Appellate Practice

Crunch Time in Litigation: Keeping an Eye on the Appeal!

October 26, 2021

Jennifer Coates
Timothy Droske
Skip Durocher
Douglas Lang

Materials

PowerPoint Presentation
Formulating Strategies to Win at Trial, on Appeal, and Avoid Gotcha's

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Crunch Time in Litigation: Keeping an Eye on the Appeal!

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Today's program is 60 minutes.

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Q&A

Submit questions using Chat. Time permitting we will try to answer questions at the end of the presentation. If we don't get to your question, you are welcome to contact any of the speakers or call on your trusted Dorsey contact.

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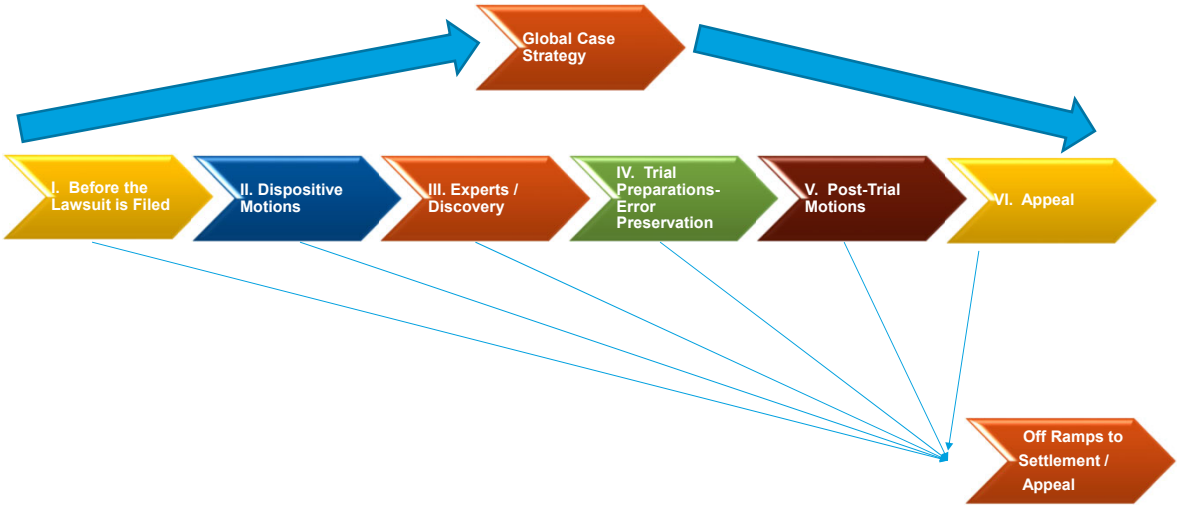
Law.com Litigation Trendspotter, Oct. 18, 2021

- **The Trend:**
  - **Appellate lawyers are increasingly being brought into cases long before any appeals are filed in an effort to better anticipate and prepare for how litigation might play out post-verdict.**
- **The Driver:**
  - **If ever there was a time to shake up the make-up of the traditional trial team, it appears to be right now.**

Law.com Litigation Trendspotter: Trial Teams Are Increasingly Lopping in Appellate Lawyers at the Outset of Cases, Law.com (Online) Oct. 18, 2021, available at https://www.law.com/2021/10/18/law-com-litigation-trendspotter-trial-teams-are-increasingly-looping-in-appellate-lawyers-at-the-outset-of-cases/

Timeline of a Case



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PREPARING FOR APPEAL DURING TRIAL

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Global Case Strategy

- **Pre-litigation strategy**
- **Which jurisdiction / venue**
- **Multi-case settlement strategy (class actions)**
- **Early off ramps to appeals (e.g., preliminary injunctions)**
- **Early preservation of appellate arguments**

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PREPARING FOR APPEAL DURING TRIAL

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CLE Code
for
Attendees in States that Require a Code

(Tip: The CLE code is different than the event code assigned by states)

Dispositive Motion Practice

- **Jurisdiction fights**
- **Constitutional claims / statutory interpretation**
- **Preliminary Injunctions**
- **Class certification**
- **Summary judgment**

Experts / Discovery

- Expert issues
- Discovery

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Trial

- Motions in limine
- Jury instructions
- Issue preservation
- Trial strategy
- Closing arguments
- Verdict

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Post-Trial Motions

- Issue and record preservation / trial court's last chance to correct
- Motion for new trial
- Judgment as a matter of law
- Others

Appeal

- "A stitch in time saves nine."
  - Issue preservation
  - Record preservation
  - Settlement posture

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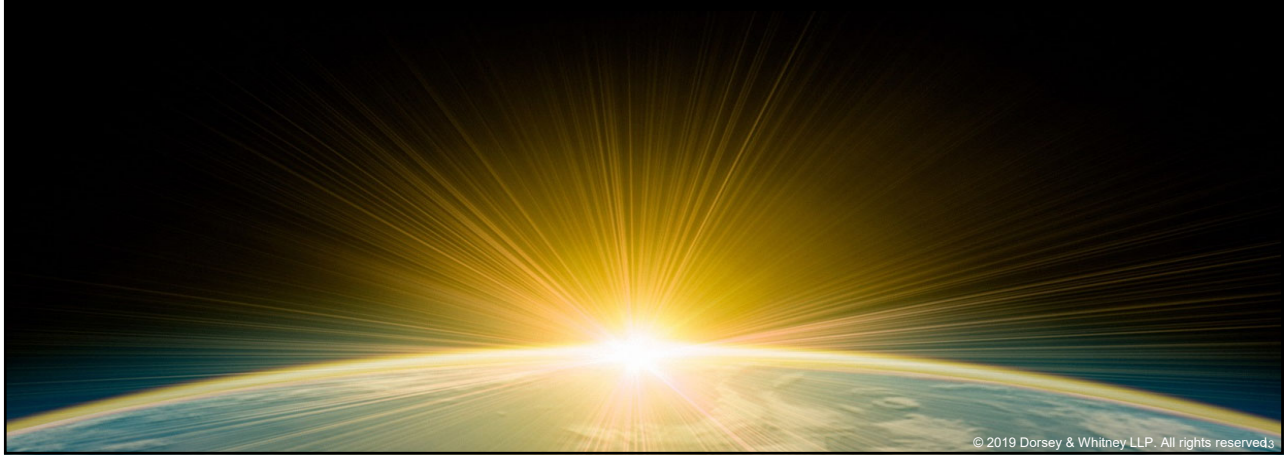
Conclusion



