



Ten Top Pitfalls on Appeal And How to Avoid Them

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1

Failing to Appeal / Cross-Appeal



Failing to Appeal / Cross-Appeal

- **Pitfall of Failing to Appeal:**
 - “Where an appellant specifies one order of the district court in his notice of appeal, but fails to identify another, the notice is not sufficient to confer jurisdiction to review the unmentioned order.” *Rosillo v. Holten*, 817 F.3d 595 (8th Cir. 2016).
 - Trappings of e-notifications.
 - Not counting the days to appeal correctly. *Sandwich Isles Comm. v. FCC*, No. 19-1056 (Fed. Cir. 2019)
- **How to Avoid:**
 - Reference the final judgment in the notice of appeal
 - Read the entire order
 - Check spam filter
 - Count the days correctly
 - Be careful on post-trial motions
 - File early and in the correct court
- **Pitfall of Failing to Cross-Appeal:**
 - Because what the appellee claimed was an alternative ground for affirmance would “enlarge her rights,” that argument “is not properly before us because she failed to cross-appeal.” *Segura v. Jones*, 259 Fed. Appx. 95 (10th Cir. 2007).
- **How to Avoid – Know when you need to file:**
 - If it would change the *judgment*, you need to file a cross-appeal (Federal)
 - Some state jurisdictions (like Minnesota) require a cross-appeal to change an *order* even if no change to the *judgment*.

2

Waiving / Forfeiting Arguments



Waiving/Forfeiting Arguments

- **Pitfall of Failing to Preserve an Argument:**
 - *Emulex Corp. v. Varjabedian*, Sup. Ct. No. 18-459
 - “A denial of summary judgment is not appealable after a final judgment regardless of whether the issue is factual or ‘purely legal.’” *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869 (8th Cir. 2012).
- **How to Avoid – Object Early and Often:**
 - Need to object to preserve issue on appeal
 - Err on side of objecting early and often
 - Detailed objection
 - Specify relief sought
 - On the record
 - Designate an attorney to specifically focus on issue preservation

3

Overlooking the Record on Appeal



Overlooking the Record on Appeal

- **Pitfall – If it's not in the record, it doesn't exist**
 - Ordering the transcripts
 - Exhibits
- **How to Avoid – There are other avenues**
 - Certain online sources
 - Motion for judicial notice
 - Amici

"[W]e do not know what the applicable grievance procedures—those used in Cantwell's facility during the time period involved in this case—were. They are nowhere in the record because the defendants never introduced them as evidence. Texas does put its grievance procedures on its website, though, and we may take judicial notice of the state's website. The procedures on the website, however, are dated January 2015, and the events involved in this case took place years prior. . . . Without knowing what the applicable grievance procedures say, it's impossible to determine whether Cantwell exhausted them. The defendants had the burden to establish that there were available procedures that Cantwell did not exhaust, and the district court erred in not holding them to it." *Cantwell v. Sterling*, 788 F.3d 507 (5th Cir. 2015).

4

Not Narrowing and Identifying the Right Issues



Not Narrowing and Identifying the Right Issues

- **Pitfalls**
 - Throwing mud against the wall to see what sticks
 - Not raising an issue that could have won
- **How to Avoid – Raise the right number of issues**
 - Don't raise too many
 - But want to put issues in play, otherwise waived
 - Avoid shotgun approach
 - Group issues together
 - Two to four issues is a good sweet spot
- **How to Avoid – Raise the right kind of issues**
 - Complaints the other side didn't fight fair rarely win
 - Frame broader legal issue
 - Do your issues fit together?
 - Make sure a reversal on an issue is a real win

"[O]ne of the most important parts of appellate advocacy is the selection of the proper claims to urge on appeal. Throwing in every conceivable point is distracting to appellate judges, consumes space that should be devoted to developing the arguments with some promise, inevitably clutters the brief with issues that have no chance because of doctrines like harmless error or the standard of review of jury verdicts, and is overall bad appellate advocacy. On the other hand, counsel can't throw the baby out with the bath water." *Howard v. Gramley*, 225 F.3d 784 (7th Cir. 2000).

