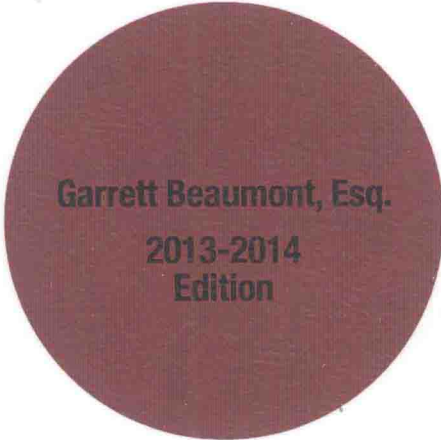




Avoiding Reversible Error in Criminal Cases



Garrett Beaumont, Esq.
2013-2014
Edition

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Avoiding Reversible Error In Criminal Cases

by **Garrett Beaumont, Esq.**



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ABOUT THE AUTHOR

Garrett Beaumont, Esq.

Garrett Beaumont has spent 30 years practicing criminal law. After receiving his A.B. degree in political science from the University of California at Berkeley and his Juris Doctor from the UCLA School of Law, Mr. Beaumont began his legal career as the research attorney for the San Joaquin County Superior Court. There he researched and helped prepare habeas corpus rulings, superior court appellate department opinions, criminal trial court rulings and civil law and motion rulings, before joining his current position as Deputy Attorney General in the California Attorney General's Office. He worked in the Sacramento Attorney General's office from 1977 to 1989, and the San Diego office from 1989 to the present time.

He has spent his entire career with the Attorney General in the Criminal Writs, Trials and Appeals division, both as a line deputy and as a supervisor, although his duties have varied over the years. Before the creation of a separate Corrections Unit in that office, Mr. Beaumont spent a portion of his time defending California Corrections personnel against federal civil rights suits filed by the inmates of California's state prisons. He has spent the bulk of his time, however, then and now, as an appellate attorney defending California's state court criminal judgments in the California Courts of Appeal, the California Supreme Court and, when he opposed certiorari or filed his own certiorari petition and amicus curiae brief, in the United States Supreme Court. When criminal judgments became final following their appeal, he then defended collateral, post-affirmance habeas corpus attacks, primarily in the federal district courts and the Ninth Circuit Court of Appeals. Contested evidentiary hearings often followed, for the most part in death penalty judgments defended by Mr. Beaumont, with death penalty habeas attacks usually focused on alleged ineffective assistance of trial counsel.

Mr. Beaumont also prosecuted criminal cases in state trial courts, ranging from murder to driving under the influence. He did so either during attorney-exchange programs with the Sacramento District Attorney's office or as a Deputy Attorney General called upon to prosecute cases where the local District Attorney had declared a conflict of interest.

AVOIDING REVERSIBLE ERROR IN CRIMINAL CASES

The perspectives Mr. Beaumont gained as an appellate attorney occasionally prosecuting cases in the trial courts helped inspire this book, as did Continuing Education of the Bar seminars he later presented to deputy district attorneys. The federal habeas corpus challenges he faced alleging ineffective assistance of trial counsel, as well as his social and professional interaction with criminal defense attorneys and trial prosecutors, helped guide his preparation of the book for both sides.

Mr. Beaumont has also contributed to Roger Haines' *Ninth Circuit Criminal Law Reporter* (1997, James Publishing), prepared monthly and bi-monthly articles for the California District Attorneys Association's publication "*Did You Know*," and contributed a chapter to the CDAA publication *Professionalism, a Sourcebook of Ethics and Civil Liability Principles for Prosecutors*. He expanded on his work for the latter publications when preparing this book.

The publisher also wishes to acknowledge and thank Douglas R. Parker for his assistance in compiling and writing the index for this text.

PREFACE

The Goal of this Book

Trial lawyers face many practical hurdles getting their cases before juries, keeping them away from juries, and/or wrestling for favorable verdicts for their clients. Criminal law cases epitomize this struggle. Few trial lawyers have the time or inclination to ponder the steady plethora of reviewing court pronouncements or the future consequences of their own in-court activities. Trial court practitioners rarely speak the same language as denizens of the reviewing courts. The nature of trial work dictates the difference. This book strives to bridge the gap between trial lawyers and the reviewing courts.

