Appellee Strategies in the Federal Courts of Appeal
Leveraging Appellate Waivers, Cross-Appeals, and Other Proactive Tactics in Civil Appeals

TUESDAY, JULY 23, 2013
1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

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APPELLEE STRATEGIES IN THE FEDERAL COURTS OF APPEAL

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July 23, 2013
## Reversal Rates (2012)

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Percentage of Civil Cases Decided on Merits</th>
<th>Civil Reversal Rate</th>
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<tbody>
<tr>
<td>All</td>
<td>57.3%</td>
<td>11.4%</td>
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<tr>
<td>DC</td>
<td>68.8%</td>
<td>12.1%</td>
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<tr>
<td>First</td>
<td>59.1%</td>
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<tr>
<td>Second</td>
<td>52.7%</td>
<td>6.4%</td>
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<tr>
<td>Third</td>
<td>61.5%</td>
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<tr>
<td>Fourth</td>
<td>70.7%</td>
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<td>Seventh</td>
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<td>11th</td>
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Four Pillars of Affirmance

- Preservation of Error
- Standards of Review
- Harmless Error
- *Stare Decisis*
Snatching Defeat From the Jaws of Victory

- Rely solely on four pillars of affirmance.
- Stick to the issues framed by Appellant and take a purely defensive posture.
- Ignore the “right for any reason” rule, and fail to offer alternate ways to the same result.
- Miss the opportunity to file a cross appeal.
Standard Appellee Strategy

- Receive Appellant’s Brief
- Outline Appellant’s Arguments
- Attack Each Argument
Trap for the Unwary Appellee

- “Right For Any Reason” rule – an appellee can argue that the decision below should be affirmed for any reason supported by the record.

- But what about issues on which the appellee lost?

- What about issues the court below ignored?
Two Competing Principles

- **Judicial efficiency** – especially in the summary-judgment context, appellate courts rule whether there is an issue of material fact for trial, and should grant summary judgment if there is not, even if the lower court applied incorrect reasoning.

- **Appellate Courts Review** – appellate courts should not be in the business of looking at new issues that have not already been addressed; they should correct errors in lower court opinions, and not render judgments on issues for which there is no ruling.

Right For Any Reason – If Not Argued?

- Appellee Waiver – issues not raised in the response brief will, in many courts, not be reviewed under the right-for-any-reason rule

  - “[a] woman of childbearing age was hired as a teacher at a small Christian school. Then she got pregnant, married, and fired—in that order. Then she filed a lawsuit. She lost on summary judgment.”
Federal Circuits – Appellee Waiver

- 7th, 10th and 11th Circuits: appellee waiver, like in the 11th

- 4th Circuit – Judge Hamilton has dissented and urged application of an appellee-waiver rule

- 2d, 4th, 5th and 6th Circuits – have refused to apply appellee waiver
Nightmare Appellee Waiver Scenario

- Subsequent appeal – *Hamilton v. Southland Christian School* goes back to the trial court, and Hamilton wins a sizeable jury verdict.

- What happens in the subsequent appeal?

- Third, Eighth, District of Columbia (D.C.), and Federal Circuits have all rejected attempts to argue that a party has waived an argument in a second appeal by not raising it in the first appeal.
When is a cross-appeal required?

- An appellate court may not alter a judgment to benefit a non-appealing party.

- A cross appeal is necessary and proper only when the appellee wants the appellate court to alter the judgment (the bottom line, not the grounds or reasoning) of the district court.

- Examples:
  - Seeking to enlarge or reduce damage award
  - Seeking enhanced or punitive damages
  - Seeking or challenging attorneys’ fees
  - Seeking to enlarge or reduce prejudgment interest
When is a cross-appeal improper?

- "It is more than well-settled that a party cannot appeal from a judgment unless 'aggrieved' by it.... Simply stated, a party who has obtained a judgment in his favor, granting the relief sought, is not aggrieved by it. A cross-appeal filed for the sole purpose of advancing additional arguments in support of a judgment is 'worse than unnecessary', because it disrupts the briefing schedule, increases the number (and usually the length) of briefs, and tends to confuse the issues.... Such arguments should, instead, be included in the appellee's answering brief."

- *In re Sims*, 994 F.2d 210, 214 (5th Cir. 1993).
Cross-Appeals: Pros

- Creates jeopardy for the Appellant
- Implicitly suggests an appellate compromise
- Provides the appellee an additional brief
- May encourage settlement on appeal
Cross-Appeals: Cons

- Puts you in the awkward position of defending the lower court on some points while attacking it on others.
- May distract from the primary focus of your appellate brief – affirm the lower court decision.
- Complicates an appeal that is otherwise easy to beat.
- Calls court’s attention to subtleties or complexities that you would prefer not to highlight.
- May make your client look greedy.
Hypothetical #1

- District Ct. grants summary judgment for Defendant on ground A, and does not address grounds B or C.

- Plaintiff appeals, asserting that SJ on ground A was erroneously granted.

- Should Defendant/Appellee raise grounds B and C as alternative grounds for affirming the SJ?

- If Defendant/Appellee does not raise those grounds, has he waived them?

- Does Defendant/Appellee need to file a notice of cross-appeal?
Hypothetical #2

- District Ct. dismisses Claim A and submits Claim B to jury. Jury returns verdict in favor of Plaintiff on Claim B.

- Appellant/Defendant argues that an erroneous jury instruction on Claim B requires a new trial.

- Appellee/Plaintiff argues that the jury instructions were correct, but if Claim B is remanded, Claim A should also be retried.

- Was Appellee required to file a notice of cross-appeal?

- If Appellee never mentioned Claim A on appeal, could he have raised it on remand?
Hypothetical #3

- Appellant’s statement of facts and issues presented are correct and complete.
- Appellant’s arguments are logically presented.
- Should appellees always submit their own version of the facts and issues presented?
- Should appellees structure their argument to correspond directly to appellant’s brief?
Final Tips for Appellees

- Don’t forget your initial reactions when you first read the appellant’s brief.
- Don’t rely on your jury argument.
- Deal with bad facts.
- Highlight the lower court decision.
- Help the court of appeals write its opinion.