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Jennifer is a Partner in the Commercial Litigation Group. She has extensive litigation and trial experience representing corporations and government entities in complex civil litigation matters. She has also defended corporations and government entities in commercial litigation, and has significant trial and appellate experience. Jennifer's recent cases include products liability with a focus on automotive and medical device. Her toxic tort practice focuses on asbestos litigation across the country. In addition, she has extensive regulatory expertise, advising clients on data privacy, enforcement actions, government investigations, and state licensing requirements.

Jennifer's automotive practice includes defending seat back, air bag, rollover, roof crush and asbestos matters for one of the world's largest automotive manufacturers. Jennifer executes the overall defense strategy and with that, is skilled in complex, trial-driven case management. She has extensive experience with engineering, economic, medical and human factors experts, cutting quickly and effortlessly to the technical defense in her cases. Jennifer is accomplished in managing the science of accident reconstruction, reviewing technical and design documents, and drafting dispositive, non-dispositive motions and discovery responses.

Jennifer's experience and capabilities extend to her medical device practice, where she has defended manufacturers of vascular access devices and pumps, stents, convective warming blankets and pain pumps in litigation involving personal injury claims up to and including catastrophic injury and wrongful death. Her work includes development of the defense strategy, preparing for and taking depositions, drafting motions and alternative dispute resolution. Jennifer also has experience in health care regulation and compliance, including Sunshine laws, government investigations and administrative litigation.

Jennifer served as an Assistant Attorney General with the Office of the Minnesota Attorney General, representing state and county agencies in civil and administrative matters, and providing oversight to all aspects of government investigations. Jennifer also represented state regulatory agencies in state and federal courts and regularly advised her clients on data privacy, risk management and compliance and regulatory matters.

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Tim Droske is Of Counsel in Dorsey's Commercial Litigation Group. Tim has led appeals and counseled clients and trial attorneys across all industries and practices on appellate strategy and litigation. Tim regularly partners with trial counsel to help craft an overall appellate strategy, identify the most compelling appellate-friendly arguments, and then write the appellate briefs, which are generally the most important basis for the court of appeals' decision. Tim's approach in all matters is that of a team player who is able to collaborate with trial counsel to bring a fresh set of eyes and appellate perspective to a case. This has included collaboration with trial teams at Dorsey or working with counsel from other law firms in a number of successful appellate-related matters. Nearly 100% of Tim's practice is dedicated to appellate-related work, and also includes teaching appellate advocacy as an adjunct professor at the University of Minnesota Law School. Tim's experience extends to all aspects of appellate-related litigation, including post-trial motions, interlocutory appeals, appellate motion practice, merits briefing, amicus briefs, oral argument, petitions for rehearing en banc, and petitions and merits briefing to the U.S. and state supreme courts. Tim is very familiar with and involved in the Minnesota appellate courts, including having served on the Minnesota Supreme Court Advisory Committee on the Rules of Civil Appellate Procedure and currently serving as the Chair of the Minnesota State Bar Association's Appellate Practice Section. Tim's federal appellate practice is national in scope, including admissions to and the handling of appeals in the Second, Sixth, Seventh, Eighth, Ninth, D.C., and Federal Circuits, as well as to the U.S. Supreme Court. Tim is attuned to and has reported on the COVID-19 pandemic's impact on appellate courts, and what appellate practitioners need to do to effectively litigate their appeals during these unique circumstances.

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Skip is a partner in the firm's Litigation and Regulatory Practice Groups. His practice focuses on complex civil litigation, with a particular emphasis on the defense of consumer class actions against financial services companies under the Truth in Lending Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and state unfair practices statutes. He has also handled a wide variety of other complex litigation, including minority shareholder disputes, insurance coverage, business torts, and federal Indian law. Skip is Co-Head of the firm's Minneapolis Office, and Chair of the firm's E-Discovery Practice Group and Co-Chair of its Indian Law Practice Group.

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Justice Lang is Of Counsel in Dorsey's Commercial Litigation Group. Justice Lang served for over 16 years on the Fifth District Court of Appeals in Dallas. That 13 Judge appellate court has the highest case volume of the 14 intermediate appellate courts in Texas. While on the court, Justice Lang authored more than 2,100 opinions and participated in more than 6,100 case decisions. During that same period, Justice Lang served for six years as a member of the Texas Multi-District Litigation Panel and as Chair of the Texas Commission on Judicial Conduct.

Justice Lang is renowned and highly respected for his tireless leadership in bar and community activities, his dedication to mentoring young lawyers, and his devotion to civility and ethics in the legal profession during his more than 40 year career. Justice Lang's belief in the importance of mentoring led him to author *Deeds, Not Words—Mentors As Guiding Lights of Integrity In The Legal Profession*, a compilation of experiences recounted to him by a variety of bar leaders, judges, and successful attorneys. Further, Justice Lang is a frequent speaker at civic and continuing education events around Texas and nationally and has many published articles to his credit on appellate law, civility, and ethics.

