whereupon the transaction was consummated.

Better:

Smith received the contract. He signed it, thus sealing the deal.

Derogatory or condescending words: Use the following words minimally, or not at all:

- absurd
- frivolous
- outrageous
- ridiculous
- risible
- silly
- specious

Instead, consider opting for these words:

- erroneous
- incorrect
- without basis
- without merit
- unpersuasive

Also, use words such as "clearly," "plainly," and "obviously" sparingly. You may feel that the argument justifies such terms, but they usually come across as heavy-handed and even annoying to a neutral reader. Do not use the word "indisputable" unless the proposition really is not disputed. For the same reasons, avoid underlining, italics, capitalization, and exclamation marks to emphasize your points. Let the force of your writing provide the emphasis.

Bad:

The court made clear that the defendant lied on the witness stand!

Better:

The court determined that every statement in the defendant's testimony was knowingly and materially false.

Foreign words: Generally, Latin and other foreign phrases should be avoided. For example, use "from the beginning" instead of "ab initio," and "among other items" instead of "inter alia." Likewise, tortured terms, such as "interfaced," should be avoided in favor of plain English, such as "met with." The word "indicate" is almost always misused in a manner that waters down the meaning of the statement. The biggest problem with the word "indicate" is that it is vague—the reader cannot tell if someone spoke, wrote, or motioned. Words like "spoke," "wrote," or "pointed," convey a better visual for your story. The word "indicate" should only be used if the record itself is unclear.

Bad:

Jones indicated that she was afraid of the defendant.

Better:

Jones said that she was afraid of the defendant.

Bad:

This precedent indicates that the officer is entitled to absolute immunity for his actions.

Better:

This precedent establishes that the officer is entitled to absolute immunity for his actions.

Formal introductory phrases: All unnecessary prefaces and "throat clearing" should be erased throughout an argument. The author should always get straight to the point. The following phrases should almost always be removed:

- All rational observers would agree
- It goes without saying that
- It is argued that
- It is significant to note that
- It must be stressed that
- The government submits (argues) (believes) (contends) that

III. Common pitfalls

A. Unnecessary facts

Always eliminate unnecessary facts, keeping particular details only if they are relevant to the matter in dispute discussed in the brief.

Bad:

Found in the first-floor front bedroom was a bag of an off-white, powdery substance. Also found was a .9-mm. Smith and Wesson handgun, serial no. BV478329994N, which held a loaded magazine with a round in the chamber. The substance was later tested and revealed to be cocaine powder.

Better:

In Smith's bedroom, on the first floor, the officers found a bag of cocaine and a fully loaded .9-mm. handgun.

B. Passive voice

Where possible, avoid the passive voice because it is not forceful and suggests uncertainty as to the responsible party.

Bad:

The filing deadline was missed.

Better:

The plaintiff missed the filing deadline.

Bad:

A bank robbery was committed. The suspect was seen running from the bank. He was described as short, thin, and in his 50s.

Better:

John Smith robbed the bank. Officers caught him within minutes, seeing that he precisely matched the description provided by eyewitnesses.

Use action words to add punch to your writing.

Bad:

The defendant made untrue statements.

Better:

The defendant lied on the witness stand.

Avoid the use of negative phrasing.

Bad:

This argument is not inconsistent with that presented by the prosecution at trial.

Better:

This argument is the same argument that the prosecutor made at trial.

C. Informality

The style of a brief should be formal, but not stilted. "Guys" do not "hang out," unless they do so in quotes, and they find it easier to "use" objects than to "utilize" them. Except on rare occasions, avoid contractions (don't use "don't"), slang, or jokes.

D. Improper tone

Maintain a proper and respectful tone befitting representation of the United States. It is fine to use colorful words, but do not use derogatory or condescending language or sarcastic humor.

Bad:

That argument makes as much sense as the town drunk after a two-day binge.

Bad:

The defendant may have hit a lucky streak during his visit to the casino, using the stolen proceeds, but fortune will not shine upon him in this court.

E. Sarcasm

Quotation marks should only be used if quoting someone else, or if providing a definition. They should never be used for sarcasm or for emphasis.

Bad:

This argument is just "dreadful," a poor excuse for a legal "position."

Better:

"*He pointed the gun," she testified*.

F. Tense changes

Pick a tense and stick to it throughout the section. In a statement of facts, the past tense is almost always preferable.

Bad:

Jones testified that Smith returned to the bank every day with the same $9,900 deposit. Jones believes this is very suspicious. He says that he notified his manager every time Smith reappeared.

Better:

Jones testified that Smith returned to the bank every day with the same $9,900 deposit. Finding this very suspicious, he stated, he decided to notify his manager every time Smith reappeared.

G. Style

Pick one style for gender-based pronouns ("he" and "she," "him" and "her," etc.) and follow it consistently: using one gender throughout, using a combination throughout ("his or her"), or rotating throughout. Using a slash ("he/she") is awkward.

H. Pronouns

Do not use a pronoun where there is any uncertainty regarding the person to whom it refers, and do not follow a pronoun with a name in parentheses.

Bad:

Smith and Jones went to the meeting together. He then addressed the board. Afterward, he (Jones) met privately with each board member.

Better:

Smith and Jones went to the meeting together. Each then addressed the board. Afterward, Jones met privately with each board member.

I. Referring to people

The defendant: Refer to people most often by name instead of by label, but feel free to use a label occasionally for variety. Remember that "defendant" is not someone's name, and it is not a title a person has bestowed on himself. Therefore, the label when used on its own, apart from the name, should be preceded by an article and should not be capitalized.

Bad:

Defendant's attorney, Mr. Gonzales, attempted to rehabilitate Defendant on cross-examination. Mr. Gonzales asked Defendant whether Defendant's confusion was the product of lack of sleep. Defendant said it was.

Better:

Defendant Smith's attorney attempted to rehabilitate Smith on cross-examination. Attorney Gonzales asked Smith whether his confusion was the product of lack of sleep. It was, the defendant agreed.

It is particularly essential to refer to defendants by name and not by title when multiple defendants are involved in the case. In appeals, Federal Rule of Appellate Procedure 28(d) provides:

> In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "'the ship," "the stevedore."

FED. R. APP. P. 28(d).

Honorifics: Decide whether or not to use an honorific (for example, "Mr." or "Ms.") before a name, and be consistent with regard to every person named in the document. For instance, do not belittle a defendant by referring to him only by his last name while referring to his attorney as "Mr." or "Ms."

The jury: Remember that "jury" is a singular word when the jury is acting as one unit.

Bad:

Smith suggests that the jury did not follow their instructions.

Better:

The jury continued its deliberations for the rest of the day. The court instructed the jurors that they must consider each count separately.

J. Wordiness

Attack wordiness. Eliminate redundancies.

Bad:

The court determined that the aversions of the plaintiff lacked sensibility and were completely unpersuasive.

Better:

The court stated that the plaintiff's claim made no sense.

In the argument section of a brief, keep in mind that while a thorough discussion of the applicable law is required, it is not necessary to provide extensive details regarding undisputed background points. For instance, a brief focusing on a question concerning execution of a search warrant need not dwell on the basic probable cause requirements for issuance of a warrant. Thus, boilerplate sections and string cites may usually be avoided. A citation to a single decision of the Supreme Court or the controlling Court of Appeals is often sufficient to establish a necessary point.

K. Paragraph tips

Keep paragraphs short, but not too short. An exception may be made for declaratory emphasis, where a one-line paragraph may be effective ("The defendant murdered the victim in cold blood."). Be judicious in the use of block quotes, and certainly avoid block quotes that exceed a half-page in length. Likewise, be careful not to overuse footnotes because they interrupt the flow of the argument. Determine whether the content of exceedingly long footnotes belongs in the text. Discuss in detail the facts and reasoning of any significant, controlling case. Other decisions may be described through parentheticals in string cites. However, be careful not to make parentheticals too verbose. If the parenthetical is too lengthy, move the discussion to the text.

L. Acronyms

Do not make up or use uncommon acronyms. No one refers to the Coca-Cola Company as "CCC." It is, however, appropriate to use and not define, a universally used acronym, such as "FBI" or "AT&T."

IV. Citations

In providing citations, always be aware of the chain of command. If a Supreme Court decision is on point, only it need be cited. Next, if a controlling circuit decision is on point, only it need be cited. In other situations, cite decisions of other circuits and, if no such decisions exist, then decisions of district courts may be used. Never rely on a secondary source, such as an article or a book, for the holding of a case or an important quotation from a case. Cite the case directly. Also, it is appropriate to rely on

concurring and dissenting opinions for informative views, but never to contradict the holding of the same case (unless the decision is not from a court that is binding in your jurisdiction, in which case you may argue that the concurring or dissenting opinion is correct). Be clear about the nature of the opinion (concurring, dissenting, etc.) that is being cited. Furthermore, cite and quote statutes and regulations directly, rather than refer to cases that merely cite the statute or regulation, unless the case is relied upon for additional interpretation.

In an appellate brief, when seeking affirmance, be sure to quote and explain the district court's ruling, thus enlisting its endorsement of your position. It always helps an argument to make clear that a judge is on your side (though of course you must also make clear when the lower court disagreed with your view). Be sure, however, not to excessively quote the lower court's opinion. Instead, argue the matter in your own words:

> *The district court correctly concluded that the defendant waived this issue. "When the evidence was presented," the court concluded, "defense counsel was silent." App. 17. Moreover, the court observed, defense counsel himself stressed the evidence in his closing argument to the jury. App. 18-19.*

In the argument, admit weaknesses and always acknowledge adverse decisions of binding courts, whether or not the opponent cited those decisions. Also be sure to respond to and discuss every significant case that was cited by the opponent.

V. Layout

A word regarding presentation is in order. A brief should not only be clear and informative, it should also be easy on the eyes. The brief should convey a consistent layout and consistent adherence to conventions. A neat and clean presentation confirms the author's reliability and dedication to providing quality work and creates a subliminal impression that the work merits serious consideration. Over time, a judge or appellate court will become familiar with your work just by its look and hopefully will begin its review with a favorable outlook just from knowing that you prepared it.

