

U.S. Supreme Court Reminds Us to Follow Core Principles of Appellate Practice

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ATTORNEYS

T. Peter Pierce

The U.S. Supreme Court's recent rebuke of the Ninth Circuit Court of Appeals calls to mind a familiar refrain: Appellate courts function as courts of review, not courts of first view. Writing for a unanimous Court on May 7, 2020 in *United States v. Sineneng-Smith*, Justice Ruth Bader Ginsburg observed that our adversarial judicial system generally considers only the arguments presented by the parties. In unusual circumstances, appellate courts may assume what Justice Ginsburg terms "a modest initiating role" by raising a new issue. The vast majority of cases, however, should proceed through appeal based on the issues the parties raise.

The principles governing appellate review constrain not only courts, but also the parties appearing before them. It is fair to say that parties urge new issues on appeal far more frequently than judges find new issues on their own. This post highlights principles that you should consider before plunging headlong into new territory on appeal.

#1: Raise it in the trial court or don't raise it at all

Generally, litigants may raise on appeal only those issues raised in the trial court. Fairness animates this rule. Trial courts should not be overturned on grounds never presented to them. To do so blindsides resource-strapped trial judges. A higher reversal rate also erodes public confidence in the judiciary. Hence, the general rule is that a judgment will be affirmed on any ground supported by the record.

Of course, as is common in the law, there are exceptions. Appellate courts in their discretion may consider new issues of law, but do so only in unusual circumstances. One that readily jumps to mind is a new law enacted after judgment in the trial court. An appellate court may decide to consider that new law, and its application to undisputed facts established in the trial court.

#2: Some new issues are almost never considered on appeal

What appellate courts will almost never do is consider new issues involving facts not yet established. Several reasons drive their resistance. Primarily, trial courts are better equipped for fact-finding by observing witnesses, assessing credibility, and weighing the evidence. An appellate court simply will not usurp these functions. Absent proper fact-finding in the trial court, an appellate court cannot be sure it will reach the correct decision on a newly raised issue.

Equally important is avoiding the prejudice inflicted on a party who could have, and presumably would have, marshaled additional facts had the new issue been raised in the trial court.

#3: Raise it in the opening brief or it's forfeited

Similar principles of fairness apply after a case goes up on appeal. The grounds for appeal must be discussed in the opening brief -- whether those grounds were raised in the trial court or not. Courts frown upon appellants who violate this rule. For example, the opening brief focuses on only one issue. The other side naturally responds only to that issue. Then, the reply brief (the last brief in an appeal) raises a brand new issue. The court will not consider the new issue, absent extraordinary circumstances. That issue is said to be "forfeited." Appellants must show all of their cards up front.

But suppose the opening brief omits an issue decided by the trial court, and the responding party fully briefs the issue anyway, urging it as a basis for affirming the judgment. May the appellant discuss that issue on reply, and urge it as a basis for reversing the judgment? In this situation, an appellate court may in its discretion consider the issue not forfeited and decide it on the merits. That outcome would be unusual, but not unheard of.

The take-away:

The core message here: Litigants on appeal largely control the scope of the issues by adhering closely to rules and established principles. Veering from that path invites appellate courts to correct course by narrowing that scope. The results often are unwelcome to the offending party.

If you would like more information, please contact **Peter Pierce**.