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Formulating Strategies to Win at Trial, on Appeal, and Avoid Gotcha's[1]

"If you didn't write it down, then it never happened."-Tom Clancy.[2]

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October 2021

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[1] *Gotcha*, "an unexpected usually disconcerting challenge, revelation, or catch." *Merriman-Webster Dictionary*, Available at https://www.merriam-webster.com/dictionary/gotcha#synonyms (last accessed February 5, 2020). See Attachment 1. Check list of Gotcha's found in federal rules and statutes.

[2] TOM CLANCY, DEBT OF HONOR, 600 (1994).

1. Introduction-Planning for Appeal Must Start at the Beginning of Any Case.[3]

a. Thorough Planning is Honest Planning.

Have you ever heard a lawyer say, "I wish we had thought of that before trial?" Maybe not. However, if one is honest with oneself, one who has missed something during trial might at least think that. So, what does it take to assure strategic points for trial and error preservation are not lost in the heat of trial, in the haste of last minute trial preparation, or even just over looked because of inexperience? The answer is-it takes a thorough and complete plan. That plan must be created when the filing of a claim is imminent-whether one's client is plaintiff or defendant.

b. The Foundation for a Strategic Plan.

Write "it" down. Great ideas, a plan, a strategy, they can all be lost in a flash when relying solely on memory. However, writing "it" down preserves those great ideas or, to paraphrase the words of Tom Clancy, "it" will never happen.

Formulation of a written strategy is critical to any endeavor, but for lawyers preparing a lawsuit for trial and appeal, it is imperative. A team must be assembled to assure coverage of all stages through appeal. The team need not be a board room full of lawyers and paralegals, but it should include at least the lead trial lawyer and a skilled appellate lawyer. Teamwork between trial and appellate lawyers is necessary due to the complexity of the rules regarding, among other things, error preservation, the form and substance of dispositive motions, jury charges, and crafting appellate arguments and briefs. In summary, the key is presenting all necessary evidence and error preservation. The critical importance of preparation of a comprehensive, written strategic plan using all of the tools of trial and appellate practice is just this: *if error is not preserved at trial-on appeal, you lose!*

At first, the written strategy can simply be a "checklist" of tasks that must be or should be accomplished at certain points in time.[4] Then for any litigation, and in particular for complicated litigation, a plan must be comprehensive and for the long run. That is, there must be a written plan that plots points for performance of tasks on a time line from the beginning of a lawsuit through a potential appeal. As an example, the chart below provides the foundational time line.

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[3] The intention of the author is to offer "practical thoughts" for planning litigation. So, comprehensive legal authorities are, intentionally, not offered as to each of the proffered topics listed in the Strategy Points-A Checklist.

[4] The effective use of checklist has been demonstrated to assure all required steps are executed in any complicated process including medicine, construction, aviation, and other specialized disciplines. Well thought out and prepared "checklists" assure thorough preparation and execution. *See* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT 8-10 (2010).

Then, one must add to that general time line the "fine points" regarding when certain pleadings, objections, motions, or other submissions must be filed in the trial court. That is not the end.

The strategic plan must also include a thorough review of a list of "Gotcha's." Each "Gotcha," or twist of the law that could be overlooked must be reviewed and checked off so no necessary steps are missed that are required by procedural rules or statutes.[5] That list of "Gotcha's" must be blended with the timeline and the "fine points" in order to compose a complete strategy.

2. How can Error Preservation Be Planned?

Most points in a case where error must be preserved can be anticipated by: a) understanding what the adversary will likely do to prosecute its claim or defend against a claim, and b) plotting out what a client must do to present its case or defend against a claim. Experienced trial lawyers know why error preservation is critical. Yet, it is worth noting that appellate courts rarely review an issue raised in a brief on appeal unless that issue claiming error is preserved in the trial court by a proper objection or motion. In most cases, the record must show that the issue was brought to the trial court's attention and the trial court had the opportunity to correct the erroneous ruling or order, there and then.[6]

3. Strategy Points-A Checklist.

The points set out below, and others that might be applicable to a particular case, should be fleshed out in a detailed, written, strategic plan along with an analysis of rule and statutory "trip-wires," or "Gotcha's." The suggested "Gotcha" Checklist attached to this paper can provided part of a baseline for a trial and appellate plan.[7]

a. Selection of Court System and Venue.

There are many specific considerations to address when one selects where a lawsuit will be filed. The selection of the court system and venue is an opportunity to set the course of the case.

Of course, first, is the question of whether the parties are subject to the jurisdiction of the court. This issue is addressed below. Second, the law of the possible available forums must be

[5] *See* Attachment 1 for *Gotchas*.

[6] *See infra* § 3(e).

[7] *See* Attachment 1. *Gotcha's*.

reviewed to determine if the law applicable to the claims is more favorable in one jurisdiction than another. An example is the amount of punitive damages that can be recovered. Some states, including Texas, put a "cap" or statutory limit on the amount that can be recovered.[8] Third, a significant consideration is whether the region, state, or city where a court is located is known for judges and jurors who harbor prejudices or customs that could be unfavorable to a party.

b. Jurisdiction.

In every case, a thorough review should be undertaken of whether or not the court has jurisdiction.[9] If the court has no jurisdiction, it has no power to act.[10] A defendant must raise valid jurisdictional questions by an appropriate motion or pleading requesting that the court dismiss the case.[11]

Of course, the question of whether there is personal jurisdiction is governed by "due process" under the United States Constitution[12]. Further, the question of whether there is subject matter jurisdiction is determined whether the law of the forum governs the claims raised.