5

Ignoring the Standard of Review



Ignoring the Standard of Review

- **Standards of Review**
 - De novo
 - No deference given to the district court.
 - Applies to questions of law and mixed questions of fact and law when facts are set
 - Abuse of discretion
 - Highly deferential; district court has a range of choice, but can't base ruling on erroneous view of law or clearly erroneous assessment of evidence.
 - Applies to voir dire, discovery, evidentiary rulings
 - Clear error
 - Highly deferential: "definite and firm conviction that a mistake has been committed" *Easley v. Cromartie*, 532 U.S. 234, 242 (2001);
 - "Strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Kaplan v. Mayo Clinic*, 847 F.3d 988, 992 (8th Cir. 2017)
 - Applies to district court's findings of fact.
- **Proof it matters**
 - In Eighth Circuit study, reversals rarely happened (18%)
 - But twice as many reversals on de novo review (97), than either abuse of discretion (46) or clear error (52)

6

Litigating Like You're Still in Trial



Litigating Like You're Still in Trial

- **Pitfalls**
 - Focusing on how the case was argued below, rather than the legal issues on appeal
 - Proof: FRAP 30(a)(2)
 - Focusing on the facts while minimizing the law
 - Proof: Look at good reply briefs
 - Fixating on all the little things that went sideways
 - FRAP 32(a)(7) (2016)
 - Sup. Ct. R. 33.1(f) (Jul. 2019)
 - Arguing like the court of appeals judges already know the case
 - Theater of the trial court
- **How to Avoid**
 - Affirmatively argue why you win; focus on the district court's order, not the parties' briefing below
 - Cite to the law as much as you cite to the record. And focus on the law that matters – what is precedent
 - Identify what is important to the issues on appeal and strip away other details
 - Get someone with a fresh set of eyes involved in the case; what do they need to know for it to make sense to them
 - Academic dissertation

7

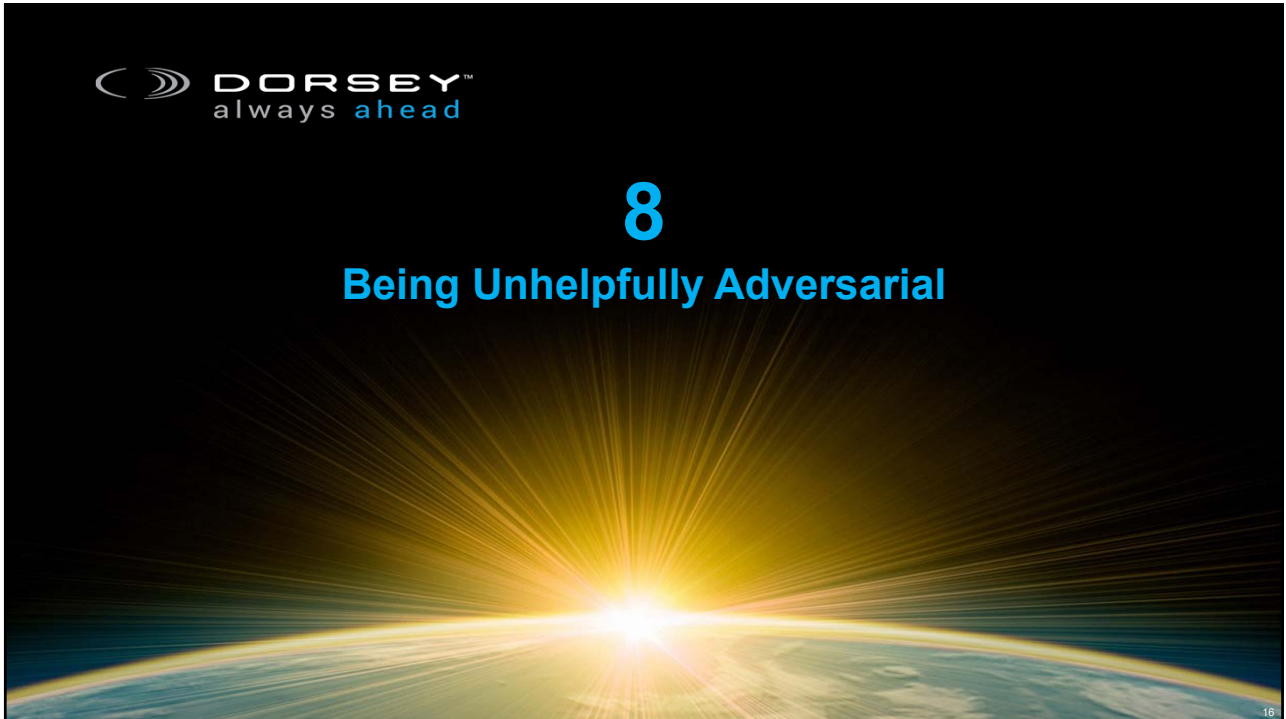
Not Properly Dealing with the District Court's or Other Side's Arguments