Every United States Attorney's office or litigating division should create a format for its appellate briefs, addressing headings, fonts, citation preferences, and other conventions. If the office does not have a format for other pleadings, each attorney should at least adopt his or her own format for non-appellate work, and stick to it. While the writer should be careful in making choices concerning font, style, and layout, remaining faithful in applying those choices is even more important. The author should employ the same preferences throughout the brief and, at a minimum, in all pleadings submitted in the same case. It is most helpful to follow *The Bluebook*, which enjoys universal acceptance.

VI. Review your work

At the final stage, hunt down and eliminate all mistakes, and make one last effort to clarify and strengthen every argument. Shepardize all case cites. Spell-check the brief and then review the draft several times before submitting it. Ideally, wait a day or more between reviews. Keep an open mind and be willing to change any part of the draft to make it better and more persuasive. And if there is time, seek the help of an editor (either a supervisor or a colleague you admire). A second perspective always helps in clarifying and improving arguments.

VII. Conclusion

Writing is an art, not a science. It deserves careful attention and care, and always gets better with practice. Keeping the core principles in mind—that you are aiming for clarity and persuasiveness, rather than adherence to stilted legal formats which have long been stale and even annoying—will help you make effective arguments and develop a reputation for stellar advocacy.❖

ABOUT THE AUTHOR

❑**Robert A. Zauzmer** is an Assistant United States Attorney in the Eastern District of Pennsylvania. He has served as an AUSA since 1990 and as an appellate supervisor for approximately 15 years. He currently serves as the Third Circuit representative to and chairperson of the Appellate Chiefs' Working Group of the Attorney General's Advisory Committee. He teaches appellate advocacy as an adjunct faculty member at the University of Pennsylvania Law School.✠

Editing the Appellate Brief

Michael E. Robinson
Senior Counsel, Appellate Staff
Civil Division

A well-written brief is, typically, a well-edited brief. Taking the time to edit a brief carefully will help assure that your arguments are focused, that your writing is easy to follow and persuasive, and that your brief is free of typographical and grammatical errors. Here are some techniques for editing your own work as well as tips for editing the work of others.

I. How to edit your own work

First, keep it simple and keep it short. As you sit down to write your brief, remember your reader. Appellate judges have demanding dockets and a limited amount of time to devote to each case. Their law clerks are busy, too. Neither of them will be happy to have to wade through a 50 or 60-page brief under any circumstances—much less a 50 or 60-page brief that is boring or hard to follow.

The key is to edit constantly as you write. Can this sentence be clearer or shorter? Can you be more direct? Are there too many headings and subheadings that interrupt the flow of the brief more than they illuminate it? Have you used too many block quotes or footnotes?

It is important to note that even when you edit as you write, you will need to build in enough time to give the brief a thorough editing at the end. It is particularly important, too, to give your supervisor ample time to review and edit the brief.

You and your reviewer should be looking for three things when you edit: (1) substance, (2) tone, and (3) style.

A. Editing for substance

The first thing we check for when editing our own brief is substance: Have we been factually accurate? Assume that anyone reading your brief will be skeptical of what you have to say. It is innate in all lawyers. Therefore, you do not want to give the reader cause to doubt anything in the brief. Check each assertion against the record and add citations when appropriate. Quote from cases or use parentheticals; do not simply paraphrase.

Make sure you have satisfied all relevant appellate standards. Was the issue that was raised on appeal properly preserved? Can you argue harmless error in the alternative? Has the standard of review been correctly identified?

Remember too that your brief must be consistent with the Solicitor General's authorization. The memos prepared by the Civil or Criminal Appellate Staffs, as well as those prepared by the Office of the Solicitor General, can often be helpful. Use them.

A common error in brief writing is assuming the reader knows as much about an area of law as you do. Judges are bright, but you should assume that you will have to instruct them about the legal principles at issue, the industry or agency involved, and the technical aspects of your case. You should also ask yourself whether there are too many acronyms in the brief. Writers are quick to abbreviate statutes, agencies, parties, or objects without realizing how confusing this can be to the reader. Will the

judge be able to remember all of the acronyms in the brief? Whenever possible, use the parties' designation in the district court or their names. Unless the acronym is universally recognized (for example, FBI, EAJA, or FOIA), use the actual name (even if a shortened name) of the agency, statute, or subject involved in the litigation.

Next, ask yourself if there are too many arguments. Some lawyers think the more arguments the merrier. But too many arguments can dilute the two or three really worthwhile arguments. Too many arguments also make a brief difficult to get through. If your opponent has included scores of arguments, see if you can group them together in more digestible portions when you respond to them.

Have a principal theme. Get judges to understand the big picture from your vantage point and they will want to rule for you on the subparts of your argument. For example, in an administrative law case, a plaintiff will want to paint the agency as acting unreasonably and without logical explanation. In defending the agency, you may want to show that the agency, faced with a difficult problem, considered the alternative solutions and reached a fair and reasonable result.

Remember too that hypertechnical arguments in a case where the big picture makes no sense will not win if judges can find a way to rule against you. Thus, for example, if you are arguing that the plaintiff lacks standing or that the court lacks jurisdiction, make sure the court also understands that you have a reasonable position on the merits.

Finally, consider whether your arguments are properly organized. Why have you chosen the order you have? Are the threshold or jurisdictional arguments addressed first? Is this the order in which the district court considered the issues? As a rule, you want to begin each argument section by making your affirmative points first. Then address your defensive points—adverse arguments made by your opponent or the court below. Of course, be sure you have addressed all of your opponent's arguments.

B. Editing for tone

As a government lawyer, you want to be sure that your brief takes an appropriate tone. Courts expect you to remain above the fray and to present the facts and your arguments in a manner befitting your special role as advocate for the United States. It is important, then, to ask yourself whether you have succeeded in maintaining the proper tone in each section of the brief. For example, are there argumentative words or phrases in the Statement of Facts? Your job is to present the facts in a neutral fashion. Therefore, you should refrain from editorializing when setting out the factual and procedural history. You have plenty of room to argue your case in the Argument section. Even then, you should avoid "fighting words" or overblown adverbs and adjectives. Ask yourself whether these words help your cause or merely distract from the substantive issues.

Avoid attacks on opposing counsel, including stupid adverbial characterizations of the other side's position (for example, "Appellant desperately contends . . . ."). They do nothing to advance your cause. Appellate judges tend to look askance at such attacks. They take even greater offense when government lawyers write disrespectfully about the trial judge.

Recently, the Fourth Circuit wrote that it found a brief filed by a United States Attorney's office offensive because the brief:

- "disdain[ed] the district court's 'abrupt handling' of Appellant's first case,"
- "[s]arcastically refer[red] to Appellant's previous counsel's 'new-found appreciation for defendant's mental abilities,'"

- "criticize[d] . . . another district court's 'crabby and complaining reaction to Project Exile,'" and
- "[i]nsinuate[d] that the district court's concerns 'require[d] a belief in the absurd . . . .'"

United States v. Venable, 666 F.3d 893, 904 n.4 (4th Cir. 2012).

The Fourth Circuit wrote in response: "The government is reminded that such disrespectful and uncivil language will not be tolerated by this court." *Id.*

C. Editing for style

Finally, when editing your brief, you will want to consider matters of style. The first thing to check is whether the brief looks appealing to the eye. Is it easy to read? Is the font legible? Is the brief cleanly formatted?

Next, have you used short sentences and simple words? The longer the sentence is, the more likely it is to confuse or bore the reader. Short sentences add punch. They get the reader's attention. Most important, short sentences tend to increase clarity. Think Hemingway, not James Joyce.

Here is a sentence from a brief that is long and confusing:

> *We had to reduce the plaintiffs' hours because of OCR improvements that reduced the LMC workload, plus there were plenty of SPBs on duty to cover peak volume hours.*

The reader is lost and has missed the information the author is trying to communicate. This is better:

> *Plaintiffs claim that their hours were reduced because of their disabilities. The evidence established, however, that their hours were reduced because: (1) there was less work for them to do due to technical improvements, and (2) other workers could cover that job duty during peak workload hours.*

How do you make sentences shorter? Ask yourself whether that adjective or adverb you have added is necessary or effective. If it is unnecessary, take it out. Trim word clusters, like "in order to" or "during the time that." Use "to" or "while" instead.

Use active verbs like "collide," "decide," or "conclude," rather than nouns formed out of those verbs, like "[have a] collision," "[make a] decision," or "[draw a] conclusion." Use the active voice rather than the passive voice. Write, "The union filed a complaint," rather than, "The complaint was filed by the union." The passive voice, in particular, often makes matters less clear because the writer frequently forgets to explain who the actor in the sentence actually is.

Get rid of massive block quotes and, as much as possible, avoid using footnotes. They are difficult for the eye to take in and many judges say they simply ignore them. Take the quote apart and include it in natural text with several citations rather than one. If something is worth including in the brief, it almost always is worth including in the text rather than a footnote.

Take a final look and ask yourself whether the brief was easy to understand and persuasive. Does the first sentence of each paragraph properly summarize or introduce the content of that paragraph? Does the last sentence of each paragraph complete the thought you wanted to convey in the paragraph? Does the paragraph provide a helpful lead-in to the next paragraph? Are your arguments logically ordered? Have you provided the best legal or record support for the assertions in the brief? Have you checked for typos and grammatical errors?

If you have done all of these things, then the brief is ready to be handed over to someone else for their reactions.

II. How to edit someone else's work

As an editor of someone else's brief, your goals are to make sure the brief is factually and legally accurate; clear, persuasive, and analytically complete; consistent with Department of Justice or internal policy; and free of grammatical and typographical errors. Good editing is time-consuming and requires your active attention.

You should also be kind. Good writing is difficult enough. Having your work reviewed by others can be anxiety producing. Consistent with the goals of good editing, try to make the fewest changes possible.

If the government is appellee, you should review the opening brief carefully to make sure that the government's brief responds adequately to the arguments made in the Blue Brief. We do not have to respond to all of them equally or in detail, or in the same order, but we do not want to have the court conclude that we have waived or conceded a point because we have not adequately responded to an argument.

Read the district court opinion. Does the brief adequately explain what happened in the district court? Does the brief use the district court's ruling fully and effectively? Does it address the deficiencies the court has pointed out with the government's position?

Does the brief begin with our affirmative arguments (why the government should win)? Does it then adequately address opposing counsel's arguments or explain why our opponent should lose?