The United States Supreme Court recently repeated long established law discussing the concept of jurisdiction, "[T]he word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)."

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[8] *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.008.

[9] Consider the amount in controversy, subject matter, and any other limits on a court's authority. U.S.C. § 1331 (federal question jurisdiction exists when an action arises under the Constitution, laws, or treaties of the United States); 28 U.S.C. 1332(a) (federal courts have diversity jurisdiction when the action involves controversies between parties of diverse citizenship and the amount in controversy exceeds $75,000); *See* Tex. Const. art. V; Tex. Civ. Prac. & Rem. Code Ann., chs. 51, 61-64; Tex. Est. Code Ann. chs. 32, 34, 1022; Tex. Fam. Code Ann. §§ 51.04, 51.0413; Tex. Gov't Code Ann. chs. 24-27; Tex. Prop. Code Ann. § 115.001.

[10] "Subject-matter jurisdiction cannot be waived or forfeited because it 'involves a court's power to hear a case.' *Arbaugh v. Y & H Corp*., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)). 'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' Ex parte *McCardle*, 74 U.S. (7 Wall) 506, 514, 19 L. Ed. 264 (1868)." *Fairholme Funds, Inc. v. United States*, 2019 U.S. Claims LEXIS 1957 *27.

[11] A plaintiff must overcome an initial presumption that the federal court lacks subject matter jurisdiction. *Howery v. Allstate Ins*., 243 F.3d 912, 916 (5th Cir. 2001); See rules addressing challenge to jurisdiction, Fed.R.Civ.Proc. 12 (b) (1) (subject matter jurisdiction), Fed.R.Civ.Proc. 12 (b) (2) (lack of personal jurisdiction over defendant); See also Tex. R. Civ. Proc. 120a (discussing special appearances); Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014 (a)(8) (discussing pleas to the jurisdiction), 101.001 et seq. (titled the Texas Tort Claims Act in section 101.002).

[12] "A defendant establishes minimum contacts with a state when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1848 (2019); *Kontrick v. Ryan*, 540 U. S. 443, 455 (2004).

c. Transfer of Venue and Removal of Suits by Defendants from State Court to Federal Court.

In federal courts, venue is governed by statutes not rules.[13] Once jurisdiction has been established, the venue must be selected.[14] Defendant may challenge the venue where the suit was filed if the venue is "unfair or inconvenient" or another venue has been agreed to by contract.[15]

A significant strategic consideration for a defendant locked into an unfavorable state court venue is to evaluate the possibility of removal of the state court action to federal court. However, one must be mindful that removal is only possible when the federal court has jurisdiction, such as where there is diversity of citizenship or the case involves a federal question.[16]

As a first step in the removal analysis, a defendant should consider if a motion to transfer venue in the state court system could be successful. Reasons for a defendant to pursue a state court transfer of venue are similar in some cases to why one might seek removal. Those include: avoiding local prejudice, seeking a different judge, delaying trial, different jury pools. Additional reason for removing a case may include: favorable and strict adherence to procedural rules, different trial procedures such as very limited voir dire,[17] obtaining greater expertise on federal questions, and more likely enforcement of arbitration[18] and jury waiver clauses.[19]

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[13] *See* generally 28 U.S.C. §§1390, 1391; see also, 28 U.S.C. §§ 1404, 1406; Fed.R.Civ.Proc. 12(h) (1).

[14] See 28 U.S.C.§ 1391 (b) (1-3) (Generally a civil action may be brought in a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.).

[15] § 1404 (a); See also, *Atlantic Marine Const. Co. v. U.S. District Court for the Eastern District of Texas*, 571 U.S. 49, 59-60, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013) ("When a defendant files such a motion [to transfer to enforce a forum-selection clause], we conclude, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer.").

[16] 28 U.S.C §§ 1441-1446.

[17] Fed.R.Civ.Proc. 47(a) (providing that the "court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper"). However, as a practical matter, jury selection in some federal court is conducted by the judge. Any questioning by lawyers is typically limited in scope and as to time allotted.

[18] See Sec. 171.021-171.026 Tex. Civ. Prac. & Rem. Code; 9 USCS § 3, 4.

[19] "The Seventh Amendment of the Constitution preserves the common law right to a jury trial in civil suits. U.S. Const. amend. VII. The right, however, may be waived by prior written agreement of the parties. Commodity *Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986); *RDO Fin. Servs. Co.* v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002). "There is a presumption, however, against a waiver of the right to a jury trial." *Yumilicious Franchise, L.L.C. v. Barrie*, 2014 U.S. Dist. LEXIS 113049, 2014 WL 4055475, at *11 (N.D. Tex. Aug. 14, 2014) (Lindsay, J.) [**38] (citing Powell, 191 F. Supp. 2d at 813), reconsideration denied, *Yumilicious Franchise, L.L.C. v. Barrie*, 2015 U.S. Dist. LEXIS 52503, 2015 WL 1822877 (N.D. Tex. Apr. 22, 2015), aff'd, 819 F.3d 170 (5th Cir. 2016). Such written agreements to waive the right to jury trial are generally enforceable against parties who bring suit, as long as the waiver was made knowingly, voluntarily, and intelligently. *Jennings v. McCormick,* 154 F.3d 542, 545 (5th Cir. 1998) (discussing waiver in the civil context)." *Servicios Comerciales*