Not Properly Dealing with the District Court's or Other Side's Arguments

- **The Pitfall on One Extreme**
 - Ignoring the district court's reasoning and the other side's arguments in the brief
 - “Like two ships that pass in the night, both parties focused on entirely different matters, failing to address the core arguments of their respective opponent.” *Coleman v. United States*, 318 F.3d 754 (7th Cir. 2003).
- **The Pitfall on the Other**
 - Letting the district court's decision or other side's arguments frame your entire brief
- **Avoid by Taking the Middle Ground**
 - Affirmatively state why you win
 - Then explain why the district court and/or other side are wrong
- **Other Mistakes**
 - Citing as precedential authority cases the Court is unlikely to care about (district court and unpublished decisions)
 - Failing to succinctly and effectively summarize your argument

8

Being Unhelpfully Adversarial



Being Unhelpfully Adversarial

- **Pitfall – Being unhelpfully adversarial on appeal**
 - Trying to sneak something by the Court of Appeals
 - Taking cheap shots at, or speculating regarding, the lower court judge or opposing counsel
 - Reflexively opposing everything
 - Only swinging for the fences (and striking out)
- **How to Avoid – Help the appellate court get it right**
 - Address the tough facts, cases, and arguments, and in an organized way that makes sense
 - Don't throw a judge under the bus
 - Think about what will make the court's job easier
 - Also ask for a holding the court can be comfortable reaching

9

Squandering Oral Argument



Squandering Oral Argument

- **Top Pitfalls**
 - Wasting the first 60 seconds
 - Summarizing the facts
 - Trying to cover everything
 - Reading to or arguing with the court
 - Dodging the judges' questions
 - Not knowing the record or cases
 - Conceding your case away
- **How to Avoid**
 - Know your introduction cold
 - Dive into the legal issue(s)
 - Focus your argument
 - Have a conversation with the court
 - Answer every question immediately & directly
 - Know the record and cases. With cites if possible
 - Know where to draw the line
- **Do a Moot Argument with Mock Judges**

10

**Assuming a Loss (or Victory) from the Panel Means
the Case is Over**

Assuming a Loss (or a Victory) from the Panel Means the Case is Over

- **Ways to seek review of panel decision**
 - **Petition for rehearing**
 - Well-suited for misstatements that could impact remand
 - **Petition for rehearing en banc**
 - Intra-circuit split
 - Conflict with Supreme Court
 - **Petition the Supreme Court**
 - Inter-circuit split
 - Conflict with Supreme Court
- **Things to keep in mind if petitioning**
 - May need to re-frame your argument to make the issue importantly wrong
 - Find amici
 - May need to stay the mandate
- **Things to keep in mind if opposing**
 - May need to conditionally cross-petition
 - May want to keep your head down and waive a response

Conclusion