Is the brief structurally sound, or does it need to be reorganized or, worse, reconceived? Know your writer. Some writers want or need very concrete revisions. These writers may be at ease with a heavier editing hand. Others just need to know that something is unclear or not adequately developed, and they can fix it themselves. Once you know your writers, you can adapt your editing style accordingly.

Remember, whenever a government lawyer files a brief in court, he or she stands in for the whole government and that product reflects on government lawyers across the country. Does the brief you are reviewing meet this standard?

III. Conclusion

The judiciary's expectations for the government's brief have always been high. To meet those expectations, government lawyers must strive to file the best briefs we can. And we cannot do that unless we take editing seriously.❖

ABOUT THE AUTHOR

❑**Michael E. Robinson** is Senior Counsel with the Civil Division's Appellate Staff. After clerking in the Southern District of New York, Mr. Robinson practiced in the law firm of Sutherland Asbill & Brennan in Washington, D.C. In 1981, he joined the Department of Justice where he worked in the Office of Legal Policy. Five years later, he moved to the Civil Appellate Staff. He has argued cases on behalf of the federal government in every circuit court in the country and in a number of state supreme courts. Mr. Robinson lectures on the Equal Access to Justice Act and frequently serves as a judge and lecturer on appellate advocacy at the National Advocacy Center. He also provides training on brief writing and oral advocacy at a number of federal agencies.✠

Appellate Motion Practice

Jean-Claude André
Deputy Chief, Criminal Appeals Section
United States Attorney's Office
Central District of California

David E. Hollar
Chief, Appellate Division
United States Attorney's Office
Northern District of Indiana

As explained in the introduction to this issue, United States Attorneys' offices handle over 13,000 appeals each year. In the overwhelming majority of these appeals, the government is the appellee. Many of the appeals the United States Attorneys' offices must defend are jurisdictionally barred or, in the criminal context, precluded by a plea agreement's appeal waiver. Even many procedurally proper appeals border on the frivolous or are plainly meritless.

There is often a better way to handle such appeals than to merely await the appellant's brief, write an answering brief, and patiently await oral argument and/or a decision. The federal courts of appeals have the power to entertain and grant case-dispositive motions, which can yield a number of benefits—not the least of which is to allow a litigant to obtain dismissal or affirmance (and, in extreme cases, even reversal) without the need for full merits briefing and oral argument. In this regard, government attorneys can and should use case-dispositive motions as an efficient way to dispose of those appeals that should not actually be before the courts of appeals.

In the dismissal context, even an unsuccessful, case-dispositive motion can be strategically beneficial—at least in the many circuits that deny such motions without prejudice to renewal of the dismissal argument in the appellee's principal brief. *But see Taylor v. F.D.I.C.*, 132 F.3d 753, 761 (D.C. Cir. 1997) (motions panel's denial of motion for dismissal is law of the case and "binding"). In many cases, the appellant has not anticipatorily explained in the opening brief why the appeal is properly before the court of appeals, or has done so only cursorily. Because the appellee ordinarily has only one merits brief in which to present its position, explaining why an appeal should be dismissed without knowing the appellant's position (or full position) leaves the appellee at a significant disadvantage. A case-dispositive motion, even if it fails to result in the prompt disposition sought, can level the playing field by flushing out the appellant's full explanation against affirmance or dismissal so that, by the time the appellee addresses the issue for the second time in its answering brief, the appellee's position will be fully developed against the initially elusive position of the appellant.

Precisely because the denial of a case-dispositive motion is typically without prejudice to renewal in the answering brief, the only costs associated with filing such a motion are attorney time and the government's institutional credibility. It is important to note, however, that losing attorney time or making appellate judges disappointed in the government for filing a losing motion are not trivial costs. Certainly, as explained in the introduction to this issue, the "expectation of candor and reliability" borne by the government "is, at its apex, in our federal courts of appeal . . . ." Kelly A. Zusman, *"May it Please the Court,"—Appearing on Behalf of the United States in Federal Appellate Courts*, 61 UNITED STATES ATTORNEYS' BULLETIN 1, 1 (Jan. 2013). Therefore, the government should only file a case-dispositive

motion when it is convinced that summary disposition is appropriate. In such circumstances, however, the extra time an attorney devotes to motions practice will frequently be more than offset by the savings of time and expense involved in preparing and filing a comprehensive brief and the time and travel expenses associated with oral argument.

Case-dispositive motion practice can also be fun. Federal Rule of Appellate Procedure 27(d)(2) provides a 20-page limit for motions and 10-page limit for motion replies. Because of these limits, even if there are additional pages to spare, the most effective motion-related filings should be pithy to maintain the attention of the motions panels who cannot afford to give the motion-related filings as much attention as full merits briefings. Consequently, the drafter is required to carefully, creatively, and persuasively distill the papers to the core legal issue(s) on which summary relief is sought and the core factual and procedural histories necessary to frame the issue(s). To effectively do so, however, the government lawyer must be familiar with the practice and the applicable standards and procedures for such motions.

Although the power to grant a case-dispositive motion is not specifically codified in the Federal Rules of Appellate Procedure (FRAP), Rule 2 allows a court of appeals "[o]n its own or a party's motion" "to . . . suspend any provision" of the FRAP (except Rule 26(b)'s provisions regarding extending the time to file a notice of appeal) for "good cause" and to "order proceedings as it directs." FED. R. APP. P. 2, 26(b). Similarly, 28 U.S.C. § 2106 grants federal appellate courts broad authority to issue rulings "as may be just under the circumstances." 28 U.S.C. § 2106 (2012). Some courts, like the Second and Third Circuits, for example, have expressly grounded their authority to grant case-dispositive motions in these provisions. *See, e.g.*, *United States v. Monsalve*, 388 F.3d 71, 73 (2d Cir. 2004) (Rule 2); *Barnes v. United States*, 678 F.2d 10, 11-13 (3d Cir. 1982) (§ 2106). Most courts of appeals, however, have used the power conferred by Rule 2 to promulgate local rules establishing the standards and required form and timing for case-dispositive motions.

Regardless of the source of authority to grant case-dispositive motions, the standards for and required timing of such motions vary widely among the circuits. All 13 of the federal courts of appeals have built on the FRAP and, in some cases, have superseded its provisions. Although Assistant United States Attorneys do not practice before the Federal Circuit, that court's local rules perhaps best illustrate the extent to which a court of appeals may use the power conferred by Rule 2 "to suspend" provisions of the FRAP. The version of the FRAP and that court's rules on its Web site literally strikes through numerous FRAP provisions that it has eliminated altogether or replaced with its own local rule provisions.

Moreover, beyond local rules, every circuit has on its Web site some form or combination of general orders, internal operating procedures, manuals for practitioners (which the courts and their clerk's offices often treat like rule books), and other court-approved material relating to practice before that particular circuit. For example, the Seventh Circuit has on its Web site not only its own local rules but also a list of operating procedures that discuss how motions are resolved, how panels are assigned to hear appeals on their merits, and how to seal portions of the record, as well as other matters. The Web site also includes a 152-page practitioner's handbook, a checklist to assist litigants in the preparation of briefs, a law review article about the best fonts to use, sample briefs, documents discussing how to remove metadata from documents submitted to the court (and therefore made publicly available), and a document about effective redaction measures. When handling an appeal for the first time (or the first time in a while) before a particular court, it is essential to be familiar with whatever sources of procedure that court offers and to consult with more experienced colleagues who can advise as to any unwritten traditions to which the relevant court will unfailingly adhere. This fact is particularly true in the case-dispositive motion context because such motions, like merits briefs and oral arguments, go directly to the resolution of the merits of the appeal, which, after all, is the central function of the appellate courts. In

other words, because a case-dispositive motion is asking an appellate court to exercise its ultimate authority, such a motion needs to satisfy the particular court's standards for the motion.

Despite the plethora of variations in the circuit courts' local rules, there are, in the case-dispositive motion context, at least a couple of constants. Every circuit allows for dismissals based on lack of jurisdiction, which accords with the time-honored principle that courts will only decide live issues over which they have jurisdiction. Every circuit also allows for dismissal based on a criminal defendant's enforceable appeal waiver. Thus, appellate courts will dismiss appeals where the case has become moot, where there is no final district court judgment or no appealable collateral order, or where, in the civil context, the district court has not certified interlocutory appeal. Appellate courts will also dismiss untimely appeals, either in the civil context as a jurisdictional matter under Federal Rule of Appellate Procedure 4(a), or in the criminal context (where timeliness is not jurisdictional) if the government seeks to enforce Rule 4(b)'s claim-processing rule. *See, e.g.*, *United States v. Sadler*, 480 F.3d 932, 940 (9th Cir. 2007). Where a criminal defendant's appeal is subject to an appeal waiver, courts of appeals will dismiss so long as "(1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made." *United States v. Jeronimo*, 398 F.3d 1149, 1153 (9th Cir. 2005).

In the context of meritless appeals, circuits' receptivity to case-dispositive motions varies widely. At one extreme, the Sixth Circuit "will not consider a motion to affirm the judgment appealed from," SIXTH CIR. R. 27(e), and thus will only allow for summary disposition in the dismissal situations already discussed. The Tenth Circuit is only slightly more receptive to case-dispositive motions, allowing for motions to dismiss in the situations already discussed and motions for summary affirmance only where intervening and controlling law requires affirmance. *See* TENTH CIR. R. 27.2(A). In sharp contrast, the D.C. Circuit, in its Handbook of Practice and Internal Procedures, specifically "encourage[s]" parties to file case-dispositive motions "where a sound basis exists for summary disposition." U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 28 (2011). The remaining circuits fall somewhere in the middle, allowing, for example, motions for summary disposition when "no substantial question is presented," FIRST CIR. R. 27.0(c); THIRD CIR. R. 27.4; when the appeal "is frivolous and entirely without merit," EIGHTH CIR. R. 47A; ELEVENTH CIR. R. 42-4; or when "it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings." NINTH CIR. R. 3-6(b).