When a removal petition is filed, the state case is stayed and transfer to the federal court from the district where the state case was filed occurs immediately.[20] The timing for filing a removal petition is critical. Generally, the defendant must file notice of removal within 30 days after the receipt of the initial pleading or within 30 days after the service of summons, whichever period is shorter.[21] In addition, a party whose case has been removed by an adversary should consider whether to seek remand.[22]

d. Enforcing Arbitration Agreements

The foundational issue as to whether arbitration may be compelled is: do the parties have a valid, enforceable agreement to arbitrate.[23] That question, in itself, is the subject of an abundance of litigation. While federal and Texas law have strong policies favoring arbitration,[24] only arbitration agreements that comport with traditional principles of contract law are upheld.[25] The burden of proof as to the validity of the agreement is on the party seeking to enforce the arbitration agreement. Yet, defenses to enforcement of the agreement may be raised as in any contract litigation.[26] For instance, an arbitration agreement procured by fraud, or that is unconscionable, is unenforceable.[27] Should the trial court determine an arbitration agreement is valid and enforceable, in many situations, that court must determine if a party's claim falls within the scope of that agreement. If the claim falls within the scope of the agreement, the "court has no discretion but to compel arbitration and stay its own proceedings."[28]

Lamosa, S.A. v. De La Rosa, 328 F. Supp. 3d 598, 619 (N.D. Tex. 2018). *Cf.* In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 132-133 (Tex. 2004).

[20] 28 U.S.C. § 1446(d).

[21] *Id*. § 1446(b).

[22] *See id*. § 1447 (addressing grounds and procedure).

[23] It is the policy of this state to encourage the peaceable resolution of disputes . . . through voluntary settlement procedures," including binding and nonbinding arbitration. Tex. Civ. Prac. & Rem. Code Ann. § 154.002. "A court shall order the parties to arbitrate on application of a party showing . . . an agreement to arbitrate;" otherwise, "the court shall deny the application." *Id*. § 171.021(a)(1), (b).

[24] *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995). See also *In re FirstMerit Bank, N.A*., 52 S.W.3d 749, 753 (Tex. 2001).

[25] *In re D. Wilson Constr. Co*., 196 S.W.3d 774, 779-781 (Tex. 2006). *See also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

[26] *See Halliburton Energy Servs. v. Ironshore Specialty Ins. Co*., 921 F.3d 522, 530 (5th Cir. 2019).

[27] Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001(b) ("A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract."), 171.021, 171.022 (providing that unconscionable agreements are unenforceable). *See also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 6872 (1996); *In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 738 (Tex. 2005); *In re FirstMerit Bank, N.A*., 52 S.W.3d at 753-54; *Henry v. Gonzalez*, 18 S.W.3d 684, 691 (Tex. App.—San Antonio 2000, pet. dism'd).

[28] *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 403-04 (1967). *See also In re FirstMerit Bank, N.A*., 52 S.W.3d at 758. Cf. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) ("The U.S. Supreme Court has explained that there are three types of disagreements in the arbitration context: (1) the merits of the dispute; (2) whether the merits are arbitrable; and (3) who decides the second question."). The default rule for the third question is that arbitrability is a threshold matter for the court to decide. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008). But a contractual agreement to submit the arbitrability question to an arbitrator is valid and must be treated like

Unless the parties have voluntarily engaged in an arbitration proceeding, the first step in the process of enforcing an arbitration agreement is to apply to the trial court to compel arbitration.[29] Once the motion to compel arbitration is filed, as indicated above, the moving party has the burden to prove the agreement is valid.[30] Then, the burden shifts to a party opposing enforcement of the agreement to raise affirmative defenses to enforcement.[31] Should the trial court deny the motion to compel, the aggrieved party may perfect an interlocutory appeal.[32] However, should the trial court grant the motion to compel arbitration, the statutes, the TGAA and FAA, do not provide for an interlocutory appeal. Under federal law, a party may seek appellate review of an order compelling arbitration only if the order is joined with a final judgment of dismissal.[33] That appeal proceeds as with any final judgment. Otherwise, one is left with one option for review of an order compelling arbitration. That is mandamus.[34]

In Texas state court, mandamus will issue to correct a clear abuse of discretion for which the remedy by appeal is inadequate.[35] In federal court, mandamus is potentially available on grounds similar to those provided under Texas law, but mandamus relief is rarely granted in federal court.[36] Of course, if one is unsuccessful in securing appellate relief, the parties are left with an enforceable order either compelling arbitration or denying arbitration.

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any other arbitral agreement. *First Options*, 514 U.S. at 943. Arbitration clauses that assign gateway questions such as the arbitrability of the dispute are an established feature of arbitration law. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). The Texas Supreme Court has held that courts must enforce a valid arbitration agreement that places arbitrability with the arbitrator rather than a court. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018); See also, Robinson v. Home Owners Mgmt. Enters., 2019 Tex. LEXIS 1170 *25 (Tex. 2019) (a court must determine, as a gateway matter, whether an arbitration agreement permits class arbitration unless the parties have clearly and unmistakably agreed otherwise. Class arbitration will only be compelled where the arbitration agreement so provides).

[29] *See*; 9 U.S.C. §§ 3, 4.

[30] Halliburton Energy Servs., 921 F.3d at 530 (describing federal procedure for motion to compel arbitration and discussing Texas state law that governs whether the arbitration agreement is valid).

[31] *See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014) (as to the Federal Arbitration Act ("FAA")); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003) (as to the Texas General Arbitration Act ("TGAA")).

[32] *See also* 9 U.S.C. § 16

[33] In re Palacios, 221 S.W.3d 564, 565 (Tex. 2006); See FAA § 16(3); Mire v. Full Spectrum Lending Inc., 389 F.3d 163, 165-167 (5th Cir. 2004).

[34] Appellate court had no jurisdiction to hear an interlocutory appeal from an order compelling arbitration; such an appeal does not lie under the provisions of the Federal Arbitration Act, 9 U.S.C.S. §§ 1-16.

