Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 16

An Appealing Conversation: Insights From a Former Court of Appeals Judge

Featuring Matthew Adams and Marsha Piccone of Fox Rothschild LLP

Adams: Hi everyone, and welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. I'm Matt Adams. I'm your host today.

I have the great fortune of being joined by my partner, Marsha Piccone, today. Marsha is an appellate lawyer and co-chair of our firm's Appellate practice group. She also is a former judge on the Colorado Court of Appeals and just has an immense wealth of experience as it relates to the appellate process and handling appeals.

And Marsha, the stark reality is, especially in the white-collar criminal space, that often there are investigations that are developed over the course of years. And as you might imagine, some of the proofs tend to get very strong. Sometimes, despite best efforts at a defense, there is conviction. Then the stage shifts from the trial process to the appellate process.

Let's start with your background, and I'm struck by the fact that you're a former Appellate Court judge in Colorado. How does your background as a judge and the time that you served on the bench translate into how you view appellate issues now in private practice?

Piccone: First, thanks Matt for inviting me to join the podcast. With regard to my time as a judge, I think having spent time on the other side of the bench, as opposed to being in front of it, it gives you a new perspective in terms of what the judges think about, what they look for, what they want to see in the appellate briefing and argument.

I'll tell one little story: I was speaking to a colleague of mine on the bench who also came on the bench about the same time I did with a very similar background as a commercial business trial lawyer or civil trial lawyer. Both of us were struck by the fact that what we would have considered a good appellate argument prior to being on the bench changed.

It was more about wanting that attorney who was in front of us to know the answers, to know the record, to be able to answer our questions as opposed to being able to give an argument in front of a jury or in front of a trial judge.

Adams: Yeah, it's really a different tact and a different skill right?

Piccone: It's a different approach. At the appellate level, the judges have a cold record. They don't get to see witnesses. They read the transcript. And it's important when you have questions to be able to ask counsel what that question is. And the same with the briefing: You're not going to want to see the trial again. You're going to want to understand why the case should be reversed or the case should be affirmed and what the reasons are behind that.

Adams: The image that comes to mind to me is that of a funnel. At the trial level, you've started at the top of the funnel, and by the time things have distilled and trickled down through the funnel, you're well down towards the narrow opening at the end of that funnel, by the time you get to the appellate court, right?

Piccone: You are, and generally the number of issues brought on appeal are fewer than the types of arguments that you make at trial.

You're looking for those reasons, if you're the appellant, to explain to the court why you want it reversed. If as you say, there has been a conviction, the court needs to understand that. In my situation as an intermediate appellate judge, we were an error correction court. So we wanted to know, what was that error? What went wrong? What did the judge do wrong? Was there some problem with the jury instructions, whatever it might be.

Adams: I'd imagine on the court, you get a spectrum of submissions from counsel, and you were the former judge, but I'll go out on a limb and venture to say that those briefs that were not distilled down that funnel and the issues clearly articulated. Instead there was an effort to sort of re-litigate the whole ... Those probably weren't very successful were they?

Piccone: It probably depended on what the issues were, but one thing I can say is they were a lot harder to distill and get down to what the real issue is.

Appellate courts are very busy. The judges have a lot in front of them. So, being able to pinpoint and explain as opposed to bringing in a whole bunch of facts that don't really bear on the issues before the appellate court, you have a better likelihood of success if you do that.

Adams: So, let's talk a little bit about the selection process when it comes to appeals.

Now, obviously there are certain issues that just get appealed as a matter of right. But when it comes to a court such as the one that you sat on, granting permission to file an appeal, and accepting the appeal, it strikes me that -- and I was reviewing this earlier today -- the United States Supreme Court's grant rate is something right around 5%, which means of the thousands of people that present their issues to the U.S. Supreme Court, only 5% are granted, certiorari is granted. I have been on the losing end of that request for certiorari a number of times on issues that I thought were just the cats meow of legal issues, but apparently the Court felt otherwise.