The timing requirements for case-dispositive motions vary among the circuits as well, making familiarity with them critically important. For the limited category of case-dispositive motions that the Tenth Circuit will entertain, for example, the motion must be filed within 15 days of the docketing of the notice of appeal. TENTH CIR. R. 27.2(a)(3)(A). The D.C. Circuit provides slightly more time, allowing for case-dispositive motions within 45 days of the appeal being docketed. D.C. CIR. R. 27(g)(1). The Third Circuit requires case-dispositive motions to be filed before the appellant's brief is due, THIRD CIR. R. 27.4(b), and will only be of any utility if accompanied by a motion to stay the merits-briefing schedule. The First Circuit requires case-dispositive motions to be "promptly filed when the occasion appears." FIRST CIR. R. 27.0(c). The First Circuit has construed that requirement to permit filing as late as the day the appellee's brief is due, so long as the motion is accompanied by a motion to extend the appellee's briefing deadline for 45 days (with additional extension motions to be filed as necessary). With respect to motions to dismiss, the Fourth Circuit's practice largely tracks the First Circuit's, but the Fourth Circuit will entertain a motion for summary affirmance only after the merits briefs are filed, *see* FOURTH CIR. R. 27(f), which largely strips the availability of that form of relief of any utility. In contrast, the Ninth Circuit allows case-dispositive motions to be filed any time before the completion of briefing, NINTH

CIR. R. 3-6, and has a practice of automatically staying any pending briefing during the pendency of any such motion.

Timing concerns have led one circuit—the Seventh—to articulate a heightened standard for motions seeking summary affirmance in order to discourage the practice and force litigants to seek such relief, if they dare, early. In *United States v. Fortner*, 455 F.3d 752 (7th Cir. 2006), the government moved for summary affirmance within days of its merits brief deadline. The court perjoratively characterized the government's belated motion as a ploy to obtain a "self-help extension of time" and warned that such motions should be filed only "when the arguments in the opening brief are incomprehensible or completely insubstantial" or "when a recent appellate decision directly resolves the appeal." *Id.* at 753-54. Unless that standard is satisfied and the motion is filed "well before the appellant's brief [i]s due," *Dupuy v. McEwen*, 495 F.3d 807, 808 (7th Cir. 2007), the Seventh Circuit expects litigants to "follow the usual process" of full merits briefing and argument. *Fortner*, 455 F.3d at 754.

It is important to note, however, that in some situations affirmance is irrefutably appropriate, but compliance with a particular court's timing rules is impossible. For example, when an intervening and controlling decision is handed down or when controlling legislation is enacted, repealed, or amended outside the period in which that particular court will ordinarily entertain a case-dispositive motion, compliance is obviously impossible. Most circuits, in this situation, will allow common sense to trump formalism and will entertain the technically untimely motion. In fact, the Third Circuit expressly provides for this contingency in its local rules. THIRD CIR. R. 27.4(b).

All-in-all, the case-dispositive motion can be a valuable arrow in the government appellate lawyer's quiver and should be considered whenever responding to an appeal that is not properly before the court of appeals or that is clearly meritless. But because the standards for and the required timing of such motions vary widely among the circuits, lawyers must familiarize themselves with the appellate issues presented early in the process. If the particular court's standards are satisfied, a motion to dismiss or a motion for summary affirmance can quickly pierce the heart of a frivolous or improper appeal, freeing the attorney to pursue other cases on behalf of the United States.❖

ABOUT THE AUTHORS

❑**Jean-Claude André** is the Deputy Chief of the Criminal Appeals Section for the Central District of California, a regular faculty member for the appellate courses offered at the National Advocacy Center, and a former law clerk to United States District Judge A. Andrew Hauk and Ninth Circuit Judge Harry Pregerson.✠

❑**David E. Hollar** is the Appellate Division Chief for the Northern District of Indiana. A former law clerk to Seventh Circuit Judge Diane P. Wood, he joined the Department of Justice in 2002, where he has also served as a trial Assistant United States Attorney in the Northern District of Indiana, and as an attorney in DOJ's Criminal Division, Appellate Section.✠

Welcome the Questions: How to Prepare and Present an Effective Oral Argument

Barbara J. Valliere
Chief, Appellate Division
United States Attorney's Office
Northern District of California

I. Introduction

Are oral arguments important? Are they influential? Or even necessary? Judges, practitioners, and legal scholars have mulled over questions like these for decades. In the end, however, "there are cases in which oral argument can change some votes, and you cannot assume that your case will not be one of them." Rex. E. Lee, *Oral Argument in the Supreme Court*, 72 A.B.A. J. 60, 60 (1986). Faced with the daunting chore of preparing for argument with his or her professional reputation on the line, however, the attorney at the lectern likely finds academic discussions of whether oral arguments "matter" ironically off topic.

Even if oral arguments' importance is debatable, most Assistant United States Attorneys (AUSAs) will no doubt perform at least one, and more likely several, during their careers. If recent statistics are any indication, AUSAs, both civil and criminal, will argue hundreds of cases in the federal courts of appeals in the coming year. While the majority of federal appeals are resolved on the briefs alone, in 2011 an average of 22.5 percent of all federal court of appeals cases were disposed of after oral argument. *See* OFFICE OF JUDGES PROGRAMS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Statistical Tables for the Federal Judiciary (Dec. 31, 2011) 8-12. The frequency of argument varies from circuit to circuit, but the fact remains that oral argument is an integral part of an AUSA's practice. In 2011, the federal appellate courts heard argument in the following percentage of their criminal cases:

- D.C. Circuit: 54.4 percent
- First Circuit: 29.63 percent
- Second Circuit: 33.67 percent
- Third Circuit: 9.84 percent
- Fourth Circuit: 8.5 percent
- Fifth Circuit: 16.025 percent
- Sixth Circuit: 20.68 percent
- Seventh Circuit: 48.8 percent
- Eighth Circuit: 27.25 percent
- Ninth Circuit: 31.88 percent
- Tenth Circuit: 36.14 percent
- Eleventh Circuit: 11.56 percent

In most circuits, therefore, a criminal case has about a one in four chance of being argued. In civil cases, the odds are similar.

The 94 United States Attorneys' offices (USAOs) likely have slightly different approaches to appellate practice, but the best USAOs have developed a tradition of encouraging and fostering intensive preparation for oral argument. At a minimum, every USAO must adhere to the standards outlined in the United States Attorneys' Manual (USAM), which, regarding oral argument preparation, lists the following minimum requirements:

> Every oral argument must be preceded by a discussion of the issues between the AUSA or Special AUSA arguing the case and, at a minimum, the responsible appellate chief or the brief reviewer. Adding one or more attorneys to the discussion, and requiring the arguing attorney to answer questions as he or she would in the appellate court, is encouraged in all cases, and is required in the limited number of oral arguments involving: (a) an en banc court; (b) an affirmative government appeal; (c) an issue of unusual significance to the office or Department; (d) a claim of serious prosecutorial misconduct; or (e) the first appellate argument of an AUSA or Special AUSA.

DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 2-5.113 (2010). The Appellate Resource Manual that accompanies this standard explains that "pre-argument preparation is intended to improve the quality of the arguments and ensure their consistency with the positions of the office and Department." DEP'T OF JUSTICE, APPELLATE RESOURCE MANUAL § 2.7 (2010). The key to this type of preparation is to ask appellate practitioners, such as the Appellate Chief or other appellate specialists, to play the role of mock judges who will pepper the oral advocate with questions that he or she may receive in oral argument.

Given that oral argument is a possibility in nearly a quarter of the appeals in the various circuits, and given that the United States Attorneys' Manual mandates minimum standards for preparation, this article is designed to assist AUSAs in their preparation for oral argument, provide suggestions to Appellate Chiefs for developing moot court programs or augmenting existing moot court programs, identify what makes a good moot court judge, and maximize the chances that an AUSA's time at the lectern will be effective and enjoyable.

II. Preparation

Consult any oral argument manual or treatise and the advice is the same: prepare, prepare, prepare. Preparation, however, has many facets and phases that should begin well before oral argument has even been scheduled. Here, in rough chronological order, are the basic steps that you should take when preparing for oral argument:

A. Write a good brief

It sounds self-evident, but the first, best rule of oral argument preparation is to draft a good brief. As Justice Ruth Bader Ginsburg once said, "[o]f the two components of the presentation of a case, the brief is ever so much more important. It's what we start with; it's what we go back to." Interview with Ruth B. Ginsberg, Assoc. Justice, Supreme Court, in the District of Columbia (Nov. 13, 2006). No matter how skilled an AUSA is as an oral advocate, arguing from a poorly reasoned or poorly written brief creates problems that 15 minutes at the lectern is unlikely to cure. Drafting a well-reasoned brief takes time and patience. Very few appellate practitioners master the art of brief writing in their first try, so seek assistance. Your brief will be reviewed by the Appellate Chief before it is filed, but make sure that you have more experienced colleagues, particularly those who are familiar with appellate practice, review your draft as well. Appellate specialists are familiar with how to craft a strong brief, and how to use, for example, the standard of review to their advantage. These skills take time to develop and practice in the

court of appeals differs greatly from practice in the district court. For that reason, even if you handled the case in the district court, you should re-read the entire record (including the entire trial transcript) when preparing your appellate brief. You cannot assume that you remember the record, and you are advised to create a digest of the trial testimony. A good digest will not only assist you in drafting the statement of facts for your appellate brief, it will also likely save you time when you prepare for oral argument months later when the facts are less familiar to you.

B. Be attentive to the logistics

Are you admitted to the court where you will be arguing? For those of you arguing away from home, have you made travel arrangements? Have you visited the courthouse, including the courtroom where you will be arguing?

Before your first argument, you should attend other AUSAs' arguments to learn, among other things, the details of the protocol in the courtroom. There are a number of details that, although they may seem obvious to attorneys who have argued previously in the court, are important for a novice to know ahead of time. For example, you will need to know where and when to check in, where to sit, how to raise or lower the top surface of the lectern, how to determine how much rebuttal time to request, and the meaning of any lights on the lectern regarding the time remaining in an argument.

C. Set up your moot courts

Once the case has been calendared for argument, select your moot court team and set up the day and times for your moot court(s). There is a more detailed discussion of moot courts in the next section, but a critical feature of successful preparation is choosing the best moot court judges and setting up the moot courts far enough in advance to benefit from them. Make sure that your moot court team has adequate time and the proper materials to prepare for your moot courts.