[35] In re McAllen Med. Ctr., Inc., 275 S.W.3d 458, 462 (Tex. 2008); In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135-36 (Tex. 2004).

[36] Apache Bohai Corp. v. Texaco China, B.V., 330 F. 3d 307, 310-11 (5th Cir. 2003) ("Mandamus is a drastic remedy reserved only for truly extraordinary situations. Will v. United States, 389 U.S. 90, 106, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967). The district court must have committed a 'clear abuse of discretion" or engaged in "conduct amounting to the usurpation of power.' Mallard v. United States Dist. Ct., 490 U.S. 296, 309, 104 L. Ed. 2d 318, 109 S. Ct. 1814 (1989) (citations and internal quotation marks omitted). This burden is particularly heavy in the context of mandamus review of a decision to enter a stay pending arbitration, 'because Congress has expressly limited interlocutory review of a district court decision on arbitration.' McDermott Int'l, Inc. v. Underwriters at Lloyds, 981

e. Discovery and Evidence Introduction Plan

Every case has its unique needs for discovery. Again, write it down. List the document discovery, depositions, and other discovery that will yield the evidence to prove each element of each claim or defense. Then, plan to use the discovery tools required to obtain the evidence.[37]

Next, one should catalogue and index the evidence for each element of each claim or defense, and set forth in detail precisely how to introduce the evidence at trial.[38] The cataloguing of evidence should commence at the outset of a case and as soon as the client's relevant documents can be accumulated. Other evidence will, of course, be accumulated and catalogued as the case progresses. This method of preparation will reduce the possibility of overlooking or losing track of key evidence.

Finally, in order to assure proper technique is employed to assure evidence is admitted, one should consult readily available textbooks to obtain clear, step-by-step directions on how to present and offer the evidence.[39] Remember, write it all down.

f. Preservation of error as to evidence and in general.

As a general rule, appellate courts decline to review an issue that was not preserved.[40] The United States Supreme Court has defined error preservation in these terms, "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. Hormel v. Helvering, 312 U.S. 552, 556 (1941), the Court explained that this is 'essential in order that

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F.2d 744, 748 (5th Cir. 1993). 'Moreover, it is more than well settled that a writ of mandamus is not to be used as a substitute for appeal [.]' Id.").

[37] *See, e.g*., Fed.R.Civ.Proc. 26 (a) (disclosures; when required), 26(f) (discovery conference, schedule, also see Rule 16 as to pretrial conference and order), 27-28, 30 (depositions), 31 (depositions by written questions), 33 (interrogatories to parties), 34 (production of documents and electronically stored data), 35 (physical and mental examinations), 36 (requests for admissions), 37 (failure to make disclosures, cooperate in discovery, sanctions). See also Tex. R. Evid. 509(3)(4).

[38] F.R.E. 901-1008.

[39] C. LORE AND STEVEN LUBET, MODERN TRIAL ADVOCACY (5th ed. 2015); THOMAS MAUET, TRIAL TECHNIQUES AND TRIALS (10th ed. 2017).

[40] For instance: "The appellants challenge the sufficiency of the evidence to support the damage award against them. This issue, however, has not been properly preserved since the appellants failed to raise it in their motion for judgment notwithstanding the verdict. Failure to challenge the sufficiency of the evidence in a motion for a new trial or a motion for judgment notwithstanding the verdict will result in waiver of the issue on appeal, *Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir.1983), except in exceptional circumstances, which are not present here. Exceptional circumstances are present when a pure question of law is involved and the asserted error is so obvious that the failure to consider it would result in a miscarriage of justice. Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1145 (5th Cir.1981). Because the appellants' challenge to the sufficiency of the evidence supporting damages involves factual matters, and hence does not involve pure questions of law, we decline to consider it." *Pounds Photographic Labs, Inc. v. Noritsu America Corp*., 818 F.2d 1219, 1226 (5th Cir. 1987); "Because the trial court had no opportunity to assess whether problems with these awards might warrant a new trial, Defendants have forfeited these issues. *Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir. 1983) ("It is well-established that there can be no appellate review of allegedly excessive or inadequate damages if the trial court was not given the opportunity to exercise its discretion in a motion for a new trial."); see also Vargas v. Lee, 317 F.3d 498, 499 n.1 (5th Cir. 2003)." *Longoria v. Hunter Express, Ltd*., 932 F.3d 360, 363 (5th Cir. 2019).

parties may have the opportunity to offer all the evidence they believe relevant to the issues… [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'"[41] One must be mindful that, on appeal, the party claiming error must demonstrate that the claimed erroneous ruling affected "any outcome in the case and, as a result, [the party's] substantial rights."[42]

When the claimed error is the exclusion of evidence, the complaining party must have actually offered the evidence and secured an adverse ruling from the court. That is not all. The proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal.[43]

In order to preserve error as to excluded evidence, an offer of proof must be made.[44] A record of testimonial evidence may be made either by interrogating a witness under oath on the record or by precisely stating the substance of the evidence in a statement to the court.[45] To make an offer of proof as to excluded documentary evidence, the documents should be identified on the record by exhibit number and submitted as an offer of proof to be included in the record.[46]

g. Preservation of error in motions and responses.

In order for written motions and responses to motions to be understood and effective, one must prepare them with proper citation to and discussion of the law and cite to and attach copies of any relevant evidence, case law, statues, or rules.[47] Once again, this process will clearly advise the trial court of the parties' position and show the appellate court the trial court was fully appraised of the position for which error is claimed on appeal.

h. Preservation of error as to the jury charge.