Talk to me a little bit about the process of when it's not an appeal as of right scenario, but it's where permission to pursue the appeal needs to be granted. With your experience in particular, at the intermediary appellate court, how does that process work?

Piccone: The court that I sat on was an appeal of right. So, the cases that we handled came to us from the trial courts, and you had a right to appeal as long as you filed your notice of appeal and did all of that within the timeframe.

The Supreme Courts, both at the state level -- or whatever the state Supreme Court is -- where it is a petition, and at the federal level, I was interested in some of the language that they use. I mean, but generally the kinds of cases they say you need to show to have a petition for cert, the Supreme Court uses the word "compelling reasons." Colorado uses "special and important reasons."

Some other states use reasons like "great concern, gravity and importance to the public." So what those courts are looking for are issues of either first impression or issues in which the law was

applied incorrectly, or there's a constitutional issue, certainly at the Supreme Court. The Supreme Court will look at whether or not the Federal Courts of Appeals are in conflict. If so, they're more likely I would say to grant the petition for cert so that they can be the final word on it. And if they look at state court issues, appeals from the highest state court, it's whether the state court has applied to federal statute wrong, or some other almost egregious ruling that comes out of a state court. That's probably not the best way to say that, but the courts are looking for issues that have broad application and questions of substance on issues that are going to affect the public generally and the interpretation of the statutes and the law.

Adams: Harvard Law Review compiles some statistics as it pertains to the cases that the Supreme Court of the United States takes. The majority, by perhaps 20%, were criminal cases and something around, in the 2020 term, something around 62%. Does that surprise you against the backdrop of what you were just talking about? About the selection process that goes into deciding when to grant cert when it's not an appeal as of right? Or is that in line with what you would expect?

Piccone: I'm not surprised that more than half of the cases that they grant cert on are in the criminal realm. Those cases often involve constitutional questions or the application of federal law. So, no, that doesn't surprise me.

As far as my state, in Colorado, I don't know the exact number, but I'm very comfortable in saying it's probably more than half of the petitions for cert that are granted in Colorado are criminal. I know on the Court of Appeals, the number of criminal cases that the courts review exceed the civil cases.

Adams: Yeah, I mean, what more compelling or what more special and important, as you articulated on those standards, than actual constitutional rights and people's liberty that's at stake in the criminal process.

Let's shift gears for just a moment and talk to me a little bit about now in your role as co-chair of Fox Rothschild's appellate practice, when is it the right time to start thinking about an appeal?

Piccone: I would say that you need to be thinking about an appeal at the beginning of the case, during the prep, because you don't want to try your case for an appeal, but you do need to make sure that you have set it up properly, both factually and legally.

The big issues that you're going to be facing in the trial that you know have to do with probably more legal than factual issues... You want to devise a strategy at the beginning of the case to make sure that you are setting it up for the best outcome that you can, both at trial and then if necessary on appeal.

Adams: And what does that involve? Does that involve making sure that you have a robust record that you've created on those particular issues?

So, let's just pull a hypothetical out for just a moment. Let's say we're talking about a search and seizure issue. What would that look like at trial, from your perspective, to develop it appropriately, to have it ready at appeal?

Piccone: First of all, obviously you'd need to gather the facts and know what all of the facts are and do the research to determine whether there are other cases on similar facts and what the legal basis for challenging that search and seizure would be.

Then, you devise the strategy. You determine what facts you need to have in whatever motions you are filing, in whatever arguments you are making to the trial judge. Recognizing that you may be seeing some conflicts in some of the cases, maybe the case law, doesn't say exactly your situation or doesn't address exactly your situation. So you're going to have to go beyond that and review case law that addresses it generally, and then make the decision strategically how you want to apply it to your case, and kind of stick with that argument.

Obviously at trial things change, and you have to be ready to make those changes. But as far as the record, you want to make sure that it's in the record. You don't want to find a situation where you go, "Oh my gosh, we did not preserve this issue," and therefore have to argue that it's, what's called plain error, which is a higher standard. You want to have a robust record, and that's probably one of the things that, if you have an appellate lawyer at trial, that helps. Because then that person can be.... You can worry about trying the case and you can focus on trying the case and the appellate lawyer can focus on making sure that what needs to be in the record is in the record.

