# CHAPTER 18

# FEDERAL CRIMINAL APPEALS

(including amendments effective Dec. 2009)

by

Paul M. Rashkind

## 18.01 INTRODUCTION

Appellate practice can be complicated and confusing, even for experienced practitioners. Much of the confusion stems from conflicting rules. Federal Rules of Appellate Procedure are supplemented and altered by local circuit rules. Neither apply in the Supreme Court, where practice is governed by the Supreme Court Rules. This chapter is a guide through the garden of rules, helping counsel to perfect federal criminal appeals and certiorari proceedings.

The first question for many lawyers is: Can I appeal? The rights to appeal and the types of appeals are addressed in sections 18.02 and 18.03. Assuming one can appeal, questions arise about who perfects the appeal and how. These matters are covered in the balance of this chapter.

The right to counsel for appeal and the duties of counsel are discussed in section 18.04. The difficult questions raised by a no-merit appeal are the topic of section 18.03.09.

Getting acquainted with the various sets of rules is summarized in section 18.05. Rule books are organized by rule number, not necessarily by subject matter. Many times counsel has to hunt for applicable provisions, which are not necessarily contiguous. Section 18.05.01 provides a different perspective, an overview of the subject matters involved in appeal, with cross-references to the rules wherever they may be scattered. Section 18.05.02 identifies local circuit rules and practice resources developed by the individual circuits, grouped by circuit and with pinpoint Internet citations.

The steps to perfecting an appeal are covered in section 18.06, and preparing a proper appellate brief is the subject of section 18.07. Both form and substance of the brief are discussed at length in sections 18.07.01 and 18.07.02. Issue selection and standards of review are examined in detail, beginning with section 18.07.02.01.09. Getting oral argument and delivering it well are highlighted in section 18.07.03.

Certiorari proceedings are summarized in section 18.08, which also explains the specific requirements for perfecting a petition for writ of certiorari.

## 18.02 THE RIGHT TO APPEAL

"The right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 159 (2000) (quoting *Abney v. United States,* 431 U.S. 651, 656 (1977)). "[I]n order to exercise that statutory right of appeal one must come within the terms of the applicable statute." *Abney*, 431 U.S. at 656. While Article III, §1 of the United States Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," this language does not confer a constitutional right to an appeal. As the Supreme Court held, over a century ago, "review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law." *McKane v. Durston*, 153 U.S. 684 (1894).

Presently, a number of different statutes provide for a right to appeal in matters related to criminal cases. The statutes providing jurisdiction to appeal in most criminal cases are 28 U.S.C. § 1291 (final decisions of district courts, including final judgment), 18 U.S.C. §§ 3557 & 3742 (review of sentence, initiated by defendant or government), 18 U.S.C. § 4106A(b)(2) (treaty transfer sentence determinations), 18 U.S.C. § 3145(c) (release or detention order); 18 U.S.C. § 3731 (permissible government appeals – orders of dismissal, suppression, exclusion, and new trial). Appeals of habeas corpus and § 2255 proceedings proceed pursuant to 28 U.S.C. § 2253 and are subject to the jurisdictional requirement of a certificate of appealability.

Less common appeals derive from other specific statutes, such as: 18 U.S.C. § 2518(10)(b) (government appeal of suppression of intercepted communications); 18 U.S.C. App. 3 § 7 (government appeal of orders disclosing classified information).

## 18.03 TYPES OF APPEALS

### 18.03.01 Plenary Direct Appeals

Plenary direct appeals are those that address the entire case: all pretrial proceedings, trial or plea, sentencing, and post-trial orders. When such appeals arise from U.S. district court orders and judgments, they are are conducted pursuant to the Federal Rules of Appellate Procedure. *See* Fed. R. Crim. P. 58(g)(1). When the appeal arises from orders and judgments of a magistrate judge, it occurs under Fed. R. Crim. P. 58(g)(2).

### 18.03.02 Sentencing Appeals

The appeal of a federal criminal sentence occurs under 18 U.S.C. § 3742. Pursuant to the statute, an appeal may be initiated by either the defendant or the government, although a government sentencing appeal may not be prosecuted "without the personal approval of the Attorney General, Solicitor General, or a deputy solicitor general designated by the Solicitor General." § 3742(b).

Either party may appeal if the sentence was imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or, if there is no guideline for the offense, if the

sentence is unreasonable. § 3742(a) & (b). The defendant may also appeal if the sentence exceeds the range recommended by the Federal Sentencing Guidelines, and the government may appeal if the sentence is lower than the guideline range. In addition to these statutory grounds for appeal, the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 223-24 (2005), has significantly altered appellate review of guideline sentences, adding a layer of reasonableness review not set forth by statute.

Although § 3742(e) ostensibly sets forth standards for appellate review of sentences, the Supreme Court excised subsection (e) from the law, in order to effectively eliminate the unconstitutional mandatory requirements of the Sentencing Guidelines. *Booker*, 543 U.S. at 223-24. *Booker* states that the resulting standard of review is "review for unreasonable[ness]." 543 U.S. at 224. The concept of reasonableness was later refined in *United States v. Rita*, 551 U.S. 338 (2007) (appellate review of sentence within the calculated guidelines), *Gall v. United States*, 552 U.S. 38 (2007) (appellate review of below-guidelines sentence), and *Kimbrough v. United States*, 552 U.S. 85 (2007) (below-guidelines sentence based on policy disagreement with Sentencing Commission). *Rita* holds that an appellate court *may* presume reasonable a sentence within the properly calculated guideline range, although a court of appeals is not obliged to employ such a presumption of reasonableness. *Rita* and *Gall* make equally clear that the sentencing judge *may not* presume that a properly calculated range is reasonable. And *Kimbrough* expressly permits a district judge to impose a sentence outside the guidelines range based upon policy disagreements with the Sentencing Commission.

### 18.03.03 Treaty Transfers

Under treaties with foreign nations and procedures set forth at 18 U.S.C. §§ 4100–4115, U.S. citizens who are prisoners in foreign countries may be returned to the United States to serve their foreign sentence in a domestic federal prison. Part of that process requires the U.S. Parole Commission to convert the foreign sentence into a U.S. sentence. This process takes place pursuant to the statute, *id.*, and rules and regulations adopted for this purpose. 28 C.F.R. § 2.68.

The treaty transfer process resembles a typical sentencing and is appealed in the same way. The Parole Commission has a Presentence Report prepared, then holds a hearing and makes a sentence determination consistent with the U.S. Sentencing Guidelines. This will be the sentence served in this country. The Parole Commission's determination may be appealed to the court of appeals of the circuit in which the offender is imprisoned, a process initiated by the filing of a notice of appeal within 45 days of the determination. § 4106A(b)(2)(A). The court of appeals decides and disposes of the appeal as it would any other sentencing appeal under § 3742, as though the Parole Commission's determination had been imposed by a U.S. district court. § 4106A(b)(2)(B).

### 18.03.04 Recalcitrant Witnesses

Title 28 U.S.C. § 1826(a) permits an appeal by a recalcitrant witness who has been summarily confined. Pursuant to § 1826(b), such an appeal shall shall be disposed of "not later than thirty days from the filing of such appeal." Some local circuit rules require that the appeal carry a special label, such as "RECALCITRANT WITNESS APPEAL" and that counsel notify the criminal motions unit of the court of appeals both telephonically and in writing within 24 hours of filing.

### 18.03.05 Collateral Orders

The "collateral order doctrine" expands the category of "final judgments" within the meaning of 28 U.S.C. §1291 to permit some pretrial or interlocutory appeals. First announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the doctrine may be satisfied if: (1) the appealed order is a final rejection of the appellant's claim; (2) the appealed issue is collateral to and separate from the principal issue; and (3) the order would effectively be unreviewable on appeal from a final judgment. *Abney*, 431 U.S. at 656-62.

Pursuant to the collateral order doctrine, the Supreme Court in *Abney* permitted an immediate pretrial appeal by a defendant of an order denying his motion to dismiss based on double jeopardy. The *Abney* Court reasoned that double jeopardy involves the right not to be tried at all for a second time and, thus, the constitutional privilege would be irretrievably lost if the decision was not heard prior to a judgment on the merits. *Abney*, 431 U.S. at 661-62. Even though the order may be appealed pretrial, this is not a requirement; the defendant may wait and appeal post-trial, if there is a conviction.

The collateral order doctrine has been applied to an order denying a motion to reduce bail, *Stack v. Boyle*, 342 U.S. 1 (1951), and an order holding a recalcitrant witness in contempt and imposing confinement under 28 U.S.C. § 1826. The Supreme Court has also permitted immediate appeal of the denial of a Congressman's motion to dismiss an indictment for violation of the Speech and Debate clause. *Helstoski v. Meanor*, 442 U.S. 500 (1979).

The doctrine does not apply to a number of other pretrial orders. Pretrial appeal of a violation of the right to speedy trial is not permitted by the collateral order doctrine. *United States v. MacDonald*, 435 U.S. 850, 854 (1977). The Court distinguished a double jeopardy appeal under *Abney* because the right to speedy trial does not encompass the right not to be tried. The Court reasoned, in part, that because a violation of speedy trial requires analysis of the prejudice resulting from the delay, the determination could best be made following trial and is, thus, not sufficiently separate from the outcome of the trial. *MacDonald*, 435 U.S. at 859. The Supreme Court has also refused to apply the doctrine to the denial of a motion challenging the sufficiency of an indictment, *Abney*, 431 U.S. at 663, or of a motion to dismiss an indictment for alleged prosecutorial abuses of the grand jury process. *United States v. Mechanik*, 475 U.S. 66, 70 (1986). Similarly, the denial of a motion to dismiss an indictment for prosecutorial vindictiveness does not satisfy the collateral order doctrine. *United States v. Hollywood Motor Car Co.,* 458 U.S. 263 (1982) (per curiam).

### 18.03.06 Other Orders

The courts of appeals have jurisdiction over orders denying a motion to withdraw a guilty plea or *nolo contendere* plea under Fed. R. Crim. P. 32(e), or denying a motion for new trial based on newly discovered evidence under Rule 33. *See United States v. Hyde*, 520 U.S. 670 (1997).

Subject to limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 (1996) ("AEDPA"), jurisdiction also lies with the courts of appeals in the context of habeas corpus and other writs. An appeal may be taken from an order denying a motion to vacate sentence or

conviction under 28 U.S.C. §2255, or denying a petition for *writ of error coram nobis* under the All Writ Section, 28 U.S.C. §1651. *See United States v. Morgan*, 346 U.S. 502 (1954). The courts of appeals also maintain jurisdiction over an order denying a petition for writ of habeas corpus filed under 28 U.S.C. §2254, attacking the validity of a state conviction.

As noted above, AEDPA places jurisdictional limitations on appeals from habeas corpus and § 2255 proceedings. The Act amended 28 U.S.C. § 2253 to add a requirement that a certificate of appealability be issued in order for the prisoner to appeal §§2254 and 2255 proceedings. As amended, the statute does not permit an appeal to be taken from the denial of a § 2254 or 2255 final order unless a "circuit justice or judge issues a certificate of appealability," *see* 28 U.S.C. §2253(c)(1)(A & B); but Fed. R. App. P. 22 recognizes that the certificate may be issued by the district court judge, as well. *See, e.g., Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (en banc), *overruled on other grounds*, *Lindh v. Murphy*, 521 U.S. 320 (1997); *United States v. Asrar*, 108 F.3d 217 (9th Cir.), *opinion amended and superseded*, 116 F.3d 1268 (9th Cir. 1997); *United States. v. Eyer*, 113 F.3d 470, 37, 37 Fed. R. Serv. 3d 1288 (3d Cir. 1997); *Houchin v. Zavaras*, 107 F.3d 1465 (10th Cir. 1997); *Else v. Johnson*, 104 F.3d 82 (5th Cir. 1997). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."§ 2253(c)(2). The certificate of appealability "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." § 2253(c)(3).

### 18.03.07 Government Appeals

The most common government appeals in criminal cases take place pursuant to two statutes, 18 U.S.C. §§ 3731 (orders of dismissal, suppression, exclusion, and new trial) and 3742 (sentencing). Less common appeals occur under § 2518(10)(b) (appeal of suppression of intercepted communications) and 18 U.S.C. App. 3 § 7 (appeal of orders disclosing classified information). All government appeals are subject to internal controls and approvals within the Department of Justice. *United States Attorneys' Manual*, §§ 2-2.100, .121, .311, .600, and 9-2.170, available at <www.usdoj.gov/usao/eousa/foia_reading_room/usam>.

The statute authorizing sentencing appeals by the government, however, specifically requires Justice Department authorization for a sentencing appeal to go forward. 18 U.S.C. § 3742(b) (requiring personal approval of the Attorney General, Solicitor General or a designated deputy Solicitor General). Failure of the government to obtain approval before commencing an appeal does not deprive the court of appeals of jurisdiction. *United States v. Zamudio*, 314 F.3d 517 (10th Cir. 2002); *United States v. Gonzalez*, 970 F.2d 1095 (2d Cir. 1992) (cross-appeal); *United States v. Long*, 911 F.2d 1482 (11th Cir. 1990). But written proof of such approval is required, at least before filing of the government's brief. *United States v. Smith*, 910 F.2d 326 (6th Cir. 1990); *Zamudio* (written proof provided in response to motion to dismiss).

As a practical matter, the approval process can be an important opportunity to forestall a government appeal or cross-appeal, especially in a marginal case, one in which the equities do not favor appellate proceedings, or where an unsuccessful government appeal would establish adverse precedent for the government. It is always worth defense counsel's time to give input discouraging authorization for a government appeal, for if approval is not granted, the appeal will be dismissed. *See United States Attorneys' Manual*, § 9-2.170.