D. Review the briefs

The first substantive step in your preparation should be a thorough review of the opening, answering, and reply briefs. Be as objective as possible and ask yourself questions that the court may ask when reading the briefs. Because the government is most often the appellee, the appellant's reply brief will often aid in distilling the issues for argument. For example, if the appellant raised seven issues in the opening brief, and yet only addressed four of those issues in the reply brief, you can be reasonably confident that the appellant will focus on those four issues at the oral argument. Although you can never be certain that the other issues will not come up at argument and you must prepare for all issues, identifying what the appellant focuses on in the reply brief is generally a good way to prioritize what to spend time on during preparation. Another thing to look for in the reply brief is whether your opponent has claimed that there are mistakes, either factual or legal, in the government's brief that you should address in a letter to the court before the argument. A short letter to the court correcting the mistake, addressed to the panel assigned to the argument, should solve the problem and save you precious time at the lectern.

As you review the briefs, keep a list of questions not resolved by the litigants' arguments. A good list of questions can assist you when reviewing the record and the cases. Also, you should review the excerpts of record while reviewing the briefs. This practice will often unearth supportive material that you overlooked when drafting the brief and that will prove useful to you at argument.

E. Review the record

Even if you created a digest of the record when writing the brief, there is no substitute for an intensive review of the entire record as you prepare for oral argument. A good reason to review the record after reviewing the briefs is that the reply brief will often raise points not made in the opening brief. A fresh look at the entire record often sheds light on parts that seemed less pertinent when you drafted the brief, but that have taken on greater significance in light of the reply brief. Also, portions of the record that seem unimportant often interest a judge on the panel and knowing the entire record cold gives you credibility.

F. Review the cases

Review of the cases should be thorough and sophisticated, but do not waste time on learning the facts of peripheral cases. If you cited cases to illustrate the standard of review, you will rarely need to recite the facts of those cases. On the other hand, cases you cited to support significant propositions or cases that your opponent highlighted as support for his or her arguments must be reviewed carefully, including the factual and procedural background. Familiarity with the facts of the cases cited is a critical part of being prepared. Be clear about the precedent: Is the case upon which you principally relied on all fours with your case? Does it support one part of your argument but not another? Did that panel actually decide your issue? Your judges will be looking closely at the precedent, so you need to make sure that you understand precisely how it applies to your case. There is no substitute for having a working knowledge of the case law, and the better you know the cases and the legal principles animating the issues, the more efficiently you can address the judges' concerns and the more persuasive you will be at the lectern.

G. Update your research

You must update your research before the argument to see if any important, relevant cases have been decided since you filed the brief. Federal Rule of Appellate Procedure 28(j) allows any party to advise the court of "pertinent and significant authorities" that "come to a party's attention" any time after briefing. FED. R. APP. P. 28(j). An advocate can advise the court by addressing a letter to the clerk that states the reasons for the supplemental citations, referring either to the page of the brief or the point argued orally. Argument is permitted in the letter, but this letter must not exceed 350 words and any response "must be made promptly and must be similarly limited." *Id.* Unless the case has been decided days before the oral argument, you should submit a 28(j) letter as promptly as possible after it has been decided, but not less than ten days before the argument. When filing within a week of argument or after argument, you should always list the panel members, if they are available, in the body of the letter, and you should always bring multiple copies of the letter to court to give to the clerk on the day of argument.

H. Prepare an outline of the argument

Prepare an outline of the important points to be raised, or important points that may have to be provided in answers. The initial outline may be quite long. It may be several pages that, by the time of your argument, you may have cut to a single sheet of paper for each issue. If properly constructed, the outline should allow you to look down and immediately recall particular lines of argument, important case names, and significant references to the excerpts of record. In most arguments, attorneys spend the majority of their time responding to questions from the court. The finest appellate advocates seamlessly fold points from an outline into answers to the judges' questions.

I. Spend quality time anticipating the tough questions

In preparing to answer the court's anticipated questions, it is worth remembering that litigation often involves different points of view, whether reasonable or otherwise. You should anticipate how the government's position could be challenged if applied to extreme circumstances or how it could be approached from a different starting point. Because one of the keys to effective appellate advocacy is being able to view the case from another perspective, attorneys and their moot teams should try to think of the most troubling hypothetical questions and to explain why a seemingly uncomfortable result is appropriate or why the hypothetical is materially distinguishable and irrelevant.

J. Determine whether a concession is warranted

Another important aspect of the preparation involves planning what to do if pressed to concede something. During many oral arguments, attorneys will be pushed by one or more judges to draw lines and defend positions as to which side of the line the case falls. It can be counterproductive to be argumentative on points that should be conceded. Effective appellate advocates appreciate the advantages of making concessions and have worked out well ahead of argument how much ground they are willing to cede. An appropriate concession shows confidence in the attorney's ultimate position. If you are unsure of the USAO's position because the issue was not raised during the preparation and moot court sessions, tell the panel that you will consult with your supervisor and, if appropriate, file something with the court after argument.

K. Prepare for a dialogue with the court

Attorneys should plan to participate in a dialogue with the court, rather than merely rehashing the brief. Productive and effective dialogue requires anticipating likely questions from, and concerns of, the different judges at the argument. The identity of the panel members is known in advance, so the AUSA should research whether any of the judges have ever written an opinion on the issues in the case. Prepare a short and direct opening statement that gets to the heart of the issues in your case, and prepare a short closing statement that ends with the relief that you seek. Practice your opening and closing statements at your moot courts and work with your moot court judges to refine them.

L. Prepare an argument binder to take to the lectern

Reams have been written about what an advocate should take to the lectern at oral argument. The consensus appears to be that you will want to have at least the following items at your fingertips: (1) a one-page (or so) outline of the argument you plan to make, usually in bullet form and in a font large enough to read, (2) a short chronology of the case with appropriate record citations, (3) excerpts from the record and trial transcripts that you may want to refer to during argument, (4) copies or excerpts from the most importance cases, or short summaries of those cases, and (5) a list of questions that you expect the judges to ask and short answers to those questions.

III. Moot courts

Good moot courts, especially in the difficult cases, can often help transform a weak performer into a good one, and a mediocre argument into a strong one. There is no substitute for presenting your argument to a prepared group of lawyers whose task it is to pepper you with questions and expose the weaknesses in your arguments, and who then help you construct the best responses to those tough questions before you appear before the court of appeals. If properly conducted, a moot court session

should always be more rigorous than the actual argument. In fact, the best moot courts are those where the advocate says afterward that "the panel didn't ask me anything that I wasn't asked by my moot court judges."

A. Moot court programs: the meat-and-potatoes version or the gourmet meal?

Moot court programs in the United States Attorneys' offices vary greatly. In some offices, the litigants do no more than what is minimally required by the United States Attorneys' Manual—they meet with a supervisor or an experienced attorney to work through the issues before the argument. In other offices, the program is more robust, with full moot court panels and several formal moot court practice sessions.

Regardless of the existing program in your office, you will get more out of your moot court experience if you make a few minimal preparations in advance. Here are some suggestions for making your moot court sessions more successful:

Prepare for the moot courts: Using the pointers outlined in Part II above, make sure that you are prepared for your moot court sessions. At a minimum, you should have reviewed the briefs, the record, and the cases. You should have prepared answers to questions that you think will be raised at argument and you should know the record cold. Often, your moot court judges will ask factual questions about the record, and you can assist them if you are able to provide answers with facts that are in the record but may not be in the briefs. Only you have access to the entire record, and thus your moot court judges will rely on you to fill in the gaps. Not knowing the record at the time of the moot courts wastes everyone's time.

Make copies of the briefs for your judges: Make sure that your judges have copies of the briefs well in advance, ideally a couple of weeks before the moot court sessions. Whether you are meeting with one person or a full three-judge panel, your moot court judges will be far more useful to you if they have time to prepare, and you should give them as much flexibility as possible to manage their time before your moot courts.

Make copies of the leading cases, pertinent orders, and select transcripts: As with distributing copies of the briefs, good moot court judges will want to have access to the underlying orders, critical parts of the record, and the most pertinent cases. The moot court judges will be far more prepared and useful to you if you provide them with what they need to delve into the legal issues so that they can ask meaningful and probing questions.

Have the trial AUSA participate in the moot courts: If you are an appellate attorney arguing the case for a trial AUSA, make sure that the trial AUSA attends the moot court sessions. Ideally, the trial AUSA reviewed your brief before it was filed and thus is already familiar with issues being raised on appeal. Regardless, the trial AUSA should be aware of the positions you intend to take in the court of appeals, particularly if the arguments differ from those the AUSA made in the district court. The trial AUSA should also be made aware if you intend to concede error or the case involves claims of prosecutorial misconduct. Regarding the latter, on rare occasions, the appellate attorney will be well-advised to concede that the trial AUSA committed some type of mistake, even rising to the level of misconduct, and then focus the argument on harmless error. The trial AUSA must be aware that the government is going to take such a position, and their attendance at the moot court sessions, where other experienced lawyers agree with the strategy of acknowledging the impropriety of the conduct, often allows the trial AUSA to come to terms with the concession.

Make sure at least one of your moot court judges is an appellate specialist: As mentioned, appellate practice differs markedly from district court practice, so you will benefit from having an appellate specialist on your moot court team. In some offices, that specialist will be the Appellate Chief, but many offices have several AUSAs who have argued multiple times in the courts of appeals. If your office has few appellate specialists, consider asking that an appellate AUSA from another office in your circuit or your appellate liaison at DOJ participate in your moot courts.

Have an informal moot court: An informal moot court is generally a discussion of all the issues raised in the appeal and, more specifically, a pothole-finding exercise. Your mooters should come prepared to point out where they see weaknesses in your arguments, question you about possible gaps in the briefs, challenge you on the problems with applying your legal arguments to other cases, and give you an opinion about how to organize your presentation to the panel. Informal moots can be extremely helpful in difficult cases with multiple issues and often help clarify what is really at stake in the appeal. Good appellate advocates use the informal moot to get a sense of what issues the panel may focus on at argument and to test out their possible responses to the tough questions.

Always have a formal moot court: If you have time for only one moot, make it formal. Even if you do not have three judges and you do not stand at a lectern, have someone play the role of the judge, and you play the advocate, and stay in role the entire time. Staying in role while the judges ask questions or follow-up questions, and having the advocate answer as if in court, will reveal your weak spots. Judges who volunteer answers for you during the moot court, even if that happens from time to time during the actual arguments, are interfering with your preparation by depriving you of the opportunity to grapple with the issue. Feedback should be provided after the moot court is over, not during the moot court itself. Moreover, if you only have time for one formal moot, do not apply time limits. Although somewhat artificial (formal moots for arguments set for 10 or 15 minutes often run over an hour), the formal moot should be an opportunity for you to answer any and all questions that the court may ask at argument. Even if only a small fraction of the questions asked at the formal moot are asked at the argument itself, the purpose of the formal moot is to prepare you for anything that could come up. Being over prepared is your goal.

