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Adverse Decisions

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The ECF notices we all dread: "the defendant's motion is granted," or "the judgment of conviction is reversed." Now what? By regulation, the Solicitor General will decide whether to authorize appeal of your adverse decision.[1] But wait! Don't call the Solicitor General. Call your Appellate Chief instead. She will walk you through our established procedures for bringing your adverse decision to the Solicitor General's attention. This article describes the process and explains how you can help the Solicitor General make these sometimes difficult decisions correctly and efficiently.[2]

I. The requirement of Solicitor General authorization

By a regulation first promulgated in 1969, the Solicitor General determines "whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs)."[3] He also represents the United States in the Supreme Court.[4] By placing a single individual in charge of appellate litigation, the Department of Justice ensures that its 93 United States Attorney's offices and seven litigating Divisions speak with one voice.

Placing so much decision-making on the shoulders of a single official is daunting. Last year, the Solicitor General and his small staff of 4 deputies, 16 assistants, and 4 Bristow Fellows[5] reviewed 1,506

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[1] *See* 28 C.F.R. § 0.20.

[2] The article focuses on adverse decisions issued in criminal cases. Most of the described procedures also apply in civil cases.

[3] 28 C.F.R. § 0.20(b).

[4] § 0.20(a).

[5] The four "Bristow Fellows," all recent appellate law clerks, spend one year in the Office of the Solicitor General drafting adverse decision recommendations and assisting with Supreme Court cases.

adverse decision recommendations.[6] Despite the volume, each recommendation receives careful attention, due in part to an established process that ensures that (1) every component or agency with an interest in the case has an opportunity to submit views; (2) the Solicitor General receives the recommendations and pertinent record materials in one focused, tidy stack; and (3) that stack lands on his desk well before the government's opening brief, en banc petition, or certiorari petition is due in court.[7]

II. Decisions that must be reported

The reporting rules for adverse decisions differ depending on the court level. Starting with the magistrate judges, prosecutors may appeal an adverse ruling to the district court without Solicitor General authorization.[8] Likewise, a prosecutor may forgo an appeal to the district court from the magistrate's decision without reporting the loss to the Solicitor General. There is one exception to this rule. Prosecutors must always promptly report decisions invalidating a rule, statute, or regulation as unconstitutional, whether that decision is issued by a magistrate judge, a district court, or a court of appeals.[9] Outside the rarest of circumstances, the Solicitor General will direct the government to appeal such decisions. If the Department does not appeal a court decision striking down a statute, the Attorney General must report the Department's failure to seek further review to Congress and explain his reasoning.[10]

In the context of adverse district court rulings, prosecutors must report, with one exception, any order that is appealable.[11] As a result, orders dismissing an indictment, suppressing evidence,[12] quashing a

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[6] In addition to reviewing 1,506 adverse decision recommendations, the Solicitor General filed over 600 briefs and petitions in the Supreme Court last year. To accommodate other pressing deadlines while resolving an appeal request, an Assistant or Bristow Fellow may ask the United States Attorney to seek an extension of the court of appeals briefing schedule.

[7] *See* JUSTICE MANUAL § 2-4.110 *et seq.*; § 9-2.170 (outlining the process).

[8] The Solicitor General's supervisory responsibilities do not encompass litigation occurring entirely within district court. *See* 28 C.F.R. § 0.20.

[9] § 2-2.110.

[10] *See* 28 U.S.C. § 530D(a).

[11] JUSTICE MANUAL § 9-2.170(B)(2).

[12] Orders suppressing evidence are appealable only "if the United States attorney certifies to the district court that the appeal is not taken for purpose

subpoena, granting a new trial, replacing a guilty verdict with a judgment of acquittal, or vacating a sentence on collateral review must be reported whether or not the United States Attorney wants to appeal because the decision whether to appeal belongs to the Solicitor General.[13] Prosecutors should also report adverse rulings on forfeiture and in collateral review proceedings, which are often treated as civil matters.[14]

The reporting rule for sentencing is more nuanced. Prosecutors must always report a sentence outside the statutory limits or based on a prohibited factor, such as race, religion, national origin, or gender.[15] But this circumstance rarely happens. Prosecutors need not report guidelines errors or a below-guidelines sentence unless requesting authorization to appeal that sentence as procedurally flawed or substantively unreasonable.[16]

Finally, if the district court's order is reviewable only by mandamus or other extraordinary writ, the prosecutor need not report it unless the United States Attorney (or the Assistant Attorney General) wants to seek appellate review.[17] The government rarely pursues these remedies; most prosecutors will spend their entire careers without having to worry about them.

Turning our attention to the court of appeals, prosecutors must report all published adverse decisions to the Solicitor General.[18] They need only report unpublished appellate decisions if (1) the appeal was taken by the government or (2) the United States Attorney or litigating Division recommends further review, either as an en banc petition to the full court of appeals, or a certiorari petition to the Supreme Court.[19]

One final note: these procedures do not apply in cases where a court accepts a government concession of error. Because the court agreed with our position, the decision is not "adverse" and need not be

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of delay and that the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731.