### 18.03.08 Cross-Appeals

Cross-appeals occur when opposing parties both file a notice of appeal. Two appeals then occur simultaneously, involving the same case and parties, although the issues may be entirely unrelated. For example, a criminal defendant may appeal the sufficiency of evidence to support the conviction, while the government appeals the sentence. Each appeal could stand alone, but when filed together, the later-filed notice of appeal is considered a cross-appeal, which is governed by Fed. R. App. P. 28.1. Designation of the parties, order of briefing, length of briefs, and the time for service are all set forth in Rule 28.1, which supersedes the provisions set forth in Rules 28(a)-(c) (contents of briefs), 31(a)(1) (time for serving briefs), 32(a)(2) (brief covers), and 32(a)(7)(A)-(B) (length of briefs). *See* Fed. R. App. P. 28.1(a). Often, these provisions are modified further by local circuit rules. *See infra* at 18.05.02.

### 18.03.09 No Merit Appeals

Few phases of defending a criminal case are as perplexing as what to do when a client wants to appeal, but there are no discernable issues of merit. The Supreme Court, however, has laid down very specific requirements for counsel in such a predicament. Failure to follow these procedures likely constitutes ineffective assistance of counsel. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477-81 (2000).

Initially, counsel must consult with the client, advising about the advantages and disadvantages of taking an appeal, making a reasonable effort to discover the client's wishes. The better practice is for counsel to confer in all cases, *id.* at 479, but there is a constitutional duty to consult when the lawyer has reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel an interest in appealing. *Id.* at 477-81. In federal cases, the decision of counsel to appeal, or not, is evaluated under the "objectively reasonable choices" rule set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Roe v. Flores-Ortega*, 528 U.S. at 479. In making this evaluation of the effectiveness of counsel, courts take into account all the information counsel knew or should have known. One highly relevant factor is whether the conviction follows a trial or a guilty plea "because a plea both reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings." *Roe* at 480. Even then, a court must consider such factors as whether the defendant received the sentence bargained for and whether the plea expressly reserved or waived some or all appeal rights. *Id.*

If the client requests an appeal, counsel is duty-bound to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. at 477. A lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner, *id.* at 477; *see Rodriquez v. United States*, 395 U.S. 327 (1969), as is a lawyer who fails to consult with the client about taking an appeal. *Roe v. Flores-Ortega*, 528 U.S. at 478. On the other hand, a defendant who explicitly tells his attorney not to file an appeal cannot later complain that, by following those instructions, his counsel performed deficiently. *See Jones v. Barnes*, 463 U.S. 745, 751(1983).

If the client requests an appeal, counsel must file a timely notice of appeal, order transcripts, and otherwise perfect the appeal. The record must be read and reviewed by counsel in search of

issues of merit. If counsel is unable to uncover an issue of merit and the only possible issues are wholly frivolous, counsel must nevertheless prepare and file a brief that complies with the requirements of *Anders v. California,* 386 U.S. 738 (1967) (holding counsel must file brief covering arguable issues and motion to withdraw).

In *Anders*, counsel determined that there were no meritorious issues to present in an appeal. He sent a letter to the court briefly stating his conclusion and notifying that Anders wanted to file his own brief. *Id.* at 739-40. The Court permitted counsel to withdraw. Anders then filed opening and reply briefs *pro se*. His conviction was unanimously affirmed. Following *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying Sixth Amendment right to trial counsel to the states), the Supreme Court held that a cursory no-merit letter from counsel is constitutionally insufficient to require an indigent defendant to proceed on direct appeal without counsel. *Anders,* 386 U.S. at 742. The Court set forth procedures to be used when counsel determines an appeal to be wholly frivolous, requiring counsel to notify the court, file "a brief referring to anything in the record that might arguably support the appeal," and move to withdraw as counsel. *Id.* at 744. The court then must conduct an investigation to determine if the appeal is truly frivolous. Often, the court of appeals permits the defendant to respond, raising any issues the client thinks are meritorious. If deemed a frivolous appeal, counsel is permitted by the court to withdraw and the judgment below is affirmed.

In *Penson v. Ohio*, 488 U.S. 75 (1988), the Supreme Court found that Penson was denied his constitutional right to representation when his counsel was allowed to withdraw from representation without filing an *Anders* brief. Counsel filed a "Certificate of Meritless Appeal and Motion," but no brief accompanied the request. The court of appeals permitted trial counsel to withdraw and gave Penson 30 days to file a brief *pro se. Id.* at 78. Upon its investigation, the court found several arguable claims, including one which constituted plain error, requiring reversal. *Id.* at 79. The court reversed that conviction and affirmed the remainder, finding no prejudice from counsel's failure to prepare a brief. The Supreme Court held that Ohio's courts violated Penson's Sixth Amendment right to counsel by failing to require counsel to file a no-merit brief, dismissing counsel prior to reviewing the record, and failing to appoint counsel to prepare an appeal once it determined that the case contained meritorious issues. *Id.* at 80-81. Ordinarily, cases involving the ineffective assistance of counsel are evaluated under *Strickland v. Washington*, 466 U.S. 668 (1984) (petitioner must prove that counsel's ineffective assistance resulted in prejudice), although in the case of constitutional errors, the government bears the burden beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967) (government carries burden to prove constitutional error was harmless beyond a reasonable doubt). The deprivation of counsel in *Penson*, however, gave rise to a presumption of prejudice, 488 U.S. at 88, making it "inappropriate to apply either the prejudice requirement of *Strickland* or the harmless-error analysis of *Chapman.*" *Id.* at 88-89.

The reach of *Anders* and *Penson* was limited, as it applies to the states, in *Smith v. Robbins*, 528 U.S. 259 (2000) (permitting states to experiment with alternative procedures that pass constitutional muster). *Smith v. Robbins* considered a no-merit procedure adopted by California in *People v. Wende*, 25 Cal. 3d 436 (1979), in which counsel does not withdraw from the case, but remains silent on the merits without explicitly stating that the appeal is frivolous. Counsel filing a *Wende* brief provides a summary of the case's procedural and factual history with record citations and then offers to brief the case upon the direction of the court. The Supreme Court found that

California's *Wende* procedure is sufficient to protect Fourteenth Amendment rights even though it differs from the procedure set forth in *Anders*. 528 U.S. 283-84. The *Wende* procedure satisfies the Fourteenth Amendment's requirement that states afford adequate and effective appellate review to indigent defendants, while assuring that public moneys will not be spent to subsidize frivolous appeals. *Wende* is not unconstitutional because it is a two-tiered system, requiring both counsel and the court to find the appeal to be frivolous, and it does not permit counsel to withdraw prior to the determination that the appeal is frivolous. *Smith v. Robbins* makes clear that *Anders* established a constitutionally sound procedure, but not the only constitutionally sound procedure. *Id.* at 278-79.

This may seem confusing to counsel with a client in federal court because *Anders*, *Penson*, and *Robbins* all address the duty of counsel in state proceedings and the constitutionally permissible no-merit procedures employed by the states. Federal courts, however, long ago adopted *Anders'* requirements and have not yet receded from them post-*Smith*. Local circuit rules in every circuit continue to require adherence to the *Anders-Penson* process.

In federal court, the *Anders* duty has seemingly been extended to counsel's responses to a government motion to dismiss an appeal. In *United States v. Gomez-Perez*, 215 F.3d 315, 316 (2d Cir. 2000), the Second Circuit required counsel to file an *Anders* brief in response to the Government's motion to dismiss an appeal based upon a waiver of appeal contained in the plea agreement. Counsel notified the court that she "took no position with respect to the Government's motion." The Second Circuit held that in order to comply with the Constitution counsel for Gomez-Perez had to file an *Anders* brief setting forth only the limited issues of "whether defendant's plea and waiver of appellate rights were knowing, voluntary, and competent[,] . . . whether it would be against the defendant's interest to contest his plea . . . and [] any issues implicating a defendant's constitutional or statutory rights that either cannot be waived, or cannot be considered waived by the defendant." *Id.* at 319 (citations omitted). *See also United States v. Mason*, 343 F.3d 893 (7th Cir. 2003) (treating counsel's written submission in response to motion to dismiss appeal as the equivalent of an *Anders* brief, even though not denominated as such).

## 18.04 COUNSEL FOR APPEAL

### 18.04.01 Generally

The Constitution does not require an appellate process in criminal cases, but if an appellate system exists, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection clauses of the Constitution, including the right to counsel in a first-tier appeal. *Halbert v. Michigan*, 545 U.S. 605 (2005) (applying Due Process and Equal Protection clauses to require appointed counsel for indigents in first-tier appeals); *Douglas v. California,* 372 U.S. 353 (1963) (Fourteenth Amendment guarantees right to counsel on first appeal if appellate process exists); *see Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (requiring free trial transcripts for indigent appellants); *Eskridge v. Wash. State Bd*., 357 U.S. 214 (1958) (same). The Supreme Court has recognized that "the promise of *Douglas*, that a criminal defendant has a right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

Although the right to counsel on appeal was seemingly limited by *Ross v. Moffit*, 417 U.S. 600 (1974) (right to appellate counsel limited to first appeal of right), this caveat did not give states license to tinker with the first-tier appeal rights of indigent defendants. *Halbert v. Michigan*, 545 U.S. 605. Michigan had sought to effectively eliminate the right to counsel on first-tier appeals in cases in which a defendant pled guilty by requiring defendants to waive their right to appeal as a condition of the guilty plea. Those who pled guilty could only have appellate counsel appointed by first filing a *pro se* motion for leave to appeal, setting forth meritorious appellate grounds. For the indigent, often uneducated or illiterate defendant, this process was difficult beyond reason. The Supreme Court struck down the Michigan procedure, holding that it violates the Due Process and Equal Protection clauses, which require the assistance of counsel to perfect first-tier appeals in jurisdictions that permit appellate review in criminal cases. *Id.* at 623-24.

A criminal defendant has no right to self-representation on appeal. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 159 (2000).

### 18.04.02 Counsel's Duty

The right to counsel on appeal has its limits. Although the attorney must be available to assist in the preparation of the appellate brief, *Swensen v. Bosler*, 386 U.S. 258 (1967) (per curiam), and "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim," *Evitts*, 469 U.S. at 394 (citing *Anders v. California*, 386 U.S. 738 (1967)), an attorney need not advance every argument urged by the client, regardless of merit. *Jones v. Barnes,* 463 U.S. 745 (1983).

Every circuit provides for the continuity of counsel on appeal, usually by local rules or rules addenda. The rules generally provide that both private and court-appointed counsel must continue to represent the defendant on appeal unless counsel is relieved by court order, substitution of counsel, court appointment, or a court determination that the defendant may proceed *pro se.* If the defendant either appeared *pro se* or with retained counsel in the district court and believes that the appointment of counsel is appropriate on appeal, the defendant may petition the district court for appointment. If that request is denied, the court of appeals may also appoint appellate counsel. The Criminal Justice Act provides that appointed counsel shall be compensated for services and reimbursed for reasonable expenses.

Every circuit also presumes that counsel will continue to represent an unsuccessful defendant in filing a petition for a writ of certiorari to the United States Supreme Court. This does not mean that a petition must be filed in every case in which there is an adverse appellate decision, but counsel must conduct a thoughtful examination of the issues and consult with the client. This is not to say that frivolous issues must be pursued through certiorari review; the Supreme Court has overturned circuit rules requiring the filing of a petition for writ of certiorari in every case, even those in which it would be frivolous. *Austin v. United States*, 513 U.S. 5 (1994) (per curiam). If, in counsel's judgment, there are no non-frivolous grounds for filing a petition, then counsel must notify the client of that fact, advising the client of the right to petition for certiorari and the applicable time limits. Each circuit treats the mechanics of this process differently. Some require counsel to either file the petition for certiorari or else move to withdraw. Others permit counsel to make the decision not to

file for certiorari without formally withdrawing.

*Austin* does not hold that a frivolous certiorari petition may not be filed; it simply holds that counsel may not file such a petition. In other words, there is no right to counsel when the petition for certiorari would be frivolous. But the client may still file such a petition *pro se*. This is not a useless gesture, for occasionally the Supreme Court grants certiorari on issues presented by *pro se* petitioners who were abandoned by appellate counsel. *See, e.g., Burgess v. United States*, 478 F.3d 658 (4th Cir.), *cert. granted*, 552 U.S. ___, 128 S. Ct. 740, *aff'd*, 552 U.S. ___, 128 S. Ct. 1572 (2007).

If counsel will not be filing for certiorari review, the client should be advised of applicable time limits and the process for a *pro se* filing. Some local circuit rules specify this very process, seemingly understanding that a client has the right to file a *pro se* petition that counsel cannot in good faith file. This juncture of continued appellate review can be tricky, so it is especially important for counsel to consult and follow the procedures applicable in the court of appeals from which the decision originates.

## 18.05 GETTING ACQUAINTED WITH RULES OF APPELLATE PROCEDURE

There are two sets of rules that govern appeals in any given circuit, the Federal Rules of Appellate Procedure and the local circuit rules. The Federal Rules of Appellate Procedure (Fed. R. App. P.) were initially adopted December 4, 1967, and have been amended frequently, both in substance and style. Federal Rule of Appellate Procedure 47 permits individual circuits to adopt additional rules governing local practice.