Adams: Yeah, in my experience, these appellate issues don't exist in a vacuum. And in one of the cases that I was mentioning to my chagrin as having been rejected for certi by the United States Supreme Court, I believed that the seminal issue was a Fourth Amendment issue. But by the time that we got to briefing it, the Fourth Amendment issue sort of took a backseat to what I thought and saw as an overarching Fifth Amendment issue.

And it had to do with the compulsion of a criminal defendant to provide their mobile cell phone password to unlock the contents of the phone. All throughout the trial court, it was addressed as a Fourth Amendment issue. I guess I had the benefit of being amicus in that particular case, so I could bring it from all angles and was more of a 30,000-foot type of perspective that I was bringing to the court. But at the end of the day, what appeared as a run of the mill Fourth Amendment search and seizure, kind of, consent issue, really rose and fell on whether it was a testimonial utterance, thus invoking the Fifth Amendment.

I think sometimes you don't really know when you're at the trial court exactly how that's going to shape out. I mean, would you agree with me that you just kind of have to be open to whatever the facts present?

Piccone: Absolutely. I would say, as an appellate lawyer, you devise your strategy based on the law and on the facts that you know. But we all know that when you get to trial, sometimes the facts don't necessarily agree. You get into a motions hearing, sometimes the facts don't necessarily come out the way that you think they will. One of the things that as an appellate lawyer, you have to think about is, you don't want to get too entrenched in a specific argument, because you do want to be able to move and adapt to how the evidence is coming in. Hopefully in the situation you just described, or in other situations, you look beyond some of the issues and you try to be creative and say, "What else could this be?" So you can't set it in stone, but what you can do is at least try to set it up such that you're making the arguments that you would anticipate if you lose, could potentially be an appellate issue.

Adams: I'd imagine that understanding appellate issues, as you say, getting in from as early as possible, is much easier in real time than going back and reviewing it through a record. Is that fair?

Piccone: It is so much easier. Yes .

I am doing that right now and reviewing an order that... I didn't know about the case up until I saw the order. And it is much more difficult and very doable, obviously, it happens probably more often

than not. But if you have some understanding of the case coming into the case as an appellate lawyer, obviously it's a little more easy, a little more efficient.

Adams: Now, across the country, there's varying rules around interlocutory appeals. For our audience, that just means before a final judgment or a conviction. But in your jurisdiction where you sat on the court, were interlocutory appeals as of right or did you have to make a special showing?

Piccone: When I was on the court, I don't believe that they even had the interlocutory rule on the Court of Appeals. They do now, and yes, you have to make a special showing and the trial court has to agree to it before you file your briefs in the appellate court. And even if the trial court agrees with that, the appellate court here, at least in Colorado, can say, "Uhuh, this isn't an issue." And it has to basically be an issue of first impression. Something that that just really has not come up before or is so in conflict. I think that our Court of Appeals in Colorado accepted one of those in the last 12 months.

Adams: Wow.

Piccone: At least here it's uncommon. And my understanding would be, and my thought process would be, that it's probably not that much different in other courts, just because it gets difficult if you're taking cases in pieces.

Now, I do know there are courts that do allow appeals throughout the course of the underlying case without having to have a final judgment.

Adams: I happen to practice in one jurisdiction where they do allow it...

Piccone: Right.

Adams: ...and another jurisdiction where they don't. In the jurisdiction where they don't, I spend a lot of time talking to clients about whether it's worth it to take that shot. And in candor, I view my obligation to tell them how small of a chance that they have at obtaining interlocutory review and how exacting and high the standard is to secure that kind of review.

Can you think of the types of cases that you would say have a better shot at that very minuscule percentage?

Piccone: The issue would true in my mind for our court appeals here in Colorado. And then there is a petition to the Supreme Court that you can seek as well. So both would kind of loosely fall in the interlocutory review.

It truly needs to be something that is close to being never... The court has not ruled on and it's going to have an effect on the case at that point. Such that if you take it all the way through to trial, you will have essentially lost it.