[13] *See* 18 U.S.C. § 3731 (identifying the types of orders that are appealable in a criminal case); 28 U.S.C. § 2255(d).

[14] JUSTICE MANUAL § 2-2.110.

[15] *Id.*

[16] *Id.*

[17] *See* 28 C.F.R. § 0.20(b).

[18] § 2-3.221(C).

[19] *Id.*

reported. But before confessing error on a question of law, Assistant United States Attorneys must alert their Appellate Chiefs.[20] Concessions require advance consultation with the Main Justice litigating components and, occasionally, with the Solicitor General. Consultation ensures that your proposed concession accurately reflects the Department's litigating position, and will not frustrate or impair the government's other pending cases.

III. Timeliness

Assistant United States Attorneys should bring reportable decisions to the attention of your Appellate Chief and appropriate Main Justice Appellate Section as soon as possible. In criminal cases, that will usually be the Criminal Division's Appellate Section.[21]

When reporting an adverse decision, time is of the essence. In criminal cases, a notice of appeal must be filed within 30 days of entry of the adverse order, unless the adverse ruling comes on collateral review, in which case the civil, 60-day time limit applies.[22] Prosecutors will often file a protective notice of appeal within the applicable time limit, thereby preserving the government's ability to appeal, to allow the Solicitor General adequate time to complete his review.[23]

In civil cases, the time for filing a petition for rehearing is 45 days, but in criminal cases, it is only 14 days in most circuits.[24] If the decision is a possible candidate for en banc review, we recommend that the Assistant United States Attorney seek a 30-day extension of the 14-day time limit. But if everyone agrees that it is not a suitable candidate for en banc review and the decision is reported promptly to

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[20] § 2-3.221(D).

[21] The Criminal Division oversees the vast majority of federal crimes, but every Division prosecutes some criminal cases. For example, the Civil Division has jurisdiction over food and drug violations; the other Divisions (Tax, Environment & Natural Resources, Civil Rights, and National Security) prosecute crimes described in their titles. Although the Justice Manual identifies the offenses assigned to each Division, when in doubt, report your adverse decision to your Criminal Appellate liaison, and she will direct it to the correct Division.

[22] *See* FED. R. APP. P. 4(a)(1)(B), 4(b)(1)(B); 18 U.S.C. § 3731 ¶ 4.

[23] JUSTICE MANUAL § 9-2.170(C).

[24] *See* FED. R. APP. P. 40(a)(1). The Eleventh Circuit (21 days) and the D.C. Circuit (45 days) have adopted more generous time limits for seeking rehearing in criminal cases.

Main Justice, the review process can often be completed within 14 days.

For every adverse decision, the package to the Office of the Solicitor General (OSG) will contain separate recommendations from the United States Attorney and from the appropriate litigating Division.[25] Recommendations from other affected offices or agencies are often included, especially in civil cases.[26] If anyone recommends appeal or en banc rehearing, the OSG will assign the recommendation to an Assistant or Bristow Fellow. A Deputy Solicitor General will add his recommendation to the pile before it hits the Solicitor General's inbox.[27] Because, at a minimum, three offices must provide views to the Solicitor General,[28] the recommendation process must begin as soon as possible. Appeal and certiorari recommendations should be sent to the Criminal Division within 30 days of the adverse decision. En banc recommendations are on a shorter fuse and should arrive within two weeks.

IV. The recommendation

The recommendation can be in the form of a letter or a formal memorandum. Often, if the United States Attorney recommends no appeal or en banc rehearing and the issue is straightforward, the recommendation can be sent in an email. Whatever the form, it must contain the essential facts. In a criminal case, that will include a description of the pending charges or counts of conviction, the judgment (if one was imposed), a summary of the facts pertinent to the issue resolved against the government, and a summary of the adverse ruling. The recommendation should contain record cites, key documents from the record, and an explanation as to why the United States Attorney does not wish to appeal. Frequently, the United States Attorney concludes that the decision is correct, that the government will not be able to overturn adverse credibility determinations or factual findings, or that the case can proceed without the dismissed counts or suppressed evidence.

When recommending appeal, the recommendation should include an objective analysis of the legal issue supported by relevant authorities

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[25] JUSTICE MANUAL § 2-3.110.

[26] *Id.*

[27] *See* JUSTICE MANUAL § 2-3.221(A)(2), (B).

[28] § 2-3.221(B)(2).

and case law. The analysis should be candid and assess the strengths and weaknesses of the government's argument. The recommendation should also state whether we preserved our arguments, and include citations to places in the record where we did so. And the recommendation should forthrightly identify any weaknesses in the factual record and unfavorable case law. Likewise, if this case is particularly important to your office, or if this criminal defendant is particularly dangerous, the recommendation should say so and explain. That information can tip the scale favorably in a borderline case.