### 18.05.01 Federal Rules of Appellate Procedure

The Federal Rules of Appellate Procedure provide a comprehensive blueprint for federal appellate practice, with one important caveat: Local circuit rules alter nearly every significant detail contained in the national rules. As a result, it will be a coincidence if the rules governing an appeal resemble those set forth by the Federal Rules of Appellate Procedure. It is vital, therefore, that the applicable local circuit rules be consulted and followed. Internet references for each circuit are contained in the next section, 18.05.02. That said, it is worth the time to consider the structure of the national rules, since the numbering system is far from intuitive.

The Federal Rules of Appellate Procedure cover a number of areas important to a criminal appeals, but related matters are not always discussed in consecutively numbered rules. For example, although rules relating to the notice of appeal are near the beginning in Rules 3 and 4, a lawyer needing basic information about service and filing or computation of filing times must jump to Rules 25 and 26. When preparing a brief, counsel must consult Rule 28, then jump to 31, 32, and 32.1. Then, constructing the necessary appendix or record excerpts requires going back to Rule 30. Since the local circuit rules are often placed immediately following the comparable federal rule of procedure, counsel may be hunting through the rule book just to get basic and simple information.

### 18.05.01.01 Initial Considerations

An appeal of right is initiated by a timely notice of appeal filed *in the district court*. Fed. R. App. P. 3 and 4. The requisite contents of the notice of appeal are described in Rule 3(c), and a form is contained in Appendix 1 of the Federal Rules of Appellate Procedure. A form is also found on every circuit's website. In many districts this is done by electronic filing. Filing fees are mentioned in Rule 3(e), although the actual amount of fees is something most easily found on the individual circuit's website. If the client is indigent, counsel must jump to Rule 24 for instructions in proceeding *in forma pauperis*. Rule 4(b) governs the time for filing an appeal in a criminal case, including the effect of pre- or post-judgment motions, and the limited circumstances for extending the time for appeal.

The next four rules counsel must generally encounter, in order, are Fed. R. App. P. 12, 26.1, 10, and 25. Rule 12 sets forth the three steps in docketing an appeal in the court of appeals. The clerk of the district court must forward the notice of appeal and docket entries of the case to the clerk of the court of appeals, who then assigns an appellate case number. Fed. R. App. P. 12(a). This event is significant because virtually every filing after the notice of appeal must be filed in the court of appeals, with the appellate case number. Although Rule 3(d) requires the district court clerk to transmit these documents "promptly," the practice varies among the circuits. Usually, the case is docketed within ten to 14 days after the notice of appeal is filed, which is about when counsel's first filing is due in the court of appeal: a representation statement is due on the fourteenth day.

Although not mentioned in Rule 12, Fed. R. App. P. 10 requires the filing of a transcript order within 14 days of the notice of appeal. And Rule 26.1 requires counsel to file a certificate naming interested parties, which many local circuit rules require to be filed within 14 days of the notice of appeal. Both of these filings are described in a little more detail in the following paragraphs.

Rule 10(b) requires counsel, within 14 days of the filing of the notice of appeal, to order and make arrangements to pay for transcripts of proceedings. If no further transcripts are required, counsel must file a certificate that no transcripts will be ordered.

Counsel must file in the court of appeals a representation statement within ten days after the filing of the notice of appeal. Fed. R. App. P. 12(b). This is simply a special form of a notice of appearance of counsel, designating the names of the parties and counsel. The form is available on circuit websites, and many circuit clerks are sticklers, requiring use of their official form of representation statement. Rules governing attorneys, including application and admission to the bar of the court of appeals, suspension and discipline, are set forth generally in Fed. R. App. P. 46. Local circuit rules are usually more specific and include how counsel not admitted to the circuit's bar may act *pro hac vice*.

Rule 26.1 ostensibly refers to the filing of a statement identifying corporate entities having an interest in the case. According to Rule 26.1, it should be filed with the first brief or first motion filed in the case. Counsel may as well forget what Rule 26.1 says. Local circuit rules have expanded the statement to be a certificate of interested persons, including everyone who is connected to the

case – the defendant, victims, lawyers, and even judges. They all must be named, usually in alphabetical order (often last name first) and many of the circuits require that this certificate be filed within ten days of the notice of appeal. Counsel must check the applicable circuit rule for the specifics applicable to a pending appeal. In addition, local circuit rules often require electronic filing of corporate disclosure information at the court's website to aid judges with recusal responsibilities.

Returning to Rule 12, subsection (c) describes the process for the district court clerk to follow in filing the record on appeal and notifying counsel of the filing. This is a critical occurrence in federal appeals because this date supposedly dictates the briefing schedule to follow. In many circuits, however, the briefing schedule is unrelated to the filing of the record. Often, briefing is expected to commence before the record is filed and without any formal notice to counsel. This can be a very frustrating process, different from circuit to circuit, in which counsel must compute filing deadlines alone, subject to the clerk's wrath if anything is filed out of time.

If the appeal raises the constitutionality of either a federal statute in a case in which the federal government is not a party, counsel must give notice of this challenge to the clerk of the court of appeals, so the clerk may advise the Attorney General. Fed. R. App. P. 44(a). The same requirement applies in appeals challenging state statutes in which the state is not a party, permitting the clerk to give notice to the state attorney general. Fed. R. App. P. 44(b). The notice must be in writing and filed immediately upon the filing of the record or as soon as the issue is raised in the court of appeals.

Substitution of parties, more common in habeas corpus appeals in which the named government official changes, is governed by Fed. R. App. P. 43(c).

All of these filing obligations naturally beg the question: Which rules govern the computation of time for filing and service of the filings? Fed. R. App. P. 25 and 26 address the mechanics of filing, timeliness, service, proof of service, and the required number of copies. Many of these specifications are altered by local circuit rules.

### 18.05.01.02 The Record

The composition of the record on appeal, transcript orders and payment, stipulated records, and correction of the record are all addressed in Fed. R. App. P. 10. It provides that the record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the district clerk. Rule 10(a). Rule 10(e) permits correction or modification of the record on appeal. This Rule can be used to augment the record in the event that something material to either party is omitted or misstated.

Indigent clients are entitled to an appellate record without cost. *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (due process and equal protection require that a transcript of proceedings be provided to indigent defendants for their direct appeal as of right).

The obligations of counsel, clerks and court reporters for preparing and forwarding the record are designated in Rule 11. Parties proceeding *in forma pauperis* may request that the appeal be heard

on the original record, without formally reproducing it as an appellate record. Fed. R. App. P. 24(c). Local circuit rules often alter these obligations, sometimes removing counsel from duties other than ordering transcripts.

### 18.05.01.02.01 The "Complete" Final Judgment

Counsel should be aware that the Judgment In a Criminal Case (Form AO-0245B) that is contained in the public court file (and available on PACER) is incomplete. The full document includes a Statement of Reasons for imposition of the sentence, which is not available to the public. This portion of the judgment is extensive, including four pages of findings about the PSI, mandatory minimum sentences, advisory guideline ranges, computation, departures available and specific reasons for departures, determination of sentences outside the advisory range, restitution and other details playing a part in the court's sentencing decision. Counsel is entitled to a copy of the Statement of Reasons portion of the judgment and should be sure to obtain from the clerk (or probation officer) a full version of the final judgment since this will be available to the judges of the appellate court. Often, the findings made in the Statement of Reasons portion have an impact on the appeal itself.

### 18.05.01.02.02 Transcripts

Federal Rule of Appellate Procedure10(b)(1) requires the appellant, within 14 days of filing the Notice of Appeal, to order in writing the parts of the transcript necessary for the appeal or file a certificate indicating that transcripts will not be necessary. *See supra* at 18.05.01.01. Generally, it is the duty of the appellant to notify the appellee of the sections of the transcripts and proceedings to be ordered, and to determine if the appellee requires the ordering of additional sections. If the costs are to be paid by the Criminal Justice Act, the order must so state. The process of ordering transcripts requires counsel to order the transcripts from the court reporter and to file a transcript designation form in the district court. If only a portion of the transcript is ordered, notice must be given to the appellee, who may then order additional portions within 14 days. Fed. R. App. P. 10(b)(3). As noted earlier, Rule 10(b)(1) requires the transcripts to be ordered within ten days of filing of the notice of appeal.

If there is no recording or transcription of the evidence available, Fed. R. App. P. 10(c) permits the appellant to prepare a statement of the evidence from the best available means. Of course, the appellee may object and propose amendments. As an alternative, Rule 10(d) provides that an agreed statement of the record may be certified as the record on appeal.

### 18.05.01.02.03 Court Reporter Duties

The court reporter has specific duties: Prepare a verbatim transcript in a timely manner or, if that is not possible, file a motion with the circuit clerk for additional time. The court reporter must file the transcript with the district clerk and notify the circuit clerk of the filing. In some circuits it is the appellant's duty to monitor transcript filing deadlines and to notify the court of appeals if the court reporter fails to comply with the time schedules. Many circuits have removed counsel from this process, requiring instead that court clerks deal directly with delinquent court reporters. Counsel

should make reference to specific circuit rules if transcripts have not been timely prepared and filed in a given case.

Federal Rule of Appellate Procedure 11 (often modified by local circuit rules) sets forth procedures for court reporters to follow when they require an extension of time to file the transcripts. Such extensions are often penalized by reducing the court reporter's fees.

### 18.05.01.02.04 District Court Clerk Duties and the Record

The district court clerk has a duty to complete and number the record and forward it to the circuit court clerk. A number of circuits now use an electronic record in which circuit court judges and personnel access the record through CHASER, a court-based program similar to PACER. Even if the court also requires preparation of a written record, the electronic version is usually ready long before the written record. For this reason, local appellate rules no longer require that brief references include the volume and page number of the assembled record, allowing instead that references may be to the docket number of the relevant document.

The record may be retained temporarily in the district court for counsel's use in preparation of the brief. Rule 11(c). This may be necessary in circuits that continue to require counsel to reference the record-on-appeal by volume and page number. This is less of a concern in circuits that permit a simple reference to district court docket numbers, for these are available by printing out the docket sheet through PACER.

### 18.05.01.03 Motion Practice

Appellate motion practice is governed by Fed. R. App. P. 27, which describes substance and form, page limits, binding, process, and the availability of oral argument. Any application for relief, including requests for extensions of time, must be made by motion (except at least one circuit allows telephone requests for extensions of seven days or less). Any affidavit in support of a motion must be filed at the same time as the motion and cannot contain legal argument. Parties may not file a separate brief supporting or responding to a motion. A motion is limited to twenty pages, and a notice of motion and proposed order are not required. If a response is filed, it must be within ten days of service of the motion and cannot exceed ten pages. Replies, if any, are due seven days after service of the response. An original and three copies must be submitted, and there is no oral argument.

Motions to voluntarily dismiss an appeal are filed pursuant to Fed. R. App. P. 42. Before the appeal is docketed, the district court retains jurisdiction to dismiss the appeal on the motion of the appellant, or based on a signed stipulation of all parties. After the appeal is docketed, the clerk of the court of appeals may dismiss the appeal based upon a signed dismissal agreement of the parties, including an allocation of costs. The court of appeals may also dismiss on the motion of the appellant. Local circuit rules often impose additional duties upon counsel for a criminal defendant, including providing written notice of the motion to the defendant and, in some cases, requiring written indicia of the client's consent to voluntary dismissal. Absent client consent, counsel must proceed with the appeal or file the brief and motion required by *Anders v. California*, 386 U.S. 738 (1967). *See supra* at 18.03.09 and 18.04.02.

### 18.05.01.04 Stays and Release Pending Appeal

Stays or injunctions pending appeal are covered in Fed. R. App. P. 8. Stays in criminal cases are addressed in subsection (c) of that rule, cross-referencing Fed. R. Crim. P. 38 as the governing provision. Release in a criminal case, before or after judgment, is the subject of Fed. R. App. P. 9. Subsection (c) of that rule establishes the criteria for release by incorporating the federal statutes on release, 18 U.S.C. §§ 3142, 3143, and 3145(c).

Fed. R. App. P. 9 provides that the district court must state in writing, or orally on the record, the reasons for an order of release or detention of the defendant. When appealing the order, the party must file a copy of the district court's order and statement of reasons with the court of appeals, and if there is a question of fact, a transcript also must be filed. Local circuit rules often require counsel to file a memorandum of law and facts in support of the appeal.

Once a defendant has been convicted and sentenced to a term of imprisonment, it is presumed that the defendant will remain detained unless it can be shown by clear and convincing evidence that: (1) the person is not likely to flee or pose a danger to the community; (2) the appeal is not for the purpose of delay; and (3) the appeal raises a substantial question of law or fact which is likely to result in a reversal, an order for a new trial, a sentence which does not include a term of imprisonment, or a reduced sentence which will total less than the amount of time already served. 18 U.S.C. § 3143. If the government is the appellant, then § 3143(c) provides that the considerations set forth in § 3142, which apply to the release of the defendant pending trial, shall be applied on appeal.

Many circuits require that a motion for bail pending appeal must set forth with specificity the merits of the arguments to be made on appeal to demonstrate that the appeal raises "a substantial question of law or fact, as required by § 3143." *See, e.g., United States v. Montoya*, 908 F.2d 450 (9th Cir. 1990). Circuits differ, however, over what constitutes a qualifying "substantial question of law or fact." *See United States v. Biernat*, 2003 WL 21246034 (D. Minn. May 23, 2003) (collecting cases).