Each party must meet its burden to submit a jury charge in accordance with the law.[48] Any objection to the charge must be presented to the trial judge in writing or dictated into the record so that the trial judge is apprised of the law supporting the proffered charge or the objections made to

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[41] *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Polara Eng'g, Inc. v. Campbell Co*., 894 F.3d 1339, 1355 (Fed. Cir. 2018).

[42] McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 553, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) ("The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment . . . and ignore errors that do not affect the essential fairness of the trial"); Dresser-Rand Co. v. Virtual Automation, Inc., 361 F.3d 831, 842 (5th Cir. 2004) (recognizing that "this Court is bound to disregard any errors . . . that do not affect the substantial rights of the parties" and that "[t]he burden of proving substantial error and prejudice is upon the appellant."); *MultiPlan, Inc. v. Holland*, 937 F.3d 487, 501-502 (5th Cir. 2019); see also Fed.R.Civ.Proc. 61; Fed. R. Evid. 103(a),(e).

[43] Fed. R. Evid. 103(a)(2).

[44] *Id*.

[45] *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3rd 1285, 1287 (8th Cir. 1995).

[46] *Bommarito v. Penrod Drilling Corp*., 929 F.2d 186, 181 (5th Cir. 1991).

[47] *See* Fed.R.Civ.Proc. 7, 11, 12, 56.

[48] Fed.R.Civ.Proc. 51 (a), (b).

the adversary's proposed charge.[49] Any requested question, definition, or instruction must be submitted to opposing counsel and the trial court in writing.[50] Any such request must be separate and apart from the party's objections to the charge.[51] This process will not only advise the trial court of the proper path to follow to avoid error, but will also demonstrate to the appellate court that the trial court had an opportunity to draft a charge in accordance with the law.[52] If the charge was erroneous, the party must still show the charge error was harmful before the appellate court may reverse.[53]

i. Post-verdict or judgment motions.

Any motions to disregard answers to the jury questions, to modify the judgment, or for new trial must be filed in writing, in a fashion that is thorough, clear, and that does not include meritless arguments. As in the instances set out above, the claimed error must be clearly shown to demonstrate the trial court was informed and had a full opportunity to correct an error. Such motions will also be useful to focus the appellate courts on the error claimed to be prejudicial.[54]

j. Interlocutory Appeals

Interlocutory appeals, when permitted, can afford review of a pivotal trial court ruling without the necessity of waiting until final judgment is rendered. At this stage, a decision by the court of appeals should set the trial court proceedings in a proper course. Generally, a party may not appeal an interlocutory order.[55] However, some statutes authorize interlocutory appeals in limited situations. There are two types of interlocutory appeals. One is a permissive appeal

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[49] Id. Fed.R.Civ.Proc. 51 (c), (d).

[50] *Id*. Fed.R.Civ.Proc. 51 (a), (b).

[51] *Id*

[52] *Id*. Fed.R.Civ.Proc. 51 (c), (d); Phillips v. IRS, 73 F.3d 939, 941 (9th Cir. 1996) (when error is properly preserved, standard of review is abuse of discretion as to whether the charge was misleading or inadequate); *Jimenez v. Wood Cty*., 660 F.3d 841, 845 (5th Cir. 2011) (When objection is not properly preserved, appellate court can only consider plain error that affects substantial rights).

[53] *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States Co.*, 195 F.3d 765, 774 (5th Cir. 1999). ("W]e will not disturb the judgment unless the error could have affected the outcome of the trial.").

[54] Fed.R.Civ.Proc. 59 (new trial, altering or amending judgment); Fed.R.Civ.Proc. 60 (relief from judgment or order); Fed.R.Civ.Proc. 61 (harmless error); Fed.R.Civ.Proc. 62 (stay of proceedings to enforce judgment); Fed.R.Civ.Proc. 62.1 (indicative ruling on a motion for relief that is barred by pending appeal).

[55] Generally, appellate courts have jurisdiction only over appeals from final judgments. See Fed.R.App.Proc. 4 (appeal as of right); 28 U.S.C. § 1291 (appeal from final judgment or order); Fed.R.Civ.Proc.. 5 (appeal by permission); 28 U.S.C. §1292 (a) (some interlocutory orders as to injunctions, receiverships, admiralty) (b) ("When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."); "Federal courts of appeals ordinarily have jurisdiction over appeals from "final decisions of the district courts." *Cunningham v. Hamilton County*, 527 U.S. 198, 203, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999).

pursuant to Fed.R.App.Proc. 5 of an "order, decree, or judgment complained of and any related opinion or memorandum."[56] The other is an appeal of right, but only as specifically authorized by Fed.R.App.Proc. 4.[57]

The rules and the statute that authorizes a permissive interlocutory appeal set out slightly different requirements, but are complementary. First, one must comply with Fed.R.App.Proc. 5 (a) (1-3) which requires the filing of a motion in the trial court by a party seeking permission to appeal a controlling question of law that is not otherwise appealable by statute.[58] If the motion is granted, according to 28 U.S.C. §1292 (b), the trial court's order must "identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation."[59] Also the trial court may initiate such appeal on its own motion.[60]

Second, a permissive appeal under 28 U.S.C. §1292 (b) does not stay the proceeding in the trial court "unless the district judge or the Court of Appeals or a judge thereof shall so order."[61] Further, the statute makes it clear the appeal is not automatic. The party seeking appellate court review of the "question of law" must file a petition for permissive appeal in the court of appeals that has jurisdiction "within ten days after the entry of the order" by the trial court.[62] The application must explain "the reasons why the appeal should be allowed and is authorized by a statute or rule."[63] Should the court of appeals enter an order "granting permission" to appeal, appellant must pay the clerk the required fees and file a cost bond required by Rule 7.[64] Then, although no notice of appeal need be filed, the date of the order "permitting" the appeal "serves as the date of the notice of appeal" for calculation of time under the appellate rules.[65] It is worthy of note that there is no provision for appeal of a trial court's denial of a motion for permissive appeal. However, should the trial court refuse to recommend a permissive appeal, one might consider mandamus and, if that is unsuccessful, petition the United States Supreme Court for review and a stay.[66]

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[56] Fed.R.App.Proc. 5 (b) (1) (E) (i).