My own career experiences led me to prepare and compile this book. I spent my first two professional years as a research attorney in a county Superior Court. I spent the next 29 years as a Deputy in the California Attorney General's office. I devoted all those years to the Writs, Trials and Appeals Section of the Criminal Division of the state Attorney General's office.

Most of my time with the Attorney General focused on writing respondent's briefs and federal habeas corpus returns, or arguing in the state Courts of Appeal, the state Supreme Court and Ninth Circuit Court of Appeals. Occasionally, however, I ventured back into the trial court to try cases.

I prosecuted misdemeanors in a six-week exchange program with the Sacramento District Attorney's office and also prosecuted felonies in a six-month exchange program with the Sacramento District Attorney's office. I prosecuted cases in various trial courts as a Deputy Attorney General when a local district attorney's office declared a conflict of interest.

My trial court forays confirmed my theory that the trial court and appellate court comprise two very different worlds. Trial practitioners and appellate practitioners think differently. The radically different pace of the two jobs dictates the difference. It is my opinion, as well as my intent when writing this book, that the two worlds should broaden lines of communication.

Those who review trial court decisions must do so with an eye to the reality of the trial lawyer's job. Trial court prosecutors, for example, face challenges unknown or forgotten by

many of those who review their actions:

"Which of my six scheduled jury trials will actually go today? Will there be an available courtroom? What should I offer to settle the case? Will the judge go along? Will the victim? Will my boss? What about the defense attorney's offer? Should I reject it or counter it?"

"Should I oppose the requested continuance? When did my police officer witness schedule his vacation? What if my informant skips town?"

"Did the police include everything in their reports? Someone said they made a videotape or audiotape. I only had a chance to skim the reports when I got the case this morning. Will the judge dismiss the case if I don't find the tape and turn it over?"

"There's my investigator: I haven't had a chance to talk to him yet. Better nab him in the hallway. Uh oh! He's talking to people wearing juror badges. Are they prospective jurors for my case or someone else's? Better get him away from them."

"Too bad I got stuck with this judge. She has a reputation as a stickler for laying foundations and establishing chains of custody. The sheriff's department didn't label those exhibits until they changed hands. If she keeps them out, my case is over."

"Better take my seat while the prospective jurors file in. I see at least three who'd never vote guilty. I can tell by the way they look. Hope they don't get called for questioning. I'll have to come up with some good reasons for my peremptory challenges. Otherwise, the defense will yell discrimination."

"Finally! I can talk to my investigator now that he's found his way to the prosecutor's desk. Why's he nudging me and telling me to be quiet? Uh, 'Sorry Your Honor, I didn't hear you. Yes, I'll introduce myself to the prospective jurors.'"

"Ah, she's calling names to the box already. Better mark them down. No time to talk. I'll have to interview my witnesses and think up an opening statement during lunch."

Appellate lawyers and judges spend much of their time analyzing precedent and the finer nuances of legal analysis. Some spend time quoting opinions and comparing the factual pattern of one case to another. Others seize on footnotes to explain why an opinion meant more than what it said. They debate the meaning of words and the interpretation of statutes. They discuss the judicial history of a reigning appellate concept. Abstractions surround them.

I felt like I went through a time warp when I traveled from one world to the other and back again. Trial court prosecutors have their hands full investigating their cases, bringing their

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cases to trial, anticipating and defeating defense strategies, and winning convictions. Criminal defense counsel face similar challenges, including how to strategically counter the prosecutor's moves. Sometimes, the reviewing courts unreasonably expect that trial court practitioners will have enough time and energy left over to absorb detailed, lengthy and abstract legal discourses, which often alter the way a case is tried. Such expectations only serve to expand the void between the two worlds.

