DON'T LOSE YOUR CIVIL APPEAL WHILE STILL IN THE DISTRICT COURT!

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Few things are more frustrating than knowing you're right but there's nothing you can do about it. As appellate practitioners, we occasionally encounter litigants who lost in the district court and whose cases present potentially reversible issues, but something trial counsel did or didn't do below renders success out of reach. That can be disappointing, to say the least, for everyone involved.

In the interest of avoiding such an unsatisfactory outcome, we've compiled a list of 15 tips for civil federal trial lawyers to address some of the mistakes we most commonly see that ruin a party's chances on appeal.

At the outset, here are two general points that everyone probably knows but bear repeating:

1. **If it's not in the record, it never happened.** Appellate courts review what the district court did with the record presented before it at the time it made its decision. If the basis for your argument isn't in a filing or a transcript, the appeals court will never know about it. While most trial court events are recorded somewhere, we frequently see proposed jury instructions and instructional colloquies held informally and off the record. Don't let them be, and if your judge insists on it, make a record of what happened as soon as you're back in court. Reporters also seem to want to stop typing whenever you're playing a recording or video excerpt in the courtroom—don't let them. It's hard to guarantee the appellate court will have an easy way to hear or view the recording later on.
2. **Raise all the arguments that might be important down the road.** If an argument isn't raised below for the district court to consider, it's usually deemed waived. While there are discretionary exceptions for purely legal arguments, it's a bad idea to force appellate counsel to rely on the appellate court's invocation of that discretion.

Once your case gets underway, there are a number of traps for the unwary long before you get to trial:

3. **Voluntarily dismissing a claim will waive it.** You'd be surprised how often trial counsel will take a judge's "hint" and voluntarily dismiss a claim that seems weak at the time, rather than let the trial court grant a motion to dismiss. But it's a bad idea from an appellate perspective—an involuntary dismissal can be appealed at the end of the litigation, but a voluntary dismissal can't be.
4. **You must raise some defenses in a motion to dismiss before your answer—or forever lose them.** Under Fed. R. Civ. P. 12, arguments based on personal jurisdiction, venue, service of process, joinder, and attacks on the sufficiency of the complaint itself must all be raised before answering. And while you can challenge subject-matter jurisdiction at any time, why wait?
5. **Be sure to immediately appeal an immediately appealable pre-trial order.** The grant of a motion to dismiss that

ends the litigation, or an order granting or denying injunctive relief, appointing a receiver, or denying absolute or qualified immunity from suit are all immediately appealable—and any appeal must be taken immediately or it's forever barred.

6. **Petition for certification of an interlocutory order for immediate appeal when necessary.** Some trial court orders are immediately appealable, but only if you petition the trial court, appellate court, or both. For example, Class Action Fairness Act remand orders have a fast 10-day petition process, Rule 23(f) class certification orders have a 14-day petition process, and, under 28 U.S.C. § 1292(b), other district court orders may be subject to interlocutory appeal after certification from the district court and appellate court that an important issue is presented for which resolution on appeal would aid efficient disposition.
7. **Think seriously about your summary judgment separate statement.** If you're moving for summary judgment, you must include all material undisputed facts in your separate statement; and if opposing, you must include the facts you dispute in yours. If it's not in the separate statement, the trial court does not need to consider it and the appellate court won't either. (Keep in mind that some district court local rules don't require separate statements, and if you're in one of those, this is one less trap you have to think about.)
8. **Include everything you want tried in your Rule 16 pre-trial order.** Rule 16 pre-trial orders supersede the pleadings and anything not included is excluded from the case—and your potential appeal.
9. **Don't forget about writs of mandamus if you truly need immediate appellate relief.** Federal appellate courts don't like extraordinary writs of mandamus or prohibition. They conflict with the one final judgment rule, which holds that generally you can appeal only the final judgment in a case, and they may have strict rules for consideration. In the Ninth Circuit, for example, the court will only entertain writ petitions that lack an adequate appellate remedy, involve clear error or a repeated judicial violation of rules of court, and raise important or novel issues. But in some situations—like a grant of a motion for dismissal on the basis of forum non conveniens, discovery orders involving privilege, or otherwise non-appealable orders that are irremediable after a final appeal—it may be worth talking with an appellate specialist about writ relief.

Once trial gets going, potential appeal-ruining mistakes come at an even faster pace:

10. **Get a definitive ruling on admission of evidence and, when in doubt, object.** You must get a clear ruling from the district court on whether it will admit or exclude your evidence. Failing to object *and to get a ruling on your objection* waives an appellate challenge. When possible, use motions in limine to address evidentiary issues, both to preserve the record and give yourself the best shot of winning the issue to begin with. If the court issues a conditional ruling on an evidentiary issue or defers its ruling, be sure to get a final and clear ruling from the court. (This rule applies to non-evidentiary issues, too—always be sure to get a clear ruling from the court on any potentially appealable issue.)
11. **If evidence is excluded, be sure to make an offer of proof.** Without an offer of proof, there is no way to get the excluded evidence into the record. And if the excluded evidence isn't in the record, there's little to no chance of obtaining a reversal on appeal based on the wrongful exclusion of that evidence. Be certain that you mark any excluded evidence for identification, discuss its relevance and what it would contain if admitted, and explain on the record why any objections to its admission are meritless.
12. **Avoid inviting instructional error and object to any jury instructions that you find problematic.** Invited instructional error is one of the easiest mistakes to make at trial—events happen quickly when you're debating instructions and the court often wants to move things along. But you still need to propose your own written jury instructions and think carefully about what you ask the judge to say, and also file written objections to the other side's proposed instructions to the extent you think they're wrong. Ultimately, you want to make sure you request instructions that you think the evidence supports, object if those instructions aren't given, and object to any instructions that you disagree with—all while being careful not to acquiesce on any instructional issues that might provide grounds for reversal.
13. **Raise any requests for a judgment as a matter of law or challenges to the sufficiency of the evidence during the jury trial.** If the plaintiff didn't meet its burden of proof or the case suffers from a fatal flaw that requires judgment in your favor as a matter of law, you must make a motion under Fed. R. Civ. P. 50(a) before the case goes to the jury. You must then renew that motion under Fed. R. Civ. P. 50(b) after the verdict to preserve a sufficiency of the evidence argument for appeal. Failure to make a timely motion under Fed. R. Civ. P. 50(a) generally precludes relief under Fed. R. Civ. P. 50(b), and failure to make a proper Fed. R. Civ. P. 50(b) motion generally precludes appellate review of the sufficiency of the evidence. Even highly experienced attorneys can make costly mistakes on this confusing issue.
14. **Think carefully about your verdict form.** A general verdict form can be more difficult to challenge on appeal because a reviewing court cannot discern from it why a jury reached the verdict it did. When reviewing a general verdict form, the appellate court will usually indulge in all reasonable inferences in support of the verdict. A special verdict form, on the other hand, can sometimes be easier to challenge on appeal because juries are far from perfect and a complicated form can lead to inconsistent findings more often than you'd think. A general verdict with special interrogatories falls somewhere in the middle of the spectrum. Think carefully about which you would prefer given your litigation position.
15. **If the jury returns an inconsistent verdict, you must challenge it before the jury is excused.** The jury must have an opportunity to clarify any perceived inconsistencies in its verdict. If you fail to raise a timely objection, you risk waiving any challenge based on the inconsistency on appeal.

While these tips are generally applicable, you should make sure to know your local rules and any quirks of the district and circuit in

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ing tools. If you learn through custodian interviews that emoji may be relevant, work with an e-discovery vendor to understand your options.

Do some homework into the various possibilities before deciding which emoji to search for when collecting data, communicating these emoji accurately to your vendor, and confirming that the custodians from whom you are collecting used the same rendition of the relevant emoji.

Understand how emoji will present on different platforms when they are produced.

Pay attention to details—emoji can look very similar but have drastically different meanings. ⊙



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Endnotes

[1]An emoji is a small image or pictograph that can be created either by pasting an image into text or by typing code into text. An emoticon is created from symbols on a keyboard, primarily using punctuation marks :-([sad face].

[2]To see the various ways emoji present on different platforms and the various meanings for each emoji, see Emojipedia, https://emojipedia.org (last visited Aug. 9, 2019).

[3]*Tired Face*, Emojipedia, https://emojipedia.org/tired-face (last visited Aug. 9, 2019); Eyder Peralta, *Lost In Translation: Study Finds Interpretation of Emojis Can Vary Widely*, NPR (Apr. 12, 2016, 5:05 PM), https://www.npr.org/sections/thetwo-way/2016/04/12/473965971/lost-in-translation-study-finds-interpretation-of-emojis-can-vary-widely.

[4]*See* Hannah Miller et al., "Blissfully Happy" or "Ready To Fight": Varying Interpretations of Emoji, Presented at Proceedings of the Tenth International Conference on Web and Social Media (ICWSM 2016) (May 18, 2016).

[5]Alex Rawlings, *Why Emoji Mean Different Things in Different Cultures*, BBC Future (Dec. 11, 2018), http://www.bbc.com/future/story/20181211-why-emoji-mean-different-things-in-different-cultures.

[6]As of July 1, 2019, "emoji" appeared in 41 cases published on Westlaw in the last six months and in 115 cases published in the last three years.

[7]*United States v. Westley*, No. 3:17-CR-171, 2018 WL 3448161 (D. Conn. July 17, 2018).

[8]*See NEXUS Servs. Inc. v. Moran*, No. 5:16-cv-00035, 2018 WL 1461750 (W.D. Va. Mar. 23, 2018).

[9]*Id.* at *4.

[10]*Commonwealth v. Castano*, 82 N.E.3d 974, 982-83 (Mass. 2017).

[11]*Id.*

[12]Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, N.Y. Times (Jan. 28, 2015), https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html; *see also* Eric Goldman, *Emoji and the Law*, 93 Wash. L. Rev. 1227, 1263 (Oct. 2018).

[13]If a key piece of evidence includes an emoji, can a party ever obtain summary judgment or will the interpretation of an emoji always be a question to be resolved by the trier of fact?

[14]Leslie Walker, *Free Emoji Makers*, Lifewire (May 21, 2019), https://www.lifewire.com/create-your-own-emoji-with-custom-apps-2654847.

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which you practice. Do your research to uncover pitfalls that might exist in your particular jurisdiction. And consider what many corporate clients and individuals with high-stakes disputes are starting to do: Bring in an appellate lawyer at the trial stage to keep an eye on preservation concerns and help shape the record with the appeal in mind.

We know trial lawyers have a lot to worry about without also having to think about their prospects on appeal. But paying attention to these tips can help ensure that your chances on appeal—if it comes to that—are as good as they can possibly be. ⊙


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