Several circuits have interpreted a "substantial question of law or fact" to mean a question that is "close" or could be decided either way. *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir.1985); *see also United States v. Bayko*, 774 F.2d 516, 523 (1st Cir.1985) (adopting *Giancola* "close" standard). *Giancola* was a modification of *United States v. Miller*, 753 F.2d 19, 22-24 (3d Cir.1985), in which the Third Circuit held that a substantial question is one that is novel, has not been decided by controlling precedent, or is fairly doubtful. The Eighth Circuit adopted a slight modification of the *Giancola-Miller* approach in *United States v. Marshall*, 78 F.3d 365 (8th Cir.1996), requiring "a showing that the appeal presents 'a close question' – not 'simply that reasonable judges could differ' – on a question 'so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor.'" *Id.* at 366 (citing *United States v. Powell*, 761 F.2d 1227, 1234 (8th Cir.1985)). *Powell* stated: "It is not sufficient to show simply that reasonable judges could differ (presumably every judge who writes a dissenting opinion is still 'reasonable') or that the issue is fairly debatable or not frivolous. On the other hand, the defendant does not have to show that it is likely or probable

that he or she will prevail on the issue on appeal." 761 F.2d at 1234. Other circuits have also adopted modifications of *Giancola*. *See*, *e.g.*, *United States v. Messerlian*, 793 F.2d 94, 97 (3d Cir.1986), and *United States v. Montoya*, 908 F.2d 450 (9th Cir. 1990) (both holding that a substantial question is "fairly debatable"); *Lee v. Jabe*, 989 F.2d 869, 871 (6th Cir.1993) (requiring additional test that defendant show "some circumstance making [the motion for bail] exceptional and deserving of special treatment in the interests of justice"). Typically, a court need not determine whether or not the ruling is likely to be reversed. *See Bayko*, 774 F.2d at 512-23 (holding release on bail not contingent on district court finding of probable reversal).

### 18.05.01.05 Briefing

A detailed description of the contents and types of various briefs is set forth in Fed. R. App. P. 28, which also describes the process for citing supplemental authority. Rule 32 explains the proper form for briefs, appendices and other papers, including cover colors, fonts permitted, length of the brief, and the need for counsel to include a certificate of compliance with type-volume limits. Fed. R. App. P. 32(a)(1)-(7). The time for filing briefs and number of copies is addressed in Rule 31. Rule 28.1 covers cross-appeals, including in one rule the order of briefs, length, and time for service. These three rules are among those most commonly altered by local circuit rules, which now also include electronic filing requirements in most circuits.

One federal rule is designed to override local circuit variations that once attempted to limit citation to unpublished decisions or cases designated as non-precedential. Federal Rule of Appellate Procedure 32 prohibits any court from restricting the citation of such federal judicial decisions. The Rule is relatively new, applying to decisions issued on or after January 1, 2007. Subsection (b) of the rule conditions the right to cite such cases; if the decision is not available in a publicly accessible database, counsel must serve copies of it with the brief in which it is cited. With the adoption of the new rule, Westlaw and Lexis began publishing such decisions, even in circuits that had previously prohibited the electronic services from doing so. As a result, most unpublished decisions, or those otherwise designated as non-precedential, are readily available online.

A more complete discussion of appellate briefing is set forth *infra* at 18.07.

### 18.05.01.06 Appendix, Record Excerpts, Addendum

Federal Rule of Appellate Procedure 30, requires the appellant to prepare and file an appendix to the brief, including: (1) the relevant docket entries from the proceedings below; (2) the relevant portions of the pleadings, charge, findings, or opinion; and (3) the judgment, order, or decision in question. The Rule permits the addition of any other portions of the record that the parties wish to bring to the court's attention. Memoranda of law filed in the district court should not be included. Rule 30 is nearly always superseded by local circuit rules. Some circuits use "record excerpts" instead of an appendix. *See*, *e.g.*, 11th Cir. Rule 30-1. At least one circuit requires an "addendum," which is included at the rear of the appellant's brief. *See, e.g.,* 1st Cir. Rule 28.0.

The Appendix required by Fed. R. App. P. 30 must begin with a table of contents, and all other documents must follow chronologically. Rule 30(a)(3) requires ten copies of the Appendix

to be served with the brief, with another copy to opposing counsel. If the parties cannot agree on the contents of the record, then the appellee may, within 14 days of receiving the designation, serve a designation of additional parts. Fed. R. App. P. 30(b)(1). The appellant bears the cost of the Appendix. Fed. R. App. P. 30(b)(2). However, if the parts of the record designated by the appellee are unnecessary, the cost for those portions will become the appellee's responsibility. *Id.* The entire record will be available to the court of appeals and, thus, sections excluded from the appendix may be relied upon by the court.

### 18.05.01.07 Oral Argument

Oral argument is available in all cases unless a panel of three judges unanimously decides that oral argument is not necessary. Fed. R. App. P. 34. Judges should permit oral argument unless: (1) the appeal is frivolous; (2) the dispositive issue has been authoritatively decided; or (3) the facts and legal arguments are adequately set forth in the briefs. The parties have an opportunity to give reasons why oral argument should be heard; under most local circuit rules this is done in a special subsection of the brief. The process of oral argument is addressed *infra* at 18.07.03.

### 18.05.01.08 En Banc Proceedings and Panel Rehearings

Rehearing petitions ask the panel to reconsider its decision. Fed. R. App. P. 40. Petitions for en banc hearing or rehearing ask the entire active court of appeals to consider a case, either before or after a panel decision has been made. Fed. R. App. P. 35.

En banc hearings involve every active member of a court of appeals, Fed. R. App. P. 35, or, in the Ninth Circuit, eleven of the active judges. 9th Cir. R. 35-3 (limited en banc). Senior judges who participated in an original panel decision may also participate in en banc proceedings. Although it is much more common to think of this process post-decision, en banc proceedings may occur both before and after an appellate panel has reached its decision. In many circuits, for example, en banc proceedings are necessary if counsel seeks to overturn a prior decision of the circuit, which otherwise provides a binding impediment to a successful appeal. In these circumstances, counsel may need to petition for en banc proceedings before the initial consideration of the case.

En banc proceedings are not favored and may be granted only if: (1) consideration of the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a question of exceptional importance. The decision is based upon a majority vote of the circuit judges in active service. Fed. R. App. P. 35(a).

En banc hearings can be initiated by the judges or by a party. If a party seeks en banc hearing, it must be requested in a petition filed no later than the date the party's initial brief is due. Fed. R. App. P. 35(c). If the party seeks rehearing en banc, the time for filing such a request is set forth in Fed. R. App. P. 40: 14 days after decision in a criminal case or 45 days in a civil case in which the United States is a party, unless altered by court order. Be aware, however, that local circuit rules alter these time limits and require that a petition for rehearing of any kind be *received by the court of appeals' clerk* within the time limit. Mailing is not considered filing.

The color of the petition's cover may be set by local circuit rule, although the national rule requires no cover. *Compare* Fed. R. App. P. 32(c)(2)(A) (no cover required) *with* 11th Cir. R. 35-5 (requiring en banc petitions to be bound with a white cover) *and* 5th Cir. R. 32(c)(2)(A) (no cover required, but if used, it should be white) *and* 9th Cir. R. 32(c)(2)(A) (no cover required, but if used, it should be white). The number of copies required for filing also varies under local circuit rules. Generally, if only a panel rehearing is sought, an original and three copies are required. If en banc hearing or rehearing is sought, the original must be accompanied by many more copies, usually corresponding with the number of judges on the en banc court. The form of the petition is the same as the form set forth for the opening briefs in Fed. R. App. P. 32. Service of the petitions is governed by Rule 31. Caveat: Local circuit rules often vary these requirements.

A petition for hearing or rehearing en banc under Rule 35 must begin with a statement that either (1) the panel decision conflicts with a decision of the U.S. Supreme Court or the court to which the petition is addressed (citing cases) and that the proceeding is necessary to ensure uniformity of the court's decisions, or (2) the question presented is one of exceptional importance. Fed. R. App. P. 35(b).

A petition for rehearing under Rule 40 must state with particularity each point of law or fact that the court has overlooked or misapprehended and must argue in support of the petition.

The petition is limited to 15 pages. If counsel elects to file two separate petitions, one for rehearing and one for rehearing en banc, the total page limit is still only 15 pages. No answer may be filed in response to such petitions, unless first ordered by the court. Generally, oral argument will not be heard unless the petition is granted. Once either petition has been granted any opinion that has issued is withdrawn.

Neither petition is a prerequisite to filing a petition for writ of certiorari to the United States Supreme Court.

### 18.05.01.09 Decision, Entry of Judgment and Mandate

The court of appeals concludes its proceedings by issuing a decision, sometimes in the form of an opinion and sometimes in the form of an order. The clerk then enters judgment under Fed. R. App. P. 36 and issues a mandate under Fed. R. App. P. 41. Entry of judgment is simply a notation on the docket sheet. The clerk must serve all parties with a copy of the opinion or, if no opinion was written, a notice of the date judgment was entered. The mandate is simply a certified copy of the decision and judgment, sometimes including directions about costs.

Not all opinions are formally published, although federal law now requires that even unpublished opinions be publicly available. Both published and unpublished opinions are available online at the web sites for each court of appeals, as well as on Westlaw and Lexis. Local circuit rules govern the decision to publish or not, and many circuits employ a presumption against publication unless a majority of the panel votes to publish. Each circuit publishes its considerations for publication as part of its local rules. Usually, the publication considerations include: Does the decision (1) establish, alter, modify or clarify a rule of law, (2) call attention to a rule of law which

appears to have been generally overlooked, (3) criticize existing law, (4) involve a legal or factual issue of unique interest or substantial public importance, (5) dispose of a case in which there is a published opinion by a lower court or administrative agency, (6) dispose of a case following a reversal or remand by the United States Supreme Court, or (7) accompany a separate concurring or dissenting expression that has been published at the request of the author.

If a panel does not publish its opinion, but counsel believes the decision meets the circuit's publication criteria, counsel may move to have it published. Counsel should beware, however, that should the panel grant the motion and publish the decision, the time for rehearing on the case may begin anew. *See, e.g.,* 11th Cir. R. 36-3.

#### 18.05.01.10 Appellate Clerk's Duties, Local Rules and IOPs

General provisions governing clerks are contained in Fed. R. App. P. 45. Some of this is meaningful for counsel to know, such as when the clerk's office must be open for filing, and that the docket, record and appellate filings are available for inspection by counsel. These general provisions are usually fleshed out with specifics in the local circuit rules and internal operating procedures, which are authorized by Fed. R. App. P. 47.

### 18.05.02 Local Circuit Rules

Within the requirements of the Federal Rules of Appellate Procedure there is broad variation set forth by local circuit rules and internal operating procedures (IOPs). Local rules sometimes specify different or additional filing requirements, time limits, and forms of filings. IOPs generally describe mechanics of the Clerk's office, many of which apply to filings and argument by the parties. Unfortunately, the differences between circuits seem endless, overriding any meaningful national uniformity. Fortunately, the circuits make local rules and practice information readily available on their respective websites. Some circuits simply offer the local rules, but others offer more comprehensive handbooks and charts for counsel, which distill key processes in ways easily accessed by the practitioner. The current information for each circuit is:

#### 18.05.02.01 First Circuit <www.ca1.uscourts.gov>

Rulebook, including Federal Rules of Appellate Procedure, First Circuit Local Rules, First Circuit Internal Operating Procedures,
<www.ca1.uscourts.gov/files/rules/rulebook.pdf>

Forms and Notices, including Transcript Information, Docketing Statement, Appearance Form, *In Forma Pauperis* Affidavit, Certificate of Compliance with Brief Type-Volume Limitations, Oral Argument Designation Form, as well as Habeas Corpus and 2255 forms for second or successive petitions, and Certificate of Death Penalty Cases
<www.ca1.uscourts.gov/forms.htm>

Criminal Justice Act Materials and Forms
<www.ca1.uscourts.gov/cjamaterials.htm>

Notice to Court-Appointed Counsel Regarding Requirements for Briefs
<www.ca1.uscourts.gov/files/notices/NoticetoCourtAppointedCounsel.pdf>

#### 18.05.02.02 Second Circuit <www.ca2.uscourts.gov>

Rulebook, including Federal Rules of Appellate Procedure and Local Rules of the Second Circuit
<www.ca2.uscourts.gov/Rules.htm>

*Second Circuit Handbook*
<www.ca2.uscourts.gov/Docs/COAManual/everything%20manual.pdf>

Forms and Notices for all types of appeals, including instruction booklets for civil, criminal and habeas corpus cases, and special forms related to electronic filing
<www.ca2.uscourts.gov/forms.htm>

Criminal Justice Act Material, Forms, and Notices to Counsel
<www.ca2.uscourts.gov/CJA.htm>

#### 18.05.02.03 Third Circuit <www.ca3.uscourts.gov>

Rules of Appellate Procedure and Forms
<www.uscourts.gov/rules/newrules4.html>

Local Appellate Rules
<www.ca3.uscourts.gov/Rules/2002lar.pdf>

Internal Operating Procedures
<www.ca3.uscourts.gov/Rules/IOP-Final.pdf>

Forms and Information Sheets, including Case Opening to Issuance Briefing Schedule, Brief and Appendix Charts, Criminal Justice Act and Appointed Counsel Information, Motion Practice, Emergency Motions, Oral Argument, Death Penalty Cases, and Rehearing
<www.ca3.uscourts.gov/coaforms.htm>

Font and Length Requirements for Filing Briefs
<www.ca3.uscourts.gov/Rules/briefsamplefonts.pdf>

Chart of Requirements for Briefs
<www.ca3.uscourts.gov/Rules/chart%20of%20requirements% 20for%20briefs.pdf>