Have a second formal moot court within the time constraints set for argument: If you have time, you may want to have a second formal moot that adheres to the time limits set for argument. Practicing your argument within the time constraints will help you sharpen your responses.

Set aside ample time for feedback and discussion after the formal moots: As important as it is to conduct an "in-role" moot court, it is equally important to deconstruct the argument immediately afterward. Although the structure of providing feedback can take any form, it is usually best given in the presence of all the moot court judges. Ideally, each moot court judge will provide feedback on both the arguments and the performance. If done as a roundtable discussion, moot court judges will generally provide you with a consensus about what arguments they think are most persuasive and what arguments you should abandon.

Videotape your formal moot courts: Remembering all the questions you were asked and all of your answers to them after the formal moot is completed can be a difficult task. Advocates generally do not take notes while at the lectern, and often ideas and answers are lost during the post-moot discussion. Videotaping your formal moot provides you with a record of the questions, and it allows you to see how you performed. Consider taping—video or otherwise—the feedback session, as well, so you can refer back to it while you do your final preparation for argument.

Use your moot court judges up until the moment of argument: If the moot court process was a success, your moot court judges have become intimately familiar with your arguments and with the strengths and weaknesses of your case. Continue to rely on those judges during the final days of your preparation. Moot court judges are usually happy to review a revised opening statement or help you analyze and assess the importance of a case decided just before argument.

B. Moot court judges: a healthy mix of "pothole finders" and "pothole fillers"

Selecting the best moot court judges for your case is an important part of preparing for oral argument. You should strive to have a mix of practitioners—appellate specialists, trial lawyers, and supervisors—on your moot court team to best approximate your actual panel. Appellate judges come from different backgrounds (some were trial judges, some trial lawyers, others may have been appellate lawyers) and their backgrounds may affect how they think about the issues in your cases. If you know the identity of the judges on your panel, you may want to keep that in mind when selecting your moot court judges. Even if you learn the identity of your panel members close to argument, assign moot court team members specific roles to play at the formal moot.

The following characteristics and attributes are important to focus on when thinking about what you want in a moot court judge:

Serious, thoughtful, prepared colleagues: The best moot court judges prepare carefully, set aside sufficient time to assist you in working through the issues, and take the process very seriously. Good moot court judges tend to be intrigued by the legal issues raised by your case and see the moot court experience as a way of assisting a colleague while learning more about a specific area of the law. An AUSA does not need to have extensive appellate experience to be a good moot court judge and, in fact, many trial AUSAs are superb mooters. What the AUSA needs is commitment to the process and the time to fully prepare for the moot court sessions.

Pothole finders: Generally, you want to have a combination of moot court judges who will help you find the problems or potholes in your arguments and who will assist you in developing credible arguments to address those problems or fill those potholes. Pothole finders are the judges who pick apart your arguments and your brief to best prepare you for the skeptical judges. As uncomfortable as it can be, these judges specialize in revealing the weaknesses in your positions. The pothole finder will require you to nail down exactly what the record says. The pothole finder will reveal that the case you are relying on is only marginally supportive. The pothole finder will encourage you to jettison arguments that have obvious weaknesses. This judge is comfortable playing devil's advocate, will often ask you the difficult hypothetical questions, and will just as often be unsatisfied with your responses. Cherish the pothole finders because if your responses please them, you will likely prevail.

Pothole fillers: Pothole finders may be critical to assessing the weaknesses of your case, but pothole fillers are equally essential to your success. A pothole filler is the judge who can help you develop arguments to answer those tough questions. The pothole filler is usually someone with extensive appellate experience or an experienced AUSA who can assess the law and the facts in your particular case and who recognizes that the panel may have concerns with the government's position that extend beyond your case. Pothole fillers are very adept at making the most of a scant record or strategically using the standard of review and harmless error to overcome the weaknesses in your case.

The experienced appellate lawyer: Appellate practice differs from district court practice in ways small and large. First, the advocate is responding to three judges' concerns, not one. Second, there is no jury. Third, the appellate panel is limited by the existing record and must adhere to strict standards

of review. Fourth, oral argument is precisely timed, and litigants are rarely allowed to exceed those time constraints. Because of these and many other differences between practice in appellate and district court, you should always include at least one experienced appellate lawyer in your moot courts.

Honest evaluators: Your moot court judges must be willing to give you honest feedback about your arguments and your performance. If you have annoying tics such as excessive gesticulating, interspersing your answers with "ahs" and "ums," or speaking too softly or too quickly, your moot court judges must be willing to point them out.

The following characteristics and attributes are important to focus on when thinking about what you do *not* want in a moot court judge:

Cheerleaders: As comforting as it may seem to surround yourself with folks who will agree with your positions, moot court judges that simply rubber stamp your arguments without honestly assessing their weaknesses and giving proper deference to the strengths of your opponents' positions are not really helping you. Cheerleading is not true support. The goal of moot courts is to prepare you for the rigors of oral argument. Therefore, the moot court judges should beat you up in practice so that you do not get beaten up in court. If your colleagues are not comfortable playing a tough judge or cannot approach the exercise in an objective manner, ask them to lend their support by attending your argument instead.

Narcissists: If your moot court judges like to hear themselves talk and are constantly recounting war stories about their trials or their oral arguments, they are wasting time. Your preparation time is precious and so is that of the other moot court judges. There is a difference between using experience to teach and simply showing off. The moot court is for the benefit of the advocate, and good moot court judges never forget that the exercise is not about them. The only possible "narcissist" who warrants a certain degree of patience and tolerance is the trial AUSA in your case. Otherwise, these types of judges should not be included in your moot court.

Unprepared judges: Sometimes, the judges on your actual panel will be unprepared, so it is debatable whether having unprepared judges on your moot court panels actually helps you because it mirrors real life. In the end, however, it seems wise to opt for moot court judges who will carefully prepare. If you want the experience of arguing in front of an unprepared judge, add a fourth person to your panel to specifically play that role.

Overbearing people: Some judges during your real argument can be overbearing and difficult. If you know one of those judges is going to be on your panel, then you may want to ask one of your moot court judges to play that role. Ordinarily, however, appellate judges are somber, polite, intelligent people. Moot court judges that are too aggressive, interrupt the advocate too often, or spend too much time on issues that have been resolved are not helpful. Moot court judges should allow you ample time to respond to the questions. Then, in the feedback portion of the moot court session, you should work with the AUSA to simplify and distill your answers.

Meek people: Moot court judge should also not be too meek, and must be willing to speak up during the exercise. Not everyone is comfortable with the moot court process, and if your moot court judge is intimidated by the setting or by the other judges, or if they cannot provide honest feedback, then they should not participate. That is not to say that you should not separately seek their views. Discussing the issues informally outside the moot court process with any thoughtful colleague can often lend clarity to your arguments.

C. Moot court in practice: making the most of your time and your resources

Not everyone has the luxury of unlimited time or vast resources. If you are limited in both respects, here are some suggestions for preparation:

If you have three to four weeks before the argument: Regardless of the size of your office, if you have this much time to prepare for argument, you can simulate most of the practices outlined in this article. You have enough time to review the briefs, the entire record, the cases, develop questions and an outline of your argument, and draft responses to questions. You also have ample time to organize an informal moot court and a formal moot court, and to solicit feedback from your mooters that you can incorporate into your final presentation. Even if you hail from a small office and may have trouble finding three moot court judges, with this much lead time, you likely can solicit assistance from AUSAs in other offices in your circuit. Many moot courts are conducted via VTC or teleconference, and if your choice is between not having a moot court and conducting one by telephone, you should opt for the latter.

If you have two weeks before the argument: If you have two weeks to prepare for argument, you can still prepare thoroughly, provided that you make wise choices about how to use your time. First, choose experienced moot court judges who will be able to quickly grasp the issues in your case. Second, try to have an informal moot court fairly quickly so that you can weed out the less important issues and spend your time on the more important ones. Third, try to conduct your formal moot court at least two days before the argument and try to videotape or tape record it. Again, if you are from a small office, reach out to neighboring USAOs in your circuit to recruit experienced mooters.

If you have one week before the argument: Set up at least a formal moot court session, even if you do it the day before the argument. Again, rely on experienced AUSAs if you are pressed for time, and if the briefs are long and multiple issues are raised, tell your mooters beforehand which issues you want them to focus on during the moot court. Concentrate on honing your responses to questions and learning the record.

If you have less than one week before the argument: When time is at a premium, concentrate on learning the record. Make sure that you speak with at least one experienced AUSA—preferably your Appellate Chief—about problems in the case, and have that person read briefs and be prepared to help you fill the potholes in your arguments. If you can squeeze in a moot court, even if truncated, you should do it. If not, make sure to practice your argument out loud, and practice giving answers to questions before you perform.

IV. Performance

"I used to say that, as Solicitor General, I made three arguments in every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night." *Resolutions In Memoriam: Mr. Justice Jackson*, 99 L. ED. 1311, 1318 (1955).

If you have prepared properly, oral argument should be an exhilarating experience. Your preparation and your moot court sessions should have distilled your arguments and polished your performance. At the risk of gilding the lily, here are some additional pointers to keep in mind on argument day:

Be on time: In most courts of appeals, regardless of where you are on the calendar, you must check in with the courtroom clerk approximately 15 to 30 minutes before the calendar is called. Make

sure to follow the protocol and not wander too far from the courtroom. The argument preceding yours may not start on schedule or may not take all the time allotted, and you do not want to make the court wait while the clerk looks for you. Also, if you can, you should listen to the arguments that precede your argument to gauge your panel.

Set up in the right place: Appellant's counsel will ordinarily sit on the left side of the lectern and appellee's counsel on the right, as you face the court. Appellants open the argument, followed by appellee, then appellant's rebuttal. There is usually a clock on the lectern in each courtroom with which you must keep track of your time. Always anticipate that you will have to keep track of your own time.