[57] See 28 U.S.C. §1292 (a) (1-3) (some interlocutory orders as to injunctions, receiverships, admiralty).

[58] Unlike Fed.R.Civ.Proc. 5 (a), 28 U.S.C. §1292 does not identify the first step as being the filing of a motion by a party with the trial court. Although, the statute implies that action.

[59] 28 U.S.C. §1292 (b), R. 5 is silent on this requirement.

[60] *Id*.; Cf. Fed.R.App.Proc. 5 (a).

[61] Fed.R.App.Proc. R 5 (b) (1) (D). §1292 (b).

[62] §1292 (b); Fed.R.Civ.Proc. 5 (a) (2) (provides for filing with the court of appeals within the "time specified by the statute.").

[63] *Id*.

[64] Fed.R.Civ.Proc. 5 (d) (1).

[65] Fed.R.Civ.Proc. 5 (d) (2) "A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules."

[66] *See, e.g., In re United States*, 139 S. Ct. 452, 453, 202 L. Ed. 2d 344, 345 (2018). "The District Court declined to certify its orders for interlocutory review under 28 U. S. C. §1292(b) (permitting such review when the district court certifies that its order "involves a controlling question of law as to which there is substantial ground for

k. Mandamus.

During the pre-trial stage, if error is committed by the trial court that may be prejudicial to the outcome of the case, and an interlocutory appeal is not permitted, one should consider filing a petition for writ of mandamus with the court of appeals to correct the error and put the case back on the proper course.[67] Mandamus relief should be considered when a trial court is believed to have erred as to virtually any ruling. However, the relator's burden when seeking mandamus relief is onerous. As the 5th Circuit noted:

> [T]he Supreme Court has established three requirements that must be met before a writ may issue: (1) 'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires--a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process'; (2) 'the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable'; and (3) 'even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.'[68]

If the court of appeals denies relief, then, as indicated above, one may consider petitioning the United States Supreme Court.[69] If granted by an appellate court, mandamus orders will direct the trial court to modify or reverse an erroneous ruling. However, remember, mandamus relief is granted "sparingly" in federal court.[70]

l. Appellate Issues Stated in Briefs.

The issues on appeal must be carefully designed to grasp and hold the attention of the reader. At the same time, the issues must state clearly the errors claimed. However, it is recommended that the issue state more than something like, "Did the trial court err in admitting hearsay evidence." The issue should focus on the specific problem and the gravity of the error, *e.g.*, "Did the trial court commit harmful error by overruling appellant's objection to hearsay testimony that addressed " In addition, a party must raise only issues that are material. That is,

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difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation"). See this Court's order of July 30, 2018, No. 18A65 (noting that the "striking" breadth of plaintiffs' claims "presents substantial grounds for difference of opinion"). At this time, however, the Government's petition for a writ of mandamus does not have a 'fair prospect' of success in this Court because adequate relief may be available in the United States Court of Appeals for the Ninth Circuit. When mandamus relief is available in the court of appeals, pursuit of that option is ordinarily required. See S. Ct. Rule 20.1 (petitioners seeking extraordinary writ must show "that adequate relief cannot be obtained in any other form *or from any other court*" (emphasis added)); S. Ct. Rule 20.3 (mandamus petition must "set out with particularity why the relief sought is not available in any other court"); see also *Ex parte Peru*, 318 U. 578, 585, 63 S. Ct. 793, 87 L. Ed. 1014 (1943) (mandamus petition 'ordinarily must be made to the intermediate appellate court')."

[67] See The All Writs Act, 28 U.S.C. § 1651, and Fed.R.App.Proc. 21.

[68] *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (citing at length *Cheney v. U. S. Dist. Ct. D.C.*, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)); See also In re Avantel, S.A., 343 F.3d 311, 317 (5th Cir. 2003). ; *In re Occidental Petroleum Corp*., 217 F.3d 293, 295 (5th Cir. 2000).

[69] See note 79, In re United States, 139 S. Ct. 452, 453, 202 L. Ed. 2d 344, 345 (2018).

[70] "The Writs of Mandamus and Prohibition are granted sparingly." *In re Estelle*, 516 F.2d 480, 483 (5th Cir. 1975); *Hicks v. United States*, 396 Fed. Appx. 164 (5th Cir. 2010).

courts of appeals will be skeptical of a party that raises, for instance, a dozen issue, when there are only three real, pivotal issues. Even so, an issue that raises error will not result in reversal unless the error is harmful in that "'there is a significant chance that it has affected the result of the trial.'"[71] One must be aware that any issues not included in a party's opening brief are waived.[72]

m. Appellate Briefs.

The appellate rules set limits on the length of briefs. The length of appellant's or appellee's initial brief is limited according to Fed.R.App.Proc. 32 (a) (7) (B) (i) (no more than 13,000 words; or a monospaced face and that contains no more than 1,300 lines of text). A reply brief is limited to "no more than half of the type volume specified in Rule 32(a) (7) (B) (i)."[73] Many parts of a full submission are excluded from these word or line limits.[74] In any case, by local rule or order "a court of appeals may accept documents that do not meet" the form and length of briefs required by the rule.[75] Any briefs filed in cross appeals and responses must comply with both Fed.R.App.Proc. 28 as to contents