For example, if there's a privilege issue and you seek review on that, you are more likely to get review because if they don't and you're ordered to produce documents, once you've produced those documents, you cannot take that back.

It's not something that can wait until the end essentially, that the harm is imminent, if you will.

Adams: That's a great example of privilege, right? Because I've even presented on interlocutory review again, in that jurisdiction where they don't allow them as of right. I've presented due process issues and argued that it strikes at the fundamental proceeding.

And even that can be reversed on appeal at the conclusion, right? Because the cat's not out of the bag. If it's a faulty process, well then we'll throw the whole process out and either start over or it's done.

Piccone: Right.

Adams: You could do it again or if it's so flawed that it can't be done again right, well then it's over. But as it relates to privilege, once that cat is out of the bag, so to speak, it's done.

Can you think of another issue like that? Where it would strike at the heart of the very thing that's sought to be protected, that you would need to decide it before the conclusion of the case?

Piccone: One other area where I've seen the courts accept the interlocutory review is -- and this is in the civil context -- but it has to do with if you've been asked to turn over, say confidential documents and discovery or documents in the discovery that really impinge someone's right to privacy. And that turning them over from one competitor to another, if you will, could potentially be a question that would be reviewed. I actually have seen one court take one of those issues. So, those are the two examples that I'm thinking. I'm sure there are others.

Adams: That's fascinating.

Now let's kind of peek ahead and do a little bit of speculation if you will.

Piccone: Okay.

Adams: We've just come out of a once-in-a-generation, or hopefully we're coming out of a once-in-a-generation, pandemic. Depends on what day of the week it is, whether we're actually coming out or, we're going back in. But assuredly, no one can contest is the fact that the federal government has injected a massive amount of economic stimulus into the economy by way of programs like the Paycheck Protection Program, idle loans, the Employee Retention Credit, all of these massive programs totalling trillions of dollars of federal funds being injected from a bottom-up approach in the economy.

What I'm seeing in my practice is an enormous amount of prosecutorial and investigative resources being thrown at rooting out and bringing to justice any kind of fraud that was associated with those programs. At the time that the Paycheck Protection Program was announced under the CARES Act at the end of the first quarter in 2020 when the sky was falling with COVID, there was talk of every loan over 2 million would be subject to audit. Well, that's playing out in real time now.

Whenever you have sort of a piece of legislation that's rushed into being because of an emergency... We saw it after 9/11. Some of the things that went on in the interests of national security that were litigated and, candidly, are being litigated to this day in things like detentions at Guantanamo. But with this COVID stimulus, you had a program that by everyone's acknowledgement now was ill-conceived at the outset. There wasn't sufficient internal controls. By the fall of 2020, there was a congressional Select Committee that indicated that this program was wrought with fraud. Some congressional watchdogs suggest that the amount of fraud could total as high as 20% of the actual

stimulus that went into the economy. When we're talking trillions of dollars, that's just an enormous sum.

When you have a program that was rolled out so quickly that everybody's acknowledging was somewhat ill-conceived - didn't have sufficient controls on the front end and now there's this rush to claw that money back, so to speak - how do you deal with the emergency nature of the statutory enactment from an appellate situation where these laws and regulations and the ambiguities and the vagaries of all of this stuff that went into law to try to fend off an emergency. How does that play into your consciousness as an appellate lawyer?

Piccone: Those are really interesting questions and making me think a little bit about what would I do and what will the judges do? One of the premises of being a judge is that you have to look at the law and you have to read the law and interpret it. That happens with every statute, whether it's well written or not.

Sometimes you'll see statutes that have been on the books for years, that who knows what was going on at the time that they wrote it and whether or not it was written quickly or well-thought-out. So it's going to be difficult I think for judges to completely set aside the emergency nature of when these statutes went in and perhaps the idea that maybe they weren't drafted as well as they should have, or they weren't clear about what the requirements were to be seeking these loans and the paycheck protection. But I think ultimately it's going to come down to what was the law and how are we as appellate judges -- and I'm using the collective we, not me -- but how are the judges going to interpret those laws?