Chart of Requirements for Appendix
<www.ca3.uscourts.gov/Rules/chart%20of%20requirements% 20for%20appendix.pdf>

### 18.05.02.04 Fourth Circuit <www.ca4.uscourts.gov>

Federal Rules of Appellate Procedure, Local Rules of the Fourth Circuit and Internal Operating Procedures
<www.ca4.uscourts.gov/pdf/rules.pdf>

Forms and Notices
<www.ca4.uscourts.gov/formsNots.htm>

Brief and Appendix Requirements
<www.ca4.uscourts.gov/pdf/BriefApxReq.pdf>

Brief and Appendix Checklist
<www.ca4.uscourts.gov/pdf/briefchecklist.pdf>

Instructions for CJA Counsel
<www.ca4.uscourts.gov/pdf/cjamemoatty.pdf>

Motion Procedures
<www.ca4.uscourts.gov/pdf/motproc.pdf>

Oral Argument Procedures
<www.ca4.uscourts.gov/pdf/oaproc.pdf>

Memorandum to Attorneys Appointed Under the Criminal Justice Act
<www.ca4.uscourts.gov/pdf/cjamemoatty.pdf>

Memorandum on Sealed and Confidential Materials
<www.ca4.uscourts.gov/pdf/SealedConfidMem.pdf>

### 18.05.02.05 Fifth Circuit <www.ca5.uscourts.gov>

Federal Rules of Appellate Procedure with Fifth Circuit Rules and Internal Operating Procedures
<www.ca5.uscourts.gov/clerk/docs/frap2006.pdf>

Administrative Order on the Real ID Act of 2005
<www.ca5.uscourts.gov/news/news/REAL%20ID%20ACT.pdf>

Practitioner's Guide to the U.S. Court of Appeals for the 5th Circuit
<www.ca5.uscourts.gov/clerk/docs/pracguide.pdf>

Guides to Briefs under FRAP 32; 29; Electronic Filing under 5th Cir. R. 31; and Petitions for Rehearing under FRAP 35 & 40
<www.ca5.uscourts.gov/clerk/docs/guide32.pdf>

Checklist of Rule Requirements for Briefs and Record Excerpts
<www.ca5.uscourts.gov/clerk/docs/brchecklist.pdf>

Sample Documents
<www.ca5.uscourts.gov/clerk/docs/sampdoc.htm>

Sample Brief in Criminal Case and Generic Brief Samples for Appellants and Appellees
<www.ca5.uscourts.gov/documents/brief.htm>

*Anders* Checklist
<www.ca5.uscourts.gov/clerk/AndersChecklist.pdf>

Preparing for Oral Argument in the Fifth Circuit
<www.ca5.uscourts.gov/clerk/docs/handout.pdf>

Answers to the Fifty Most Frequently Asked Questions
<www.ca5.uscourts.gov/clerk/docs/faqs.htm>

#### 18.05.02.06 Sixth Circuit <www.ca6.uscourts.gov>

Federal Rules of Appellate Procedure, Sixth Circuit Rules, and Internal Operating Procedures
<www.ca6.uscourts.gov/internet/rules_and_procedures/pdf/rules2004.pdf>

Forms, including Case Opening, Case Initiation, Briefs and Appendices, Oral Argument, *In Forma Pauperis*, Habeas Corpus and 2255 Cases, Capital Cases and Criminal Justice Act, and Certiorari
<www.ca6.uscourts.gov/internet/forms/forms.htm>

#### 18.05.02.07 Seventh Circuit <www.ca7.uscourts.gov>

Federal Rules of Appellate Procedure and Circuit Rules
<www.ca7.uscourts.gov/Rules/rules.htm>

Seventh Circuit Operating Procedures
<www.ca7.uscourts.gov/Rules/rules.htm#opproc>

Practitioner's Handbook for Appeals
<www.ca7.uscourts.gov/Rules/handbook.pdf>

CJA Information and Forms
<www.ca7.uscourts.gov/cja/cja.htm>

Guidelines for Briefs and Other Papers
<www.ca7.uscourts.gov/Rules/type.pdf>

"Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents"
<www.ca7.uscourts.gov/Rules/Painting_with_Print.pdf>

Brief Filing Checklist
<www.ca7.uscourts.gov/Rules/check.pdf>

Brief Examples
<www.ca7.uscourts.gov/Rules/briefex/BRindex.htm>

#### 18.05.02.08 Eighth Circuit <www.ca8.uscourts.gov>

Local Rules of the Eighth Circuit
<www.ca8.uscourts.gov/newrules/coa/localrules.pdf>

Internal Operating Procedures
<www.ca8.uscourts.gov/newrules/coa/IOP.pdf>

Notice to Counsel in Criminal Cases Concerning the Posting of Appellate Briefs on the Internet (posting of electronic briefs on Internet and requiring redaction by counsel)
<www.ca8.uscourts.gov/newcoa/notes/redactcr-egov.pdf>

Plan to Expedite Criminal Appeals
<www.ca8.uscourts.gov/newrules/coa/plan.pdf>

Court of Appeals Forms
<www.ca8.uscourts.gov/newcoa/forms.htm>

#### 18.05.02.09 Ninth Circuit <www.ca9.uscourts.gov>

Federal Rules of Appellate Procedure and Ninth Circuit Rules
<www.ca9.uscourts.gov> (under "Rules and Changes")

Most Frequently Asked Questions and Answers
<www.ca9.uscourts.gov> (under "FRAP and Circuit Rules")

Standards of Review, extensive collection, including detailed table of contents and 371 pages of standards
<www.ca9.uscourts.gov> (under "Handbooks and Manuals")

"Perfecting Your Appeal"
<www.ca9.uscourts.gov> (under "General Information")

### 18.05.02.10 Tenth Circuit <www.ca10.uscourts.gov>

Federal Rules of Appellate Procedure and Tenth Circuit Rules
<www.ca10.uscourts.gov/downloads/2007_Rules.pdf>

Practitioners' Guide
<www.ca10.uscourts.gov/downloads/pracguide_web.pdf>

Initial Appeal Documents and Instructions
<www.ca10.uscourts.gov/downloads/init_appeal.pdf>

Forms, including appellate documents, briefs, certificates, motions and FAQ
<www.ca10.uscourts.gov/clerk/showforms.php>

CJA Forms and Information
<www.ca10.uscourts.gov/clerk/showcja.php>

### 18.05.02.11 Eleventh Circuit <www.ca11.uscourts.gov>

Federal Rules of Appellate Procedure, Eleventh Circuit Rules, and Internal Operating Procedures, Addenda and General Orders
<www.ca11.uscourts.gov/rules/index.php>

Forms and Documents
<www.ca11.uscourts.gov/documents/index.php>

CJA Information and Forms
<www.ca11.uscourts.gov/documents/cja.php>

### 18.05.02.12 D.C. Circuit <www.cadc.uscourts.gov>

Circuit Rules and Federal Rules of Appellate Procedure
<www.cadc.uscourts.gov/internet/internet.nsf/Content/Rules>

Handbook of Practice and Internal Procedures
<www.cadc.uscourts.gov/internet/internet.nsf/Content/Court+Rules>

Forms Common to All Cases, including *In Forma Pauperis*
<www.cadc.uscourts.gov/internet/internet.nsf/Content/Forms>

Criminal Justice Act Information
<www.cadc.uscourts.gov/internet/internet.nsf/Content/Criminal+Justice+Act+Information>

### 18.05.03 Supreme Court Rules

The Supreme Court has its own rules and only they apply to proceedings in that Court. Neither the Federal Rules of Appellate Procedure nor local circuit rules apply in the Supreme Court. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam). The Supreme Court Rules are available online at <www.supremecourtus.gov/ctrules/ctrules.html>.

## 18.06 STEPS TO PERFECT AN APPEAL

After an appealable judgment or order has been entered in the district court, an appeal is perfected by timely filing of a notice of appeal in the district court, filing representation and disclosure statements, ordering transcripts of proceedings in the district court, docketing the appeal, forwarding the record to the court of appeals, briefing and, if permitted, oral argument. The logistics are governed by the Federal Rules of Appellate Procedure, as complemented by local circuit rules.

### 18.06.01 Notice of Appeal

#### 18.06.01.01 Criminal Cases

The right to a federal criminal appeal commences with the filing of the Notice of Appeal. A sample form of the Notice of Appeal is contained in the Federal Rules of Appellate Procedure, Addendum 1, and can be downloaded from the Internet site of each court of appeals. The district court clerk is responsible for serving the notice of appeal on the parties, Fed. R. App. P. 3(d), although in practice counsel often serves it on opposing counsel as a matter of courtesy.

Federal Rule of Appellate Procedure 4(b) requires that a Notice of Appeal be filed within 14 days after entry of the judgment on the criminal docket, or if the government appeals first, within 14 days of the date on which the government files its notice of appeal. Fed. R. App. P. 4(b)(1)(A). The government has longer to appeal: 30 days after the judgment or order is entered, or any defendant appeals. Fed. R. App. P. 4(b)(1)(B).

The term "entry" means entered on the criminal docket. Fed. R. App. P. 4(b)(6). If the notice of appeal is filed prematurely – after the court announces its decision, sentence, or order, but before it is formally entered -- the notice of appeal is treated as filed on the date of entry. There is no requirement for counsel to file a second notice of appeal. Fed. R. App. P. 4(B)(2).

The time for filing a notice of appeal is affected by the filing of post-trial motions for:

* Judgment of acquittal (Fed. R. Crim. P. 29)

* New trial, on any ground other than newly discovered evidence (Fed. R. Crim. P. 33)

* New trial based on newly discovered evidence, if motion made within 14 days of the entry of judgment (Fed. R. Crim. P. 33)

* Arrest of judgment (Fed. R. Crim. P. 34)

In the event one or more of the enumerated motions have been filed, the notice of appeal must be filed within 14 days of the entry of the order disposing of the last remaining motion, or within 14 days of the entry of judgment of conviction, whichever period ends later. Fed. R. App. 4(b)(3)(A). If a notice of appeal was already filed, a new notice need not be filed upon disposition of the enumerated motions. The notice of appeal becomes effective upon entry of the order disposing of the last remaining motion, or upon entry of the judgment of conviction, whichever occurs later. Fed. R. App. P. 4(b)(3)(B). And a valid notice need not be amended to reflect disposition of the enumerated motion. Fed. R. App. P. 4(b)(3)(C).

The time for filing a notice of appeal may be extended by the district court based on excusable neglect or good cause, either before or after the time for filing otherwise expires, with or without motion or notice. The maximum extension of time is 30 days from the expiration of the time otherwise prescribed. Fed. R. App. P. 4(b)(4).

The "mailbox rule" applies to appeals by inmates confined to an institution. A notice filed by an incarcerated inmate is timely filed if deposited in the institution's internal mail system on or before the day it is due. If the institution has a system designed for legal mail, it must be used. Proof of timely filing is made by a declaration under 18 U.S.C. § 1746 or a notarized statement, setting forth the date of the deposit and that first-class postage was prepaid. Dates are expanded for cross-appeals by the government and civil litigants. Fed. R. App. P. 4(c).

If the notice of appeal is erroneously filed in the court of appeals, the clerk of that court must note on the notice the date on which it was received, then forward it to the district court clerk. Such a notice is deemed filed in the district court on the date noted by the court of appeals' clerk. Fed. R. App. P. 4(d).

Although filing of a notice of appeal generally divests the district court of jurisdiction over the aspects of the case relevant to the appeal, the district court does retain jurisdiction to correct a sentence under Fed. R. Crim. P. 35(a). Fed. R. App. P. 4 (b)(5). The filing of a Rule 35(a) motion does not stay the time for filing a notice of appeal, nor does it affect the validity of a notice filed before entry of the order disposing of the motion. *Id.*

### 18.06.01.02 Civil Cases, including Habeas Corpus and 2255's

Criminal practitioners need to be aware of civil rules regarding the Notice of Appeal because a habeas corpus proceeding is civil in nature. *Browder v. Dept of Corr. of Illinois*, 434 U.S. 257, 269 (1978). An appeal from a writ of error coram nobis is also appealed under the rules for civil appeals. Fed. R. App. P. 4(a)(1)(C). Subsection (a) of Fed. R. App. P. 4 governs such cases, requiring that a Notice of Appeal be filed within 30 days after entry of the judgment or order, *see* 28 U.S.C. § 2107, except where the United States or an officer or agency of the United States is a party, when the time for filing the Notice of Appeal is 60 days. The 30-day filing requirement applies to an order denying a petition for writ of habeas corpus to a petitioner whose liberty is restrained by a state. The 60-day filing period applies both to a federal prisoner in custody under service of sentence who moves

pursuant to 28 U.S.C. §2255 (*see* Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts) and a habeas corpus petition predicated upon execution of the federal sentence.

The rules applying to premature notices of appeal are the same as for criminal appeals, *see* Fed. R. App. P. 4(a)(2), but the rules relating to the effect of post-trial motions and for extensions of time are somewhat different. *See* Fed. R. App. P. 4(a)(4)-(7). In addition, the Supreme Court recently held that it would no longer recognize "equitable exceptions" such as the "unique circumstances exception" to excuse an untimely filing of the notice of appeal in a habeas corpus case. *Bowles v. Russell*, 551 U.S. ___, 127 S. Ct. 2360 (2007). *Bowles* reiterated that the time for invoking appellate jurisdiction in a civil case, in which the time to appeal is set forth by statute, is "mandatory and jurisdictional." 127 S. Ct. at 2363. Ironically, *Bowles* may be read as implying that the time for filing a criminal appeal is not jurisdictional, which would be a departure from previous thinking, because the time for appealing a criminal case is set forth only by court rule, not by any statute.

### 18.06.02 Appellate Briefing

Federal Rule of Appellate Procedure 31 provides that the appellant must serve and file a brief within 40 days after the record is filed; the appellee must serve and file a brief within 30 days after the appellant's brief is served; and the appellant may file a reply brief within 14 days after service of appellee's brief (at least three days before argument). In cross-appeals, the appellee's reply brief must be filed within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument, absent permission of the court. Fed. R. App. P. 28.1. Local circuit rules alter this simple formulation in almost as many ways as there are circuits. Counsel must consult the specific circuit's rules and compute the briefing schedule based upon the applicable local rule. In addition, local rules dictate electronic filing requirements. A detailed discussion of appellate briefing is found below at 18.07.

### 18.06.03 Timely Filing

Federal Rule of Appellate Procedure 25(a) provides that filing may be accomplished by mail addressed to the district court. Generally, a filing is not timely unless the clerk receives the papers within the time set for filing. However, a brief or appendix is deemed to be filed upon mailing if it is mailed by First-Class Mail (or other equally expeditious class), postage prepaid, or by a third-party commercial carrier for delivery to the clerk within three calendar days.

Federal Rule of Appellate Procedure 26(a) details how to compute the time for filing. Generally, the day of the act is excluded. All intermediate Saturdays, Sundays and legal holidays are included and counted – a significant change from the prior rules. Legal holidays are enmumerated in Rule 26(a)(6). The last day of the period is included unless it is a Saturday, Sunday, or legal holiday, or if the act to be done is filing a document with the court clerk and weather or other conditions make the clerk's office inaccessible. The Rule also details how to compute periods stated in hours, which begin immediately, include intervening weekends and holidays, but exclude due dates falling on weekends and legal holidays. Electronic filings may be made until midnight on the

due date, carrier-delivered filings are due when the latest delivery is made by the chosen carrier, and filings by other means are due by the time the Clerk's office is scheduled to close. Unless actual delivery to opposing counsel occurs on the date of service (as by hand delivery), the due date is extended by three calendar days; electronic service is not treated as delivery on the date of service, so it benefits from the three-day cushion. Fed. R. App. P. 26(c).

Rule 26(b) empowers courts to extend the time for filing most documents, for good cause, but the court may not extend the time to file a notice of appeal unless authorized by law or Fed. R. App. P. 4.

Counsel must be cautious of local circuit rules, which implement the provisions of Rules 25 and 26 in remarkably different ways. Counsel must also consult the Supreme Court Rules for filings in that Court, since Sup. Ct. R. 29 and 30 are worded differently, as explained *infra* at 18.08.02.

A proof of service – or certificate of service – must accompany any paper that is filed with the court of appeals or the United States Supreme Court. *See* Fed. R. App. P. 25(d) and Sup. Ct. R. 29.5. This requirement may be satisfied in one of two ways: (1) an acknowledgment of service by the person served, or, more commonly, by (2) proof of service consisting of a statement by the person who made service certifying the date and manner of service, the names of the persons served, and their mail or electronic addresses, or facsimile numbers, or the address of the places of delivery. If a brief or appendix is filed by mailing or delivery, as permitted under Rule 25(a)(2)(B), the proof of service must state the date and manner by which the document was mailed or dispatched.

The proof of service may be on or affixed to the filing or it may be a separate document. As always, local circuit rules should be consulted for any variations in practice. In addition, a Supreme Court proof of service must be signed by a member of the Bar of the Supreme Court who represents the party on whose behalf service is made.

## 18.07 BRIEFING THE APPEAL

### 18.07.01 Form of Brief

The form of briefs, appendices and other papers is designated in Fed. R. App. P. 32. There is a fair amount of variation under local circuit rules, but "every court of appeals must accept documents that comply with the form requirements of this rule" Fed. R. App. P. 32(e). Rule 32 addresses a number of technical aspects of form:

- ✓ Covers
- ✓ Binding
- ✓ Font
- ✓ Length
- ✓ Appendix
- ✓ Other Papers
- ✓ Signature

### 18.07.01.01 Covers

Covers must appear in the following colors:

* Opening Brief for Appellant: blue
* Opening Brief for Appellee: red
* Reply Brief: gray
* Intervenor or Amicus: green
* Supplemental: tan
* Appendix: white

The front cover of a brief or appendix filed by counsel must contain: (1) the number of the case centered at the top; (2) the name of the court; (3) the title of the case; (4) the nature of the proceeding and the name of the court, agency, or board below; (5) the title of the brief identifying the party or parties for whom the brief is filed; and (6) the name, office, address, and telephone number of counsel representing the party for whom the brief is filed. Fed. R. App. P. 32 (a). Local circuit rules sometimes designate additional colors for cross-appeals. *See, e.g.,* 11th Cir. Rule 28.1-2, I.O.P. 2.

### 18.07.01.02 Binding

Briefs may employ any type of binding that does not obscure the text and allows the brief to lie reasonably flat when open. Fed. R. App. P. 32(a)(3). Local circuit rules may require that the appendix (or its circuit equivalent) be bound at the top and that each item within it be separately tabbed. *See, e.g.,* 11th Cir. Rule 30-1. Local rules can be odd, such as one that prohibits binding filings with exposed metal prong fasteners. *See*, *e.g.*, 11th Cir. R. 30-2.

### 18.07.01.03 Paper, Font, Line Spacing, and Margins

Briefs may be reproduced by any process that yields a clear black image on light paper, using one side of opaque and unglazed paper. The text should be at least as clear as the output of a laser printer. Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; glossy paper is only permitted if the original is glossy. Fed. R. App. P. 32(a)(1)(A), (B) & (C).

The brief must be double-spaced on 8½ by 11 inch paper. Quotations of more than two lines may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers, but not text, may appear in the margins. Fed. R. App. P. 32(a)(4).

Typeface (font) may be either proportionally spaced (*e.g.*, Times Roman) or monospaced (*e.g.*, Courier), using a plain roman style, with italics or boldface for emphasis. Case names must be italicized or underlined. Fed. R. App. P. 32(a)(5)&(6).

If a proportional typeface is used, the font must have serifs, but a sans-serif alternative type

(*e.g.*, Arial) may be used for headings and captions. Such type must be at least 14-point in size. If monospaced type is used, it must be more than 10½ characters per inch. Fed. R. App. P. 32(a)(5).

### 18.07.01.04 Length of Briefs

A principal brief is limited to 30 pages and a reply brief is limited to 15 pages. If the brief complies with certain type-volume limitations and contains a certificate of compliance to that effect, *see* Fed. R. App. P. 32(a)(7)(A),(B)&(C), a brief may be measured, alternately, by words or lines:

| | Proportional typeface | Monospaced typeface |
|---|---|---|
| Principal brief | 14,000 words | 1,300 lines |
| Reply brief | 7,000 words | 650 lines |

Using the alternate word- or line-count permits much longer briefs, approximately 50 pages for a principal brief and 25 pages for a reply brief. The only cost of the longer brief is that counsel must include a certificate of compliance with type-volume limitations, which is otherwise not needed.

Headings, footnotes, and quotations count toward the word and line limitations. Not counted are words or lines devoted to the corporate disclosure statement, table of contents, table of citations, statement respecting oral argument, and any addendum containing statutes, rules and regulations.

Local circuit rules usually include a provision expressly authorizing motions to exceed the word and line limitations, subject to the caveat that such motions are viewed by the court with disfavor.

The certificate of compliance states that the brief complies with the type-volume limitation based on the word- or line-count of the word processor used. A suggested form for the certificate is attached to the rules as Form 6. *See* Fed R. App. P. 32(a)(7)(C)(1) and 28.1(e)(3).

### 18.07.01.05 Form of Appendix

The form of an appendix is the same as the form for briefs. It may include a legible photocopy of any document found in the record, or a printed decision by a court or agency. And, if a necessary document is oversized, such as technical drawings, the appendix may be oversized, as well, and need not lie flat. Fed. R. App. P. 32(b).

### 18.07.01.06 Other Papers

The form of a motion is set forth in Fed. R. App. P. 27(d). *See* Rule 32(c). For the most part, other papers (including petitions for hearing and rehearing en banc) follow the same form as briefs, except that a cover is not needed if the caption and signature page of the paper together contain all of the information required by Rule 32(a)(2), as described *supra* at 18.07.01.01. The length requirements of Rule 32(a)(7) do not apply; instead, the page limit requirement for the specific document applies. *See, e.g.,* Fed. R. App. P. 27(d)(2) (motions), 35(b)(2)(petitions for en banc determination), 40(b) (rehearing).

#### 18.07.01.07 Signature

Every filing must be signed by counsel, or, in the case of an unrepresented party, by the party. Fed. R. App. P. 32(d).

### 18.07.02 Contents of Brief

The content of the opening and reply briefs and the proper order of the subsections is designated in Fed. R. App. P. 28. Local circuit rules alter these requirements in many cases, so they must be consulted, as well.

Counsel must be aware of rules governing privacy. The subject was first addressed by a Judicial Conference policy, which was incorporated into local rules, but is now also set forth as well in Fed. R. App. P. 25(a) (incorporating by reference Fed. R. Crim. P. 49.1 and Fed. R. Civ. P. 5.2). Together, these rules impose a duty on counsel to maintain the privacy of personal data and identifiers by redaction of social security numbers, dates of birth, names of minor children, home addresses, financial account numbers, medical records, and the like. *See*, *e.g.*, 11th Cir. Rule 25-5.

#### 18.07.02.01 Opening Brief

- ✓ Corporate Disclosure Statement
- ✓ Table of Contents
- ✓ Table of Authorities
- ✓ Jurisdictional Statement
- ✓ Statement of the Issues
- ✓ Statement of the Case
- ✓ Statement of Facts
- ✓ Summary of the Argument
- ✓ Argument and Standards of Review
- ✓ Conclusion
- ✓ Certificate of Compliance

In addition to these specific sections, local rules often require a description of the nature of the case, the custody status of the defendant, a statement of related cases, and a statement of adoption of issues of co-defendants.

Local rules can also include some quirky requirements, such as the Eleventh Circuit's rule requiring counsel to place an asterisk in the table of authorities next to those cases on which counsel relies most heavily, or the Eighth Circuit's requirement that "apposite" cases be listed on the statement of issues page, following each relevant issue. *See* 11th Cir. R. 28-1(e) and 8th Cir. R. 28(f)(2). One formerly common local rule, limiting counsel's right to cite unpublished or non-precedential decisions, has been superseded by Fed. R. App. P. 32.1, which permits counsel to cite any decision of a court, whether formally published or not. In the end, counsel must superimpose the applicable local circuit rules on the federal rules in order to have a full understanding of the requisite content of a given brief. The local circuit rules, and helpful summary sheets, are all available online,

as set forth *supra* at the sections beginning at 18.05.02.

#### 18.07.02.01.01 Corporate Disclosure Statement

A corporate disclosure statement is generally required of non-governmental entities. Fed. R. App. P. 26.1. It must be filed in nearly every appeal and it includes more than just a list of corporate entities. Under nearly all local circuit rules, it also includes a list of all interested persons. Some circuits have unusual specific requirements, such as placing the names in alphabetical order (last name first) and denominating a description of the role of each person (*e.g.*, "district judge," "defendant", "defense counsel"). Recently adopted local rules require electronic filing of the information, as well as a hard copy filing.

#### 18.07.02.01.02 Table of Contents

A table of contents with page references is required by Fed. R. App. P. 28(a)(2). Many local rules require that sub-issues also be detailed, with page references. The table of contents presents an opportunity for counsel to preview the appeal. Thought should be given to how the issues are worded and how they relate to each other, especially as viewed by a busy judge or law clerk who might scan this section to get an initial sense of the merit of the appeal.

#### 18.07.02.01.03 Table of Authorities

The table of authorities should be alphabetically arranged, broken down into separate sections for cases, statutes, and other authorities. Some local rules make special requirements, such as requiring that the cases on which counsel rely primarily be designated with an asterisk in the margin or listed on the statement of issues page. *See, e.g.*, 11th Cir. Rule 28-1(e) and 8th Cir. R. 28(f)(2).

#### 18.07.02.01.04 Jurisdictional Statement

The jurisdictional statement should include the basis for subject matter jurisdiction in both the district court and the court of appeals (with citations to applicable statutes and facts), evidence that the Notice of Appeal was timely filed as required by Fed. R. App. P. 4(b), and an assertion that the order or judgment on appeal disposes of the party's claims (or some other basis for appellate jurisdiction). *See* Fed. R. App. P. 28(a)(4)(A)-(D). In criminal cases, the district court usually derives jurisdiction from 18 U.S.C. §3231. The appellate court has jurisdiction over appeals from final judgments under 28 U.S.C. §1291, and it has jurisdiction to review a criminal sentence pursuant to 18 U.S.C. §3742(a). Evidence that the notice of appeal was timely filed is generally satisfied by setting forth the dates on which the judgment and sentence was entered and the notice of appeal was filed.

#### 18.07.02.01.05 Statement of Issues

A statement of the issues on review is simply that, the issues set forth by the title of each issue. Fed. R. App. P. 28(a)(5). In the Eighth Circuit, counsel must also list apposite cases for each issue. *See* 8th Cir. R. 28(f)(2).

### 18.07.02.01.06 Statement of the Case

A statement of the case briefly indicates the nature of the case, the course of proceedings and the disposition below. Fed. R. App. P. 28(a)(6). It is not necessary to include every procedural aspect of the case. For instance, if the case ultimately resulted in a plea and the sentence is the only subject for appeal, then it may be unnecessary to explain in detail the proceedings which preceded entry of the plea, including bail review and motion hearings. This section should be limited to proceedings that are useful to understand the case and necessary to disposition of the appeal.

Local circuit rules often add to the requirement of the federal appellate rules. Many circuits, for example, require counsel to designate the defendant's bail status or if the defendant is currently incarcerated. At least one local circuit rule requires that the standard or scope of review for each issue be set forth as a third section of the statement of case. *See, e.g.*, 11th Cir. R. 28-1(i).

### 18.07.02.01.07 Statement of Facts

The statement of facts is a recitation of the facts *relevant* to the issues on appeal – favorable and unfavorable – with references to the record (or appendix, as required in some circuits). Fed. R. App. P. 28(a)(7). This is another early opportunity to set the stage for the issues to be argued. Although facts are facts, and counsel has a duty to present them accurately, skillful organization, presentation and emphasis assist the court to appreciate the issues under review.

### 18.07.02.01.08 Summary of the Argument

The summary of the argument is a succinct, clear and accurate statement of the arguments made in the body of the brief. Fed. R. App. P. 28(a)(8). It is not a mere recitation of the headings. Utilized properly, it is another opportunity to get a head start on the full-blown argument. Consider being creative and saying things a little differently, leaving out case citations unless they are truly compelling or bind the court's decision. A good summary of the argument has the appeal of a good 60-second movie preview, capturing and highlighting the best of a two-hour movie, and making the reader want buy a ticket to see (read) the rest of it.

### 18.07.02.01.09 Argument (and Issue Selection)

The argument section sets forth the party's contentions, the reasons supporting them, and citations to the law and record upon which the party relies. Each section of the argument commences with a statement of the issue. The federal rules also require a concise statement of the standard of review, which may be incorporated into the argument or set forth in a separate heading at the beginning of the argument. Fed. R. App. P. 28(a)(9)(A)-(B). Some local circuit rules vary the placement of the standard of review, requiring it to be discussed within the statement of case. *See, e.g.*, 11th Cir. R. 28-1(i)(iii).

The standard of review dictates the degree of deference that an appellate court will give to the findings of fact and conclusions of law made by a trial court. The standard of review is likely determinative of the outcome of the case and too often overlooked by appellate writers. For errors

that were properly preserved and objected to in the district court, the appellate court reviews *de novo*, for clear error, or for an abuse of discretion. Issues not preserved below have an additional, although not insurmountable, obstacle: plain error review.

Considering the importance of the standard of review, and regardless of where the local rule requires it to be physically placed within the brief, it should also be incorporated into each individual issue and argument. The standard of review is to appeals what the burden of proof is to trial. Knowing whether the standard of appellate review is *de novo* or abuse of discretion or plain error is like knowing the difference between probable cause or preponderance of evidence or beyond a reasonable doubt. And, since in many instances the standard of review can be made more favorable by how the issue is framed, its importance cannot be overestimated. Standards of review are discussed more fully *supra* at sections 18.07.02.01.09.01-.03.

A few words about issue selection. Although issue selection may seemingly be affected by the standard of review, and by binding circuit precedent, these factors should not be determinative. Counsel should not be deterred solely by an adverse standard of review or prior circuit precedent. The Supreme Court has made clear that there are few issues which are too frivolous to raise and there is great peril in failing to raise any non-frivolous issue. In *Bousley v. United States*, 523 U.S. 614 (1998), for example, the Supreme Court held that an issue had been procedurally defaulted because it was not raised on direct appeal, even though at the time of the direct appeal, no court had ever accepted the argument. Bousley had pleaded guilty to a gun use charge prior to the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995) (holding that a defendant must actively employ a firearm to "use" it within the meaning of 18 U.S.C. § 924(c)(1)). The trial court rejected his 28 U.S.C. §2255 habeas petition. Later, *Bailey* was decided, but the Eighth Circuit affirmed the dismissal of the petition, finding that it had been procedurally barred because he failed to raise the issue on direct appeal, even though no court had accepted the argument prior to *Bailey.* Who could have predicted revolutionary decisions such as *Apprendi*, *Booker,* or *Crawford*? Indeed, each year the Supreme Court decides a handful of cases in an unexpected way and in many of those decisions the Court rejects seemingly solid precedent. Yet, failure to raise and preserve those issues in appropriate cases arising before the decisions will result in procedural defaults that are often impossible to repair.

### 18.07.02.01.09.01 Standards of Review

The standard of review for an appellate issue, and how it is applied to a given case, is the single most important facet of an appeal. That said, the applicable standard of review is often subject to debate. It is impossible for a chapter of this manual to provide a comprehensive guide to the various standards and how they are applied in the respective circuits. But an excellent starting point is an outline prepared by staff counsel of the Ninth Circuit Court of Appeals, Standards of Review (Sept. 2006), available at <www.ca9.uscourts.gov> (under "Handbooks and Manuals"), and at <www.rashkind.com>. The outline is Ninth Circuit-centric, and counsel should always attempt to locate standards enunciated by the circuit in which the appeal is pending, but this outline is a very productive beginning for an appeal pending in any circuit.

Identifying potential standards of review allows counsel to take the next step, framing an

issue with the best standard of review, one most likely to allow the client to prevail on appeal. It is particularly important to argue for a better standard of review when a district court's discretionary ruling affects a defendant's constitutional rights. Imagine, for instance, a case in which the trial court denied a defense request for a two-hour continuance to allow counsel to procure the presence of an exculpatory witness. The decision might be reviewed only for an abuse of discretion. However, the defense could argue that denial of the continuance should be reviewed *de novo* and the trial court should be given no deference because denial of the continuance resulted in the denial of a constitutional right, the defendant's Sixth Amendment right to put on a defense.

The standard of review may also be debatable if the issue is reasonable suspicion for a stop. While the inquiry is necessarily fact intensive, the determination of whether there is reasonable suspicion has been found to be a mixed question of fact and law to be reviewed *de novo. See United States v. Michael R.*, 90 F.3d 340, 345 (9th Cir. 1996).

Standards of review relating to federal sentencing are not what they have been in the past. Historically, multiple standards of review applied. For instance, the legality of a sentence pursuant to the United States Sentencing Guidelines was reviewed *de novo,* as was the district court's interpretation of the Guidelines. *See, e.g.*, *United States. v. Jackson*, 176 F.3d 1175, 1176 (9th Cir. 1999) (per curiam); *United States v. Castillo*, 181 F.3d 1129, 1134-35 (9th Cir. 1999). The trial court's factual findings within the sentencing phase were reviewed for clear error. *See, e.g.*, *United States v. Frega*, 179 F.3d 793, 811 n.22 (9th Cir. 1999). The district court's application of the Guidelines to the facts of a particular case was reviewed for an abuse of discretion. *United States v. Garcia-Guizar*, 160 F.3d 511, 524 (9th Cir. 1998) (citation omitted). Congress added 18 U.S.C. § 3742(e) to the mix, which applied a *de novo* standard of review to guidelines sentencing. Much of this changed after *United States v. Booker*, 543 U.S. 220 (2005), which revitalized application of the sentencing factors set forth in 18 U.S.C. § 3553 and replaced the statutory *de novo* standard with review for "reasonableness" (equating to "abuse of discretion "). *Rita v. United States*, 551 U.S. 338 (2007). The post-*Booker* abuse of discretion standard applies to appellate review of all federal sentences, whether within or outside the applicable guideline range. *Gall v. United States*, 552 U.S. 38 (2007).

Although the ultimate sentence is now reviewed for abuse of discretion, errors of law in computing the guideline range and applying guidelines are still reviewed *de novo*, *see Kimbrough v. United States*, 552 U.S. 85 (2007), and factual findings made in the course of applying the guidelines and factors set forth under 18 U.S.C. § 3553 will likely continue to be reviewed for clear error. Although properly computed guidelines sentences may be accorded a presumption of reasonableness by an appellate court, *Rita*, 552 U.S. ___, 127 S. Ct. 2456, a sentence warrants "closer review" when a district court varies from the guidelines based solely on its view that the Guidelines range fails to properly reflect the § 3553(a) considerations. *Kimbrough*, 552 U.S. ___, 128 S. Ct. at 574-75. In reviewing the reasonableness of a sentence outside the Guideline range, an appellate court may "take the degree of the variance into account and consider the extent of a deviation from the Guidelines." *Gall*, 128 S. Ct. at 594-97 ("We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.").

Sometimes it is not easy to distinguish questions of fact from questions of law. For example,

the definition of a waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Whether a waiver is voluntary is a question of law to be reviewed *de novo. United States. v. Aguilar-Muniz*,156 F.3d 974, 976 (9th Cir. 1998). However, the determination of whether a waiver is knowing and intelligent is a question of fact to be reviewed for clear error. *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc). Thus, the determination of whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact to be reviewed *de novo. United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995) (citation omitted). In short, it is often the case that an appellate practitioner is able to characterize the issue so that the trial court may be given less deference and the appellate court a wider discretion within which to decide the appeal favorably.

Assuming the error raised on appeal was preserved below, appellate courts apply one of three standards of review, sometimes in combination: *de novo*, abuse of discretion, and clear error.

### 18.07.02.01.09.01.01 *De Novo*

The least deferential standard of review is denominated *de novo*, which means anew or afresh. The reviewing court reviews the findings from the same position as the trial court, with no deference to the lower court's determination. Unlike factual matters, for which a lower court may be better situated to determine truth and weight, the law is the law and it should have a single meaning. *De novo* review is applied, for example, to pure questions of law like the district court's determinations of its jurisdiction, violation of the right to speedy trial, and its interpretation of a statute. It is also applied in some instances to mixed questions of law and fact, such as the lawfulness of a search.

### 18.07.02.01.09.01.02 Abuse of Discretion

Abuse of discretion is a deferential standard used to review judicial exercises of discretion. A trial court abuses its discretion when it bases its decision on an erroneous view of the law. For example, the abuse of discretion standard is generally applied to the district court's decision to admit or exclude evidence, including whether witnesses will be permitted to testify, as well as to decisions to grant or deny continuances and to discovery requests.

### 18.07.02.01.09.01.03 Clearly Erroneous

Clearly erroneous is a highly deferential standard used to review the trial court's findings of fact. It requires a definite and firm conviction that a mistake has been committed. If the finding of the district court is plausible in light of the record viewed in its entirety, a finding may not be reversed simply because the appellate court would have weighed evidence differently. The trial court's determinations of fact are given deference because it is the trial court that is presumably in the best position to evaluate the evidence and judge the credibility of the witnesses.

### 18.07.02.01.09.02 Harmless Error

Once an appellate court has found an error by reviewing under one of the above standards, the question becomes whether the error warrants a reversal of the conviction or sentence. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Similarly, Fed. R. Crim. P. 11(h) specifically provides for application of the harmless error rule to uphold guilty pleas where there has been a technical violation. Even a constitutional error can be harmless. *Chapman v. California*, 386 U.S. 18, 22 (1967).

To establish that error is harmless, the government (or other appellee) must demonstrate that the prejudice resulting from the error was more likely harmless than not. If the error implicates the federal Constitution, however, the appellee bears the burden of establishing it is harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 7 119 S. Ct. 1827, 1833 (1999).

Although the harmless error rule is not limited by its terms and applies to all errors where a proper objection is made, the Supreme Court has recognized a limited class of fundamental constitutional errors that "defy analysis" by harmless error standards. *Arizona v. Fulminante,* 499 U.S. 279, 309 (1991). These are "structural" errors which require automatic reversal. *Neder*, 527 U.S. at 8 (citing *Johnson v. United States*, 520 U.S. 461, 468 (1997) (citation omitted) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery,* 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction)); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (denial of choice of private counsel). Structural errors are relatively rare and consist of serious violations that taint the entire process, rendering impossible meaningful appellate review. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004).

### 18.07.02.01.09.03 Plain Error

As a general rule, errors must be preserved for appeal, meaning that the error must have been raised and perfected in the trial court. Traditionally, if an issue was not preserved in the trial court, it was deemed to be waived and the appellate court would not review the issue at all. Nonetheless, a finding of waiver did not, and does not, create a jurisdictional bar to review, and an appellate court can exercise its jurisdiction to review even a waived issue. More recent case law requires the record to reflect the intentional abandonment of a known right in order to effect a valid waiver. *See, e.g.*, *United States. v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997). If the record does not reflect such an intentional abandonment, then the appellate court will deem the error to be merely forfeited and review for plain error. Thus, a forfeiture is a mere failure to act at trial, rather than an intentional relinquishment of the right to challenge an error. Federal Rule of Criminal Procedure 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Plain error is: (1) error, (2) that is plain, clear or obvious, (3) that affected substantial rights,

and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732-35 (1993) (explaining the requirements for plain error under Rule 52(b)). The plain error exception is intended only to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Olano,* 507 U.S. at 736. The error must be so clear-cut and so obvious that a competent district judge should be able to avoid it without the benefit of objection. If the state of the law is *unclear* at trial and only becomes clear as a result of later authority, the error is perforce not plain. *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). However, where the state of the law below was *clear*, but was clearly contrary to the law at the time of the appeal and the appellant failed to object, the review will be only for plain error if the law later changes. *See United States v. Johnson*, 520 U.S. 461, 468 (1997); *United States v. Keys*, 133 F.3d 1282 (9th Cir. 1998) (en banc). This somewhat ironic situation arises because the presence of error is determined at the time of appeal rather than at trial or sentencing, so defendants in the appellate pipeline may take advantage of new rules announced while their appeals are pending.