I wrote monthly articles for the California District Attorneys Association's *Did You Know* magazine, hoping to translate recent, lengthy opinions affecting trial prosecutors' work into simple answers to the question: *What do I do next?* Feedback from some suggested these articles were appreciated. I therefore decided to rewrite them and compile them into an overall trial guide, expanding the guide to include topics not covered in the articles and to reach defense counsel as well as prosecutors.

This book is the result of those efforts. It attempts to chronologically cover the hidden legal hurdles trial lawyers might face from the time they get the case through the verdict. It is not exhaustive, by topic or by any state's law, although it is intended to be read by criminal attorneys in every state. It does not cover all the possible hearsay exceptions or proof requirements of every element of every crime, which are often the subjects of separate, detailed treatises. Nor does it cover the intricacies of sentencing, with pre-sentence reports, state sentencing rules and sentencing manuals already providing trial practitioners more than enough information for that vast topic. It does not cover specialized litigation like death penalty prosecution, insanity trials, or mentally disordered sex offender proceedings.

Instead, it includes general trial topics for most felony crimes handled by trial lawyers, with the goal of providing general information useful to all trial litigation. *The topics chosen include those that most often catch the attention of appellate lawyers and the reviewing courts.* The book emphasizes recent appellate court developments and makes no pretense of helping either prosecutor or defense counsel win the desired trial court verdict. They know best how to do that.

If successful, the book will help trial lawyers avoid the hidden stumbling blocks that could ruin their records on appeal. It will help conserve the trial practitioner's time and energy for the battles faced every time a case gets filed and brought to trial by removing concerns that some hidden twist in the ap-

pellate law will derail litigation efforts once the case gets reviewed.

Benefits to Prosecutors and Defense

I originally designed the book exclusively for prosecutors. Avoiding unwanted reversals seemed to be their domain. Then I realized that defense counsel also had a stake in avoiding appellate error. For defense counsel, appellate error often means a finding of ineffective assistance of trial counsel. By including defense counsel within the scope of this book, I speak to those who honestly seek the best trial court result for their client, i.e., the most favorable plea bargain or the most favorable verdict, from acquittal to some lesser included offense. Defense lawyers interested in this book will prefer such a result to appellate error, the loss of professional standing occasioned by a judicial finding of constitutional ineffectiveness, and the necessity to re-defend the same client in a new trial.

In California, a reversal for constitutional ineffective assistance of defense counsel carries an added sting: the reviewing court refers defense counsel's name to the California State Bar Association for possible disciplinary action. Aside from the danger of such a referral, a judicial finding of ineffectiveness necessarily dims the private practitioner's repeat business or the public practitioner's chances for further promotion.

AVOIDING REVERSIBLE ERROR IN CRIMINAL CASES is divided into two main parts: Prosecution Errors and Defense Errors. Since prosecutors initiate the charges and bring the case to trial, the first section devoted to prosecutorial errors far exceeds the other section in length.

Although its main focus is on errors committed by the prosecution, the Prosecution Errors section provides information equally vital to defense counsel since raising appropriate objections to the prosecutor's actions or evidence and finding ways to rebut the prosecution's case comprise the bulk of defense counsels' duties. Defense counsel need to know what prosecutors can and cannot do in order to effectively represent their clients. The separation of the two sections of the book is, in that sense, an artificial one.

Each topic within the book's two sections discusses authorities relevant to the error being addressed. Since I have practiced exclusively in California, much of this book's case and statutory law comes from California. The book nevertheless includes case authority from other states. Future supplements to **AVOIDING REVERSIBLE ERROR IN CRIMINAL CASES** will include new cases from both California and

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non-California jurisdictions, as applicable, and will also expand on the errors made by the defense. New subsections will appear in the supplements as needed. The book's value, however, should not depend on the source of the precedent. Major points of law cut across state lines, despite the name and number of the code section or the citation of the published opinion. The book's goal—imparting a working awareness of appellate consequences for each trial court action—remains unaffected by the particular source of cited statutory or case law.