It's the type of situation where I would expect that you're going to get varying interpretations across the country depending on where you are and the facts of that case. Those are the kinds of issues that I could see percolating up into the appellate courts and then perhaps the Supreme Court.

But again, ultimately I think it comes down to -- when you are in the appellate process -- really looking at the interpretations of those statutes. How do they apply and what do they say? I think there may be holes in those statutes that defendants can then look at and it'll ultimately turn on what the judge thinks it says.

Adams: Yeah, I just think we are at the very infancy of a massive amount of litigation. I know our firm is tracking the criminal and regulatory enforcement cases that are being brought under some of these COVID stimulus programs, and every day, the number of these cases continue to increase.

There are starting to emerge various patterns of the reasons why people made errors, for example, in obtaining their maximum loan calculation. There were questions that arose. And I think this statute that, if we're going to isolate it to the CARES Act, there was a lot of regulation that went along with it too, because this was just an enabling statute. And then the SBA as a federal agency was tasked with promulgating regulation that also governed it. Some of those regulation took a vague statutory provision and actually made it more confusing at the outset. That process only sort of unwound over time.

I think as I have dissected a number of these cases, and we're handling them at various stages throughout the country, I think one of the predominant themes is that the low-hanging fruit in this area kind of speaks for itself, right? It's when you see it -- speaking of the Supreme Court, Justice Potter Stewart-- and you're able to determine right away that this is a fake business that was designed to take money in and use it for some kind of ridiculous thing.

But we've had a guest, an earlier version of this podcast, that was actually one of the trial witnesses at the first case to ever get tried for PPP fraud, way back in March of 2021. One of the pretty fascinating things that she said is that gentleman was convicted of taking in PPP money and using it to acquire a boat. But at the same time, he basically co-mingled the money with existing funds and had sufficient justification to take in the amount of money that he achieved through the program.

The quibble of the government was that when you do a dollar-for-dollar tracing, they were seeing that he acquired something like a boat. Well, isn't money fungible? If I have a million dollars and I get a PPP loan for a million dollars, and I put 'em in the same bank account, and I use a million dollars to pay my payroll and a million dollars to buy a boat...

The program didn't require you to segregate the money, and money is fungible. So, I think there's gonna be a lot of interesting intellectual battles that are coming down the line on this very issue. I think, Marsha, based on the number of cases that our firm has, we're probably going to see some action in that regard. And I can't wait to enter that realm with you as well.

As we come to our sort of concluding thoughts for the time that we have today together: If you had to give one piece of advice to litigants who want to make sure that they're not dispensing with any rights to have another court look at the issues that they're trying to litigate, what would that piece of advice be?

Piccone: Make your record. And you'll hear that for many of the appellate judges and lawyers is, make the record. It's never going to be perfect when you're in a trial situation, but know what you want, know your main issues and make those records.

Particularly when you're arguing jury instructions. If you've got an objection, make sure that it's on the record to make sure that it's clear and what that objection is. It all comes back down to appellate judges have only a written record and that's what you want to make sure you do.

Adams: I'm struck by your advice, because oftentimes in the course of giving advice to medical professionals I'll say, "If it doesn't exist in the patient record, it didn't happen." Is that kind of the same thing that you're saying?

Piccone: It's absolutely correct. Yes. One example is, sometimes the judge will call counsel up to the bench and there'll be a sidebar conference. And some important things can happen during those things. Sometimes they're not on the record. So, that's the kind of thing where you want to look, make sure that the court reporter's taking it down. If they're not, ask them to take it down. But if it's not in the record, it did not happen.

Adams: Well, Marsha, I can't thank you enough for joining us today on "The Presumption of Innocence" and lending some insight into the appellate process. Obviously, there's so much more to unpack. We could talk all day about these issues, but it's a great primer, and I hope that the audience found that as beneficial as I did.

Until next time. My name's Matt Adams, and thank you for joining us. We'll see you next time on "The Presumption of Innocence."