

Strength-Testing Your Appellate Issues

The Facts	The Law	The Procedural Posture	The Prejudice
<p>Can your client make a substantial showing of innocence?</p> <p>If not, was the crime a minor one?</p> <p>Did your client play a minor role?</p> <p>What is your client's background? Criminal history? Education and work record?</p> <p>Were the others involved in the crime (particularly Government witnesses) nasty people?</p> <p>How reliable was the Government's evidence?</p> <p>Does the record reveal clear vindictiveness, indifference, or sloppiness by the prosecutor or trial court?</p> <p>Are all the facts relevant to the issue clear from the record?</p>	<p>What standard of review applies on appeal?</p> <p>Who carried the burden of proof below? How heavy a burden?</p> <p>Is your circuit's precedent clear (for or against)? What about the other circuits?</p> <p>If the issue involves interpreting a text (the constitution, a statute, a rule), what support do you have for your interpretation?</p> <ul style="list-style-type: none"> • plain language • legislative history • agency interpretation • canons of construction <p>Does the issue touch upon basic constitutional rights (e.g., due process, cross-examination, right to counsel, right to present a defense, right to a jury)?</p> <p>Does the issue raise policy concerns that go beyond your client's case?</p>	<p>Is there a timely objection or motion in the record?</p> <p>If so, what grounds were stated by defense counsel?</p> <p>If preserved by motion, was the issue also urged in open court?</p> <p>Did the objection or motion explain why the issue was important to the defendant?</p> <p>Was the challenge raised every time the issue came up?</p> <p>Did the court rule on the objection or motion?</p>	<p>Did the error go directly to the main issue at trial (or sentencing, or an important pretrial hearing)?</p> <p>Does the record clearly show the effect of the error on your client?</p> <p>Was the bad evidence or improper procedure expressly relied on by the prosecutor, judge, or jury?</p> <p>Was defense counsel surprised by the error? If so, was it due to lack of notice? Accident? Mistake? Negligence?</p> <p>Can your client make a substantial showing of innocence?</p>

The Client

What good does it do your client if you win on this issue?
 What risk does your client face if you win?

The Court

What is the purpose of the rule/statute/precedent upon which you rely?
 What do you want the Court to do? What relief do you seek?
 What is the easiest way for the Court to reach that result? What is your strongest case?