The reader may wonder why someone who spent nearly 29 years as a prosecutor reaches out to both prosecutors and defense counsel. The book's ultimate goal—the avoidance of unnecessary reversals and retrials—depends equally upon both camps. If both prosecutors and defense counsel enter the trial court knowing how to avoid appellate error, the ultimate beneficiaries should include the courts, the people they serve, and justice itself.

Lessons Learned from a Tai Chi Master

With these goals in mind, I leave the reader with the following thoughts gleaned from a legal strategy seminar I took from Solana Beach Tai Chi Master Chris Luth. Master Luth offers a variety of seminars that focus on such topics as conflict resolution and training, group dynamics and stress reduction. His clients include sheriff's departments, government agencies, businesses, attorneys, psychologists, and professionals from all walks of life.

Stymied by an intractable federal habeas corpus proceeding challenging a 17-year-old California death penalty judgment, I sought out Master Luth's counsel to deal with my legal ordeal. The session yielded many strategic insights, a few of which are imparted below to assist all trial practitioners in avoiding errors which if made, could mar records and lower professional standing.

A. Cease striving to take your opponent's energy. Take your focus away from belittling or beating down your opponent. Such efforts move you away from the goal of perfecting your record. Furthermore, they invite similar, retaliatory tactics. The resulting negative spiral thrusts you into irrelevant battlegrounds, increasing the risk of random error.

B. Maintain your center. Throughout the contest, maintain and act from your center. Don't let the winds of conflict distract you from your ultimate goal. Abraham Lincoln stood as a paragon of this type of centeredness. Whether representing railroads or individuals, Lincoln never lost sight of his ultimate

goal in each case. As one might expect, his opening statements and concluding arguments to the jury were short in length and long on common sense. He rarely objected during trial, even if an opponent strayed from a particular evidentiary rule, unless his own case was threatened. He willingly lost many a legal skirmish to win the ultimate verdict. Your own risk of creating reversible error will diminish exponentially to the degree you successfully maintain your center throughout the contest.

C. Avoid moral judgment. *THE TAO OF PHYSICS* by Fritjof Capra (Shambala Productions, Inc. 1975) says energy fills the universe. The things we see are merely vibrations of varying wave lengths and intensity. Duality characterizes reality. Up and Down. In and Out. Backwards and Forwards. Light and Dark. Male and Female. None of these aspects of reality exists without its polar opposite. You work within the framework of laws laid down by others. So does your judge. So does your jury. The "right" tactic for you is always the tactic that advances your case within the law. If you step outside your role as advocate within a legal system designed by others and assume the mantle of moral superior, you condemn your antagonist to immorality. Such a stance lifts you from the field in which the law has placed you. A prosecutor who steps outside his role by straying from the evidence presented in the courtroom, like the defense attorney who abandons the code of ethics which bind the defense, invites appellate error.

D. Stay in the moment. Master Luth loves skiing and surfing. But if forced to choose between the avocations, he clearly prefers surfing. The waves, unlike the mountain, keep moving beneath your feet, much like your trial opponent, your judge, your jury, and the law upon which you rely. Surfing challenges you in ways skiing cannot. You must maintain your awareness at all times by staying in the moment. This skill requires all three skills set forth above. To keep your balance over the rolling waters, you must avoid distractions by avoiding unnecessary efforts to take your opponent's energy. You must maintain and move from your center. And you must avoid making unnecessary moral judgments about the shifting environments facing you since you cannot afford the emotional distraction such judgments entail.

My own federal habeas corpus ordeal seemed like a chapter from the best seller, *WHO MOVED MY CHEESE?* by Spencer Johnson (Putnam Publishing Group 2000). Changing federal law, my opponent's shifting claims, and the federal court's varied rulings made me feel as if I were shooting at a moving target as I attempted to defend California's death penalty

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judgment. Perhaps you feel that way when trying cases. If so, remember the foregoing insights from Master Luth, even if you forget case citations or code section numbers. When all is said and done, your awareness of your surroundings and a curious and humble state of mind are your best guardians against appellate error.