Listen: The government is often the appellee, and thus, you will have the luxury of arguing second. You should take notes during your opponent's argument as to your opponent's main points and the questions asked by the court. Listening during your opponent's argument is critical to organizing your response. Regardless of how you prepared, if your opponent fails to address three of the six arguments in his brief, you should ordinarily not address those arguments unless a judge on the panel asks you questions about them. To ensure that you have addressed everything that the panel wants addressed, however, you should always say something like "unless the court has further questions on the topics I have discussed, or the issues not addressed by my opponent, the government will submit on the briefs." Also, listen to your opponent's argument and the court's questions to discern whether you want to change the order of your argument. Often the panel will signal during your opponent's argument that it is concerned with a particular issue and not with others. You may want to reorganize your argument to start with the one that is of interest to the panel so that you can be certain to allot enough time to assuage any of the panel's concerns.

Greet the panel and give a short statement of the government's position: Protocol dictates that you begin with, "May it please the Court. My name is AUSA Jones, and I represent the United States." In the next sentence or two, advise the court of the topics to be addressed, or at least how the argument will start. Try to weave in the government's position on those issues. For example, where there is a single issue, state that "the district court's order denying the motion to suppress should be affirmed for three reasons." Where there are several issues on appeal, you may want to broadly explain why the government wins on each issue. For example, state that "defendant seeks reversal of his conviction on three grounds, none of which have merit. First, the evidence as to each count of conviction was sufficient. Second, the district court properly admitted the Rule 404(b) evidence. Finally, the prosecutor's comments in closing were proper, and at the very least, do not amount to plain error. I will address the arguments in that order." By structuring your opening statement in this way, you have given to the court the government's position on the issues raised and a roadmap of how you intend to discuss them.

Do not summarize the facts: Assume that the panel knows the facts of the case. If, during your argument, it becomes apparent that the panel is not conversant with the facts, fill them in, but rarely start an argument with a summary of the facts. Sometimes you will need to correct the facts if your opponent has misstated them, and you should do so. It is important to remember, however, that recitation of the details of the case should come as part of the argument or in response to a judge's question, rather than by way of an introduction or presentation of background.

Never exaggerate the facts: The panel will likely know the record fairly well by the time of argument. If you exaggerate the facts, you will be caught, and it will not only slow you down, it will undercut your credibility. Acknowledge the bad facts and argue that they do not matter for other reasons.

Do not read your argument: Judges uniformly do not like it when an advocate reads the argument. This oral argument is your opportunity to have a conversation with the court, and you should prepare for a conversation, not a lecture or a speech. Maintain eye contact as you deliver your affirmative argument and invite the questions with your delivery. More often than not, the questions from the panel will help you focus your argument.

Listen to the questions and answer them: Answer questions immediately. Stop your argument, listen to the question, and answer it. Never say that you will get to that answer later in your argument. Use a transition to get back to the unfinished topic being discussed before the question was asked. Never interrupt the judge, and never continue to speak when the judge is trying to ask you a question. Answer with a "Yes" or a "No" if at all possible. If it is not possible, explain why it is not possible. Do not back into answers by providing a long explanation that ends with, "so the answer to your honor's question is . . . ." As a general rule, answer first, explain second.

Answer the hypothetical questions: If you have been well mooted, you should be prepared for the difficult hypothetical questions. Never respond, "that's not this case." The judge knows that it is not this case, but is asking you to assist in finding the limits of the legal proposition that you are arguing. Embrace the opportunity to do so. In some cases, you may have to agree that a certain line must be drawn. Focus on why the facts of the hypothetical are distinguishable from those in the case on appeal or why the issue presented by the hypothetical has no impact on the resolution of the case on appeal.

Do not avoid responsibility: An appellate AUSA should never try to avoid responsibility for the case by blaming the trial AUSA. Argue the case as if you were the trial AUSA, even if you were not. The only exception is if you were not the trial AUSA and you are directly asked whether you were.

Do not go outside the record: You may not volunteer information that is outside the record. If a question from the court calls for information that is outside the record, an attorney can answer it, but should preface the answer by noting that it involves information that is outside the record.

Be respectful: Again, do not talk over a judge. Do not lean on the lectern. Try to use a conversational tone of voice and speak slowly enough to be understood. Address members of the court as "Your Honor" or by name, for example, "Judge Smith," not merely "Judge." When addressing the Chief Judge by name, say "Chief Judge Jones."

Maintain credibility: Your credibility is on the line during an argument and, if lost, it is difficult to regain. The following tips offer some general rules to abide by: (1) do not try to be funny, (2) be diplomatic when correcting a judge that has misconstrued the facts or the legal argument in the government's brief, (3) avoid an argumentative or condescending tone, and (4) always be courteous when referring to defense counsel. If you were properly mooted, you are keenly aware of issues that you may need to concede or mistakes that you may need to acknowledge. Make your concessions in a straightforward manner and without defensiveness.

Understand the government's position: If you do not know the answer to a question or understand the question, just say so. Never pretend to know something that you do not. It is far worse to answer and be wrong. If you do not know an answer, ask permission to follow up after argument. Most courts will permit you to write a post-argument letter providing the answer.

Have a closing statement ready: This statement is generally just a single sentence. After the questions have stopped and you have made your final point, simply say something like, "If there are no other questions, we ask the Court to affirm (reverse) the judgment of the District Court."

Sit down: If it becomes clear during your argument that the judges understand the government's position, you should say, "Unless there are any further questions, the government will submit on its brief." Once all the important points have been made and it is clear that the court is persuaded, it is best to end early, because speaking more only invites questions and problems. Do not snatch defeat from the jaws of victory. When the red light on the lectern goes on, the argument is over. You must ask the court's permission to complete an answer and to sum up. If the court gives you time, bring the argument to a close in a sentence or two at most, and then sit down.

V. Postscript

After the argument, you should meet with the Appellate Chief to review what happened in court. During this debriefing, you and the Chief should focus on any matters that must be explained or clarified for the court. There will be some situations in which the government needs to provide the court, either with the court's permission or at its direction, with a letter specifying what the government's position is on a recent decision, or what the government's policy is on an issue not specifically articulated in the briefs. In rare instances, the government will need to correct or clarify something the AUSA said that was incorrect or confusing.

Most important, keep your moot team involved. Shortly after the argument, send them a brief email explaining what happened and thank them for their assistance. When the decision is issued, send a copy to your moot team and again thank them for their assistance.❖

ABOUT THE AUTHOR

❑**Barbara J. Valliere** is the Chief of the Appellate Division for the United States Attorney's Office for the Northern District of California, a position she has held since 2005. She has been an AUSA since 1989, and previously served as a Deputy Chief in the Appellate Division in the United States Attorney's Office for the District of Columbia. Ms. Valliere has taught several appellate advocacy courses at the National Advocacy Center and has served on the Appellate Chiefs' Working Group of the Attorney General's Advisory Committee, most recently as Chairperson from 2010 to August 2012.✠

Word with Style (Or, How I Learned to Stop Worrying and ~~Love~~ Tolerate Microsoft Word)

Lawrence R. Sommerfeld
Chief, Appeals and Legal Advice
United States Attorney's Office
Northern District of Georgia

I. Introduction

Let's get one thing straight from the start—I am not a Word evangelist. In my view, Word is no better or worse than WordPerfect. But what is a devoted WordPerfect user to do now that we are switching to Word? After all, we use our word processor more than any other single tool to do our work—our real work. Combine this dependence with many people's innate fear of new technology, and the result for many is a large dose of anxiety. Start by taking a deep breath and relaxing. In the next few pages, I will invite you to take a new approach that will free you from any anxieties, help smooth your transition regardless of which word processing tool you use, and help you write better and more quickly to boot.

First, realize that in any word processor, all you will be doing the vast majority of the time is typing your text. Your text appears, and you can backspace to correct or hit return to start a new line. You can use your mouse and scroll bar to move within your document. It is all the same regardless of whether you are using WordPerfect, Word, Apple's Pages, OmmWriter Dana, or whatever your text editor of choice may be. Considering the fact that typing content constitutes most of what we do, most of the time your work will be much the same.

But what about headings? How do I indent both sides of long quotes? What about bullet points? And the ultimate WordPerfect user's lament—what about "reveal codes?" Herein lies the rub. The bad news is that Word works so differently than WordPerfect that approaching your documents by thinking about codes is a road to frustration. There is a rough equivalent to WordPerfect's "reveal codes" that this article will touch on later, but you will be doing yourself a disservice if you are thinking about your documents that way. You must let loose of this way of thinking. But don't worry, there is a better way.

All of these questions about headings, quotes, bullets, and codes reduce to a more fundamental question: How do I format my document? Text entry is easy and is about the same on every text editor. What differs is formatting. What I suggest may seem radical to some of you, but if you accept it, easing your transition to Word will be a side benefit. The big payoff will be that no matter what text editor you use, you will write better and in less time. Here is the simple talisman:

II. Forget formatting

More generally, separate content from formatting. When you type content, type content. Forget how it will look. If you must, put a quick note beside your text (for example, "[quote]," or "[header]," or "[subhead]"), and then move on. This is called "markup." Thinking about formatting gets in the way of

writing. Focus on what you want to say and how you want to say it. Focus on your content and only your content. You will write more quickly, clearly, and you can worry about how it looks later.

That may delay the problem, you say, but eventually you will need to format your document. Headers are important and so are bullet lists and tables. And, yes, we even need an occasional long quote (but try to minimize them, please, to where they are most effective). All true, but do not let formatting get in the way of your flow. When the time comes, after you have completed your first draft and need a break from composing content, here is the key to formatting:

III. Think function (or structure), rather than formatting

What do I mean by "think function, not formatting"? Perhaps a good way to illustrate is by looking at an example, a long quote. When you have a long quote in WordPerfect, if you are like me, you hit a carriage return, then change line spacing to single-space, and hit return again. Then you double-indent your margins. Finally, you type your content. After you are done typing the quote, you repeat much of this in reverse. You hit return, then change back to double-space, then hit return once more. Thankfully, the double-indent is automatically turned off in WordPerfect. Not only does this procedure interrupt your work every time you have a long quote, but if you forget something or miss a key, your brief is inconsistent. And, if you are in a review section, you are at the mercy of the drafter. If the drafter knows enough about formatting long quotes and knows how to operate the specific word processor, you might be okay. But chances are there are inconsistencies within briefs and, certainly, among them. These inconsistencies occur when we think "formatting" rather than "function."

What I am suggesting is that rather than having to undergo manual formatting every time you use a long quote, simply hit a button called "quote." When you do so, the word processor will automatically set off an appropriate amount of extra paragraph spacing, double-indent the margins, and single-space your lines. And after you hit return to end the long quote, all of this will return to normal automatically. So, rather than thinking about all of the formatting you need to do for a long quote, simply think of the "function" or "structure"—that is, "I want a long quote here," and click the "quote" button.

The same practice is true for point headings. If, for example, you are on a third-level subheading, do you use italic or bold? Is it underlined? Does your office use "(2)" or "2." and what did you do last time, three pages ago? How do you do all of this in your word processor? All of these questions get in the way of writing. Instead, simply hit a button called "Header 3." Your header is reformatted correctly and consistently (whether it is bold, italic, or a particular format that your office has chosen), and is numbered automatically.

Sound good? Thinking of function rather than formatting makes word processing easy, straightforward, and consistent. How do we accomplish it? We do so with style(s).

IV. Styles

Styles are sets of formatting stored in one place. Word is based on styles. WordPerfect has styles, too, but I am not aware of any office that uses them. Styles have all the advantages we have been discussing, and more. They make formatting easy, consistent, and easily modifiable. Basically, we can set up a group of formatting, say paragraph spacing before and after, line spacing of single-spaced, and double-indent, and call it the "Quote" style. We can tell Word to put that Style on the "Quick Style" menu. Then, the user can click on "Quote" whenever inserting a long quote, and all of the formatting will be done automatically and consistently throughout the entire document.

Styles are even more useful for headers. We can define styles Header 1, Header 2, Header 3, and so forth. Then, the user can click on those styles, and their headings will be automatically and consistently formatted. And, there is more. By using header styles, Word can automatically build a table of contents.

You can also navigate by headings. Word includes a "Navigation Pane." By clicking on it, you can see your document's structure, listed by headings. You can even drag headings around and your text will move accordingly, with all headings renumbered. Snazzy and useful. The key to accomplish this is to remember "function" or "structure," not "formatting."

Our goal, then, is to build a set of styles that includes all of the structures and functions that a user would need in a brief. We need a quote style for long quotes, bullet point styles for bullet points, headers that include at least sub-subheadings, and so forth. Once we have these styles built-in, users can entirely forget about formatting their documents and simply use the "Quick Styles" that are already developed.

Note that users do not need to know anything about using Word. Users simply type their content and then click on the style that is appropriate to the function or structure they need. If they want a bullet list, they click "bullet." If they have a subheader, they click "Header 2." All of the formatting is done automatically. Users never need to use any "direct formatting" (for example, italics, bold, indent, or line spacing). In fact, you do not want to use direct formatting. Rather, you want to use the styles that you have adopted so that your entire document, and all the documents you submit, are formatted correctly and consistently throughout.

Syles are also easy to modify. Say, for example, that you have your subheader style (Header 2) set up so that text is boldface. But you change your mind and now want all subheaders italicized instead. Simple. Right-click on the "Header 2" style and choose "modify." Choose "italic" and turn off "bold." Now, all the text in your document designated as "Header 2" automatically changes from bold to italic. You no longer need to scour the document or worry that you missed something. Using styles lets you easily and consistently modify your work.

Once you start using styles, you will see how helpful they can be and how much time they will save you. Direct formatting will become a rarity. If you are in a review section, you will want to insist that drafters use styles so that all your briefs are consistent and correct. Using styles eases the burden on drafters and allows them to forget all those formatting details, particularly in a new word processor. Word helps in this regard by allowing you to restrict formatting, if you choose, so that direct formatting is unavailable.

V. Template

At this point, you are likely to have some questions. First, who has time to make all those styles? As far as appellate briefs go, a template is available that I suggest you consider. Michael Laskowski, IT Solutions Manager in the Northern District of Georgia, and I developed it, and my office has been using it for appellate briefs since February 2012. You are welcome to use it. The template includes a cover sheet where the user types essential information for the brief, such as the defendant's name, the appeal number, defense counsel, and certain key dates. We tried to include all the styles needed for appellate briefs, such as long quotes, two styles for bullet points, and several levels of headers. The Appellate Chiefs' Working Group has made available a webinar that demonstrates how to use the template, including how to make a Table of Authorities using Westlaw's software that is now available throughout the United States Attorney's office (USAO) community.

VI. Keyboard shortcuts

We also developed keyboard shortcuts in conjunction with the brief template. They include keystrokes for the section and paragraph symbols, and various other abbreviations. The keyboard shortcuts are also available to you, as well as the brief template. The Executive Office for United States Attorneys (EOUSA) is planning to roll out similar keyboard shortcuts throughout the USAOs that the individual offices may override or customize. Keyboard shortcuts are useful time-savers that also help make your documents more consistent.

VII. Training

You may be wondering how you can learn more. After EOUSA announced the Word conversion, my office saw the need for personal training that was available whenever needed. So, we contracted a number of licenses from Lynda.com, a leader in online on-demand training materials. Lynda worked out so well that Mike Laskowski pitched it to EOUSA and OLE and, fortunately, OLE agreed to purchase licenses for use throughout the USAO community. You must try this great resource. Lynda has a large selection of on-line training available, including a thorough introduction to Word 2010 and a class that is devoted to Styles in Word. Lynda is especially useful because each Lynda class is divided into brief segments that are no longer than perhaps eight minutes. So, even if you find yourself free for only 15 minutes at a stretch, you can watch 2 or 3 short segments and continue to learn. Even better, if you can start your day by devoting a half hour to watching Lynda, you will be a Word and Styles master in less than a month.

EOUSA has also arranged for a 24-hour Word helpline you can call. This resource sounds like a potentially useful idea, but I have not tried it. After taking Lynda classes and making some Google searches, other resources have been unnecessary. Once more—you must try the Lynda Word 2010 and Styles classes. They are time well spent.

Finally, when in doubt, search Google. A great advantage of using Word is that many others share your struggles and have already figured out how to solve most of the problems that you encounter. Go to Google and type "Page numbering in Word 2010," or "compare two documents in Word 2010." (Be sure to include the version because Microsoft loves to change things.). You will likely find what you need fairly quickly. Of course, you could simply pull up that five-minute segment on Lynda.

VIII. Paste special/unformatted text

Do you remember all of those codes from WordPerfect? If you cut and paste them into Word you are looking for trouble. In fact, cutting and pasting from any program into another can cause headaches. Fortunately, because you have all of your formatting available in pre-set, easily accessible styles, you can avoid these problems. After you copy text, do not just paste it into Word. Doing so will bring the formatting with it and can corrupt your document. By the way, this problem existed in WordPerfect, as well. If you ever cut and pasted one WordPerfect document into another, you introduced a ton of codes and a ton of problems to your document. Instead, click the down-arrow next to the paste button and choose paste special/unformatted text. By doing so, you will paste only the alphanumeric characters and will leave behind the nasty proprietary metadata that will cost you time and frustration later. Remember the mantra—forget formatting. After you copy and paste unformatted text, go back and click the appropriate styles and your document will be perfect. It will be formatted consistently, both internally and with all of your other documents. This practice takes a few more minutes than simply cutting and

pasting. However, it will save you much more time later because you will have fewer corrupted documents and will minimize other formatting problems.

IX. Lagniappes

This section offers some final tips. The top line across the Word screen is the Quick Access Toolbar. Customize it with the few commands you actually use. If you right-click when your cursor is on the toolbar, you can choose "Customize Quick Access Toolbar." Change "popular commands" to "all commands" and scroll down. Add "Style" (the one with the down arrow) to your toolbar. Then, wherever your cursor is, you will see the style you are currently using. You can also change styles by clicking the arrow next to that style on the toolbar. I further customized my Quick Access Toolbar by adding the paragraph symbol (which shows hidden characters), the footnote command, and a box that enables the navigation pane. Once you add the commands you use, hide the ribbon. It is a waste of space. Microsoft says that the ribbon allows you to access any command in two mouse clicks. Theoretically, I guess. If you are like me, you have no idea where the command you are looking for is located on the ribbon. Sort of classic Microsoft: everything is there, if only you can find it. So, put whatever commands you use on the Quick Access Toolbar and hide the rest. As a bonus, you will have more room to work and fewer distractions.

Go to "File menu," select "Options," and then "Proofing," and disable autocorrect, auto-numbering, auto-formatting, and so forth. Word guesses right about half the time, meaning it is wrong about as often. Leave on smart quotes and the en- and em- dash shortcuts (two- and three- hyphens, respectively). The rest can go. Superscripts and auto-capitalization are especially annoying when entering citations for circuit court cases.

Finally, what about that "reveal codes" substitute? Click "Shift-F1" and on the right of the screen will be the formatting of your text. But Word does not use codes, so this function probably does not do what you want, though you may get some comfort out of it. If some text does not look as expected, it may be helpful to hit Shift-F1 and click the "Distinguish style source" box to see what formatting is from styles and what is direct formatting that a user may have inserted.

X. A last word on typography

Perhaps this section should have started the article. Increasingly, fine typography resources are available. Start with "Typography for Lawyers," Butterick's Web site and book. *See* TYPOGRAPHY FOR LAWYERS, http://www.typographyforlawyers.com/. It is hard to overstate the importance of good design, yet lawyers remain behind the curve. Learn to appreciate good design and typography. Your documents will be more inviting and more persuasive.

XI. Conclusion

WordPerfect and Word use different metaphors. Forget codes—they will lead you down a fruitless path. Instead, separate content from formatting and learn to use styles. Also, take advantage of the excellent resources that are available, such as Lynda.com. If you embrace the separation of content and formatting, learn to think "function" or "structure" using styles instead of direct formatting, and especially if you devote a half-hour a day for a few weeks to Lynda, you may find that you more than tolerate Word, and you may actually stop worrying and better enjoy your writing.❖

ABOUT THE AUTHOR

❑**Lawrence R. Sommerfeld** is the Chief of Appeals and Legal Advice for the Northern District of Georgia, a regular faculty member for the appellate courses offered at the National Advocacy Center, and a former law clerk to Eleventh Circuit Judge Frank M. Hull and former United States District Judge Jack T. Camp. He was previously his office's Computer Hacking and Intellectual Property Crimes coordinator, and practiced privately for law firms in Silicon Valley and New York City.✠