The third prong of the plain error analysis requires that the error "affect substantial rights" and has been interpreted to be identical to the harmless error analysis under Rule 52(a) except that it is the defendant, rather than the government, who bears the burden of persuasion with respect to prejudice. This burden shifting "does not affect the subjective standard governing what renders an error prejudicial." *Id.* (citing *Olano*, 567 U.S. at 734). Whatever standard is applied, the court of appeals cannot correct the forfeited error unless it was prejudicial.

Once the three prongs of the plain error test are satisfied, a court of appeals will only reverse if the plain error "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *Johnson*, 520 U.S. at 469-70 (internal quotation marks and citations omitted); *see United States v. Dominguez-Benitez*, 542 U.S. 74, 76 (2004) (challenge to guilty plea required reasonable probability that, but for error, defendant would not have entered plea); *United States v. Cotton*, 535 U.S. 635 (2002) (refusing to allow plain error relief under *Apprendi* due to legally insufficient indictment with which defendant never took issue). Sometimes a court may choose not to notice a prejudicial error in the trial context, particularly where there is overwhelming evidence of guilt. It may be very expensive to undo or redo a jury trial or one party may have already performed a condition of a plea bargain which may not readily be rescinded.

### 18.07.02.01.10 Conclusion

A short conclusion to the brief is required by Fed. R. App. P. 28(a)(10). This should be neither perfunctory nor boilerplate. It should be specific about the relief sought ("reverse the sentence" or "reverse the conviction" or "affirm the order suppressing evidence") and be equally specific about what relief should occur thereafter in the district court ("remand with instructions to dismiss count II"). If multiple issues are presented, the conclusion should address the myriad alternative outcomes sought by the appeal.

### 18.07.02.01.11 Certificate of Compliance

If a principal brief exceeds 30 pages or a reply brief exceeds 15 pages, a certificate of compliance with Fed. R. App. P. 32(a)(7) must be filed, setting forth the number of words or lines

of text in the brief. Fed. R. App. P. 28(a)(11).

#### 18.07.02.01.12 Other Required Sections

Local circuit rules often impose additional requirements, such as a statement of related cases and a statement regarding adoption of issues set forth in co-appellant's briefs. The standard caveat applies: Check the local rules.

### 18.07.02.02 Appellee's Brief

The appellee's brief must conform to the requirements of Fed. R. App. P. 28(a)(1)-(9)&(11), and local circuit rules, but need not restate the statements of jurisdiction, issues, case and facts, or the standard of review, unless the appellee is dissatisfied with the appellant's statements. The remaining sections of the appellee's brief should be identical to those in the opening brief. Fed. R. App. P. 28(b).

### 18.07.02.03 Reply Brief

The reply brief is optional, but highly recommended in most cases. Having the last word in litigation is rarely counterproductive. Reply briefs must contain tables of contents and authorities (with pages references). The appellee may not file an additional brief in response to a reply brief without leave of court. Fed. R. App. P. 28(c).

### 18.07.02.04 Briefs with Multiple Appellants

Appeals with multiple appellants, or cross-appeals, implicate special rules, many of which are local. Some circuits have special rules for the order of briefing (and color of briefs) for cross appeals. Some circuits allow only one brief for multiple appellants, especially if they are represented on appeal by the same counsel. Where more than one brief may be filed by multiple appellants, any number of appellants may join in a brief or adopt by reference a part of another's brief. Fed. R. App. P. 28(i).

## 18.07.03 Oral Argument

Oral argument is available in all cases unless a panel of three judges unanimously believes that oral argument is not necessary. Fed. R. App. P. 34. It should be permitted unless: (1) the appeal is frivolous; (2) the dispositive issue has been authoritatively decided; or (3) the facts and legal arguments are adequately set forth in the briefs. The parties have an opportunity to give reasons why oral argument should be heard; under most local circuit rules this is done in a special subsection of the initial brief.

The appellant opens and concludes the argument, but cannot read at length from briefs or authorities. Exhibits may be used, but must be removed by the parties or they will be destroyed. If one party fails to appear, the court may hear argument from the other party. If both fail to appear for oral argument, the merits may be decided on the briefs.

Some, including one Supreme Court justice, believe that oral argument is superfluous. Most experienced judges and lawyers see it differently. Oral argument offers the two most compelling parts of persuasion, primacy and recency. It provides an unprecedented opportunity to communicate directly with the deciders of the case, without interruption by law clerks and the maze of written arguments in the briefs. Counsel can isolate the strongest contentions, correct misapprehensions, and direct the argument to a known panel of judges. It is important for arguing counsel to prepare for oral argument by rethinking the case, the briefing, the relevant cases, and to study prior decisions of the specific judges on the panel in order to distill and develop the most persuasive legal positions. In most cases, a good oral argument will take the written argument to new levels. Rule 28 (j) should not be overlooked; it authorizes the filing of a letter setting forth supplemental authority in conjunction with oral argument. In fact, Rule 28(j) letters may be filed any time before decision, even after oral argument.

## 18.08 PETITIONS FOR WRIT OF CERTIORARI

The Supreme Court has original jurisdiction over few issues and, therefore, uses the extraordinary writ of certiorari to hear most of its cases. Sup. Ct. R., Part III. Although the Court has jurisdiction to hear other petitions for writ, as well, such as mandamus and habeas corpus, these are rare and not the subject of this chapter.

One point should be stressed. The Federal Rules of Appellate Procedure do not apply in the Supreme Court, which is governed instead by its own Rules of the Supreme Court of the United States. These are available online at <www.supremecourtus.gov> as are many other helpful documents including bar admissions forms, case handling guides, docket sheets, orders and opinions of the Court. In particular, counsel may want to download the current versions of the Court's guides for handling indigent and paid cases, both of which are filled with information and forms useful in preparing petitions for writ of certiorari, <www.supremecourtus.gov/casehand/guideforifpcases.pdf> and <www.supremecourtus.gov/casehand/guidetofilingpaidcases2007.pdf>.

### 18.08.01 Reasons for Granting the Writ

The considerations governing Supreme Court review on certiorari are the subject of Sup. Ct. R. 10, which reminds counsel that issuance of the writ is not a matter of right, but of judicial discretion, granted only for compelling reasons. For example, the Court considers granting the writ when there is a conflict between: (1) two or more circuits, (2) a state court of last resort and a federal circuit, (3) two state courts of last resort, on an important federal question, or (4) a state court of last resort or a circuit court and the Supreme Court. The Court also may exercise its supervisory powers to act when a court has departed from the accepted and usual course of judicial proceedings.

### 18.08.02 Navigating the Supreme Court Rules

The Supreme Court Rules are relatively brief and straightforward, covering in separate parts rules relating to attorneys (Sup. Ct. R. 5-9), jurisdiction (Sup. Ct. R. 10-20), motions and stays (Sup. Ct. R. 21-23), briefs and oral argument (Sup. Ct. R. 24-28), Court practice and procedure (Sup. Ct. R. 29-40), and disposition of cases (Sup Ct. R. 41-46).

In a typical criminal case, counsel should know that a certiorari petition must be filed within 90 days of the decision below (the opinion date, not the later mandate date), or from the order denying a timely filed motion for rehearing. Sup. Ct. R. 13. The time may be extended by a justice for up to 60 days, but a request for extension of time should set out specific reasons and be filed at least ten days before the petition is due. *Id.* Counsel of record must be admitted to the Supreme Court Bar, Sup. Ct. R. 5, or admitted *pro hac vice*, Sup. Ct. R. 6, but these requirements do not apply to an attorney appointed under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(6). Sup. Ct. R. 9.

A document is timely filed if received by the Clerk within the time specified for filing, or if it is sent to the Clerk by first-class U.S. mail, postage prepaid and bearing a postmark (not a commercial postage meter), or by commercial carrier for delivery within three calendar days. A separate prison mailbox rule applies to *pro se* filings of inmates. The full set of requirements for timely filing and computation of time is set forth in Sup. Ct. R. 29 and 30.

Applying for a writ of certiorari commences with a petition. Sup. Ct. R. 13-14. The petitioner must file 40 copies and the docketing fee, unless the petitioner qualifies to proceed *in forma pauperis.* An *in forma pauperis* petitioner need only submit an original and 10 copies of a typewritten petition and 10 copies of the motion to proceed *in forma pauperis.*

The respondent may file a brief in opposition (within 30 days, unless time is extended), to which the petitioner may reply. Sup. Ct. R. 15. Supplemental briefs may be filed at any time while a petition is pending. *Id.*

If certiorari is granted, a full round of briefing follows the cert grant. Sup. Ct. R. 24-26. Oral argument is granted pursuant to Sup. Ct. R. 28 and is heard in most cases, unless the Court makes a summary disposition of the case.

### 18.08.03 Form of Petition and Other Filings

The petition for writ of certiorari must contain the following, as set forth more fully at Sup. Ct. R. 14 and 12.3:

- ✓ Questions presented for review
- ✓ List of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless all are named in the case caption) and corporate disclosure statement
- ✓ Tables of contents and authorities (if petition exceeds five pages or 1,500 words)
- ✓ Citations to the official and unofficial reports of opinions and orders in the case
- ✓ Statement of the basis for jurisdiction, including the date of the judgment below, rehearing orders, extensions of time, reliance on a cross petition, and any statutory basis
- ✓ Verbatim recitation of constitutional provisions, treaties, and statutes relied upon
- ✓ Statement of the case and relevant facts
- ✓ Reasons for granting the writ (argument)
- ✓ Appendix, including opinions and orders below, other relevant matters, rehearing orders, and the judgment sought to be reviewed
- ✓ Proof of service

If the petition relates to a capital case, the notation "Capital Case" must precede the questions presented. Sup. Ct. R. 14.1(a).

If the petition for writ of certiorari is printed in the form of a booklet, the cover must be white, and the document is subject to word limitations. Petitions and briefs in opposition may not exceed 9,000 words. Replies and supplemental briefs may not exceed 3,000 words. Sup. Ct. R. 33.1. Booklet format documents, including the appendix, must be typeset in a Century family 12-point font, except for footnotes, which must be 10-point font. Beware that Century family is larger than the more common Times Roman family, which is not permitted in booklet documents. Sup. Ct. R. 33.1(a)-(d).

Court-appointed counsel should be familiar with the less costly rules for *in forma pauperis* petitions, which may be filed in manuscript form on 8½ by 11-inch paper. Sup. Ct. R. 12.2. No cover is required; the petition may simply be stapled in the upper-left corner. These documents are subject to page limits, not word limits. Sup. Ct. R. 33.2(b). Petitions and brief in opposition are limited to 40 pages. Replies, supplemental briefs and petitions for rehearing are limited to 15 pages.

The word and page limitations do not apply to the questions presented, list of parties and corporate disclosure statement, tables of contents and authorities, and the listing of counsel at the end of the document.

The summary information provided in this chapter is just that. Diligent counsel must also consult the Supreme Court Rules and the practice aids available online at <www.supremecourtus.gov>. That said, if the petition is timely filed in good faith, but technically deficient in form, the Clerk will return it for correction and re-filing within 60 days, and if counsel submits a corrected petition within that time, it will be deemed timely filed. Sup. Ct. R. 14.5

### 18.08.04 Substance of the Petition

The Supreme Court is not an error-correction court. It decides broad issues, usually those that have developed a conflict in lower courts. This is not to say that only broad issues are considered or that a circuit conflict is an absolute prerequisite to a cert grant. The Court has shown interest in very specific issues or questions that seem to arise based on its own prior decisions or recent legislation.

The general concept of a cert petition is to capture the Court's (and its clerks') interest, with brevity. Thousands of petitions are filed each Term and fewer than 100 get plenary review. The thrust of the petition is to distinguish the case from the pack and give the justices reason to think the question presented is appropriate for the very limited docket of the Term.

### 18.08.05 Merits Briefing and Oral Argument

Supreme Court litigation is unique. Briefing may seem similar to other court cases and, as in some courts, each side is afforded 30 minutes for oral argument. But the nine justices and the nature of being before the "highest" court present a different challenge. Counsel must prepare,

strategize, and engage in numerous moot courts in order to be most ready for the experience.

Long before moot courts and oral argument, counsel must assure that written briefing will provide ample support for potential turns and twists of oral argument. This requires plenty of brainstorming and coordination of potential amicus curiae. Although this may seem daunting, help is available.

The Supreme Court Advocacy Program, including the Defenders Supreme Court Resource & Advisory Panel, offers free assistance to court-appointed counsel for each step in the certiorari process: petition, cert grant, merits briefing, and moot courts for oral argument. They can help with even the small details, such as how to prepare an appendix or get the brief printed at government expense. Assistance may be arranged through the Supreme Court Advocacy Program at <www.fd.org/odstb_court.htm>.

The list of potential amici is endless, but there are a few constants, and are good places to begin. Those that appear before the Court with regularity include the National Association of Federal Defenders ("NAFD"), the National Association of Criminal Defense Lawyers ("NACDL"), and Families Against Mandatory Minimums ("FAMM"). Sometimes the American Bar Association will appear as an amicus, but its approval process is somewhat difficult to navigate. Many times an organization with little direct connection to criminal cases will be of assistance; veterans and immigration advocacy groups, as well as linguistics professors have appeared as friends of the Court in recent years.

Resist the temptation to handle a cert grant alone. There are many free resources to help you perfect your client's arguments. Take advantage of them. If you feel lost, start with the Supreme Court Advocacy Program at <www.fd.org/odstb_court.htm>.