FOREWORD

In editing Mr. Beaumont's manuscript, what struck me most was that, without sacrificing substantive content, he provides the user with relevant legal principles in an easy, conversational manner. The anecdotes he shares are invaluable in imparting practice tricks, tips, and cautions that are typically gleaned after years of trial and appellate practice. Irrespective of whether you represent prosecution or defense, or are a seasoned professional or newly admitted attorney, **AVOIDING REVERSIBLE ERROR IN CRIMINAL CASES** provides a rare opportunity to get into the mind of a 30-year criminal law veteran for advice on the most critical intricacies of your case. It's like having a mentor to whom you can turn for insights on the way the system works and how you should proceed whenever a criminal case throws you a curveball. With so much at stake, such advice can literally mean the difference between life or death, and certainly can help to avoid countless hours spent needlessly retrying cases or preparing for otherwise preventable appeals.

Lori Maze, Esq.
Editor

HOW TO USE THIS BOOK

Overview

Thank you for choosing **AVOIDING REVERSIBLE ERROR IN CRIMINAL CASES**, a unique and practical new resource for criminal attorneys. This text is designed to provide a straightforward discussion of the most common errors made by prosecution and defense counsel before, during, and after the trial of criminal cases. The text will also allow readers to quickly find ready-to-use citations to identify and avoid making those mistakes. While the publisher has attempted to include many essential errors made by counsel in the trial of a criminal matter, not every possible error can be covered in this text. We welcome your feedback or contributions regarding other potential errors, trial issues, or additional matters and assure you that we will strive to add new issues and new potential errors with each annual update.

While this book is designed to identify errors by any attorney and includes discussion and checklists applicable in any state, readers should note that the author, Garrett Beaumont, has been a California criminal lawyer for 30 years. As such, his point of discussion often springboards from issues or citations that have arisen from his own courtroom experience. This is not to suggest that the laws of other states are not represented herein, but readers should note that the citations are not meant to be an exhaustive national survey. Instead, this book should be used first as a checklist to avoid any of the identified errors and second as a means of reviewing Mr. Beaumont's analysis and mistake-avoidance suggestions. Cases or other legislative laws are cited for illustrative purposes. Once a potential error is identified, readers should evaluate the laws of their own states to determine if they are at risk of making the same potentially reversible mistake. As with any secondary source, if you still require additional case authority after reading this book, please review traditional treatises or online research sources to determine the comprehensive status of the law in your jurisdiction.

Quick-Research Format

AVOIDING REVERSIBLE ERROR IN CRIMINAL CASES is organized in a unique "quick-research" format that

allows you, whether in your office or in court, to zero in on potential errors made during a criminal trial and advises you on how to avoid making those mistakes. Every chapter is broken out into the following three quick-research sections:

1. Potential Error

In this section you will find a clear and concise statement of the potential error.

2. How to Avoid Error

This section delineates what action to take to avoid committing the error specified in the preceding section.

3. Discussion

This section provides an informative, yet succinct explanation of the practical aspects of the error at issue and discusses key citations having addressed such error. By understanding the different scenarios in which the particular error can be committed, counsel is better able to avoid stumbling into that pitfall.

You will find both state and federal authority cited and analyzed within the *Discussion* section. As indicated above, the cases contained in this section are by no means meant to be exhaustive, but rather, are intended to provide a useful compendium of key citations to support the discussion of each error and to provide a springboard for further research, argument and/or opposition, in the event that appellate review becomes necessary.

The author and publisher have attempted to provide essential and up-to-date legal citations in this text; however, this source should not be your final reference. Once you have found a helpful case, be sure to read it in full to ensure that the holding is applicable to the facts of your case and to KeyCite® the case to verify that it is still valid and citable law. Before filing a brief or taking any action on a case, you should also consult with the local rules for the applicable court, including “local, local” rules, to determine the hearing dates, procedural requirements, and preferences for a particular judge who will be hearing your case. Again, if you find after reading this book that you still require additional case authority, please review other appropriate legal resources for your jurisdiction.



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