The Criminal or other Main Justice Division will draft its own recommendation, objectively looking at the case with a bit more distance and considering the institutional interests of the Division. The recommendations drafted in the OSG will look at the case with even greater objectivity and again consider the interests of the Department as a whole. And once all of those recommendations are finished and compiled, the Solicitor General will review them and render a decision.

Once the Solicitor General renders his decision, the Main Justice Division's Appellate Section will notify the United States Attorney. Do not file your brief, petition, or dispositive motion in the court of appeals until you hear back from the Solicitor General. If appeal is authorized, carefully review the packet of materials returned by the OSG. Those materials will inform you which arguments the Solicitor General has authorized for inclusion in your brief, and which arguments have been disapproved. Those materials will also contain helpful citations and legal analysis that bolsters the government's position. Be sure to conform your brief to the Solicitor General's analysis.

V. The criteria

The likelihood that the Solicitor General will authorize further review in your case depends on the stage of the proceedings.

The Solicitor General is fairly liberal in authorizing appeals. If we have a reasonable argument that the district court erred on a question of law, and we preserved our arguments in the district court, the Solicitor General will usually authorize appeal. On the other hand, the Solicitor General is virtually certain to decline the appeal if we did not preserve our arguments. The government routinely argues that defendants have waived or forfeited claims, and we must hold

ourselves to the same standards. In the Supreme Court, for example, the Solicitor General regularly advises the Court that it should not grant review where the defendant failed to press his claim below.[29] We cannot continue to make that argument if we overlook our own defaults.

The Solicitor General is also unlikely to authorize appeal if, to prevail, we must challenge factual findings. About the only time the Solicitor General will authorize a challenge to findings of fact is where nothing in the record supports the findings; otherwise, we cannot show "clear error." The Solicitor General is also unlikely to authorize an appeal if the standard of review is abuse of discretion. For example, the Solicitor General rarely authorizes an appeal of a sentence as substantively unreasonable because the district court has broad discretion to choose an appropriate sentence if it correctly calculated the guidelines range. Occasionally, if the legal question is of nationwide importance, the Solicitor General may wait for another case with more favorable facts to enhance our likelihood of success. If your case does not present a desirable vehicle for resolving an important question, he may deny authorization.

If we lose in a court of appeals, the Solicitor General will decide whether or not to file a petition for rehearing en banc. This decision looks to the criteria in the Federal Rules of Appellate Procedure, that is, whether en banc review is necessary to resolve an intra-circuit conflict or whether the case presents a question of exceptional importance.[30] As the preceding statistics suggest, the Solicitor General applies these standards rigorously, and often declines to seek en banc review. Most often, he concludes that it is in our interest to read the adverse opinion narrowly, thus limiting the damage it might cause in future cases. Consequently, prosecutors should not overstate the breadth of an adverse court of appeals holding when seeking Solicitor General authorization, or in a court filing.

The Solicitor General seeks Supreme Court review quite sparingly. Before filing a certiorari petition, the Solicitor General will insist, with rare exception, on a square conflict in the courts of appeals on the issue. A primary role of the Supreme Court is to maintain

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[29] *See* United States v. Williams, 504 U.S. 36, 41 (1992) (noting the Supreme Court's "traditional rule" precluding a grant of certiorari when "the question presented was not pressed or passed upon below") (citation omitted).
[30] *See* FED. R. APP. P. 35(a).

uniformity among the circuits, and the Solicitor General files hundreds of briefs opposing certiorari each year because there is no square conflict. Again, we hold ourselves to the same standard. You should not recommend certiorari unless you are certain the outcome would have been different had your case been heard in another court of appeals.

VI. Release orders

The same approval procedures apply to a district court's decision granting the defendant's release on bond under the Bail Reform Act. Because appeal of a release order falls within the Solicitor General's broad responsibility to supervise appellate litigation,[31] you can only appeal the district court's order with the Solicitor General's approval. Such authorization is granted sparingly, recognizing the discretion afforded to district court decisions in this area. But the Solicitor General will occasionally allow such appeals where we have compiled a clear record documenting the risk the defendant poses to the community. If you anticipate the need to appeal a release order, please alert the appropriate Main Justice Appellate Section immediately, as these requests require expedited review and processing.

VII. Amicus briefs

The Solicitor General must also authorize the filing of an amicus brief by the government "in any appellate court."[32] If a State Attorney General or other official or party asks the government to participate as amicus, bring that request to the attention of the appropriate Main Justice Appellate Section.

VIII. The bottom line

We are a large, robust Department with, in criminal cases, one client: the United States. The adverse decision process ensures that we represent our client professionally, zealously, and consistently across the 94 districts. It provides a unique opportunity for us to collaborate on our most important mission: to execute the laws in a fair and just manner. The process improves our advocacy and raises our credibility in the courts.

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[31] *See* pp.21–24, *supra*.
[32] 28 C.F.R. § 0.20(c).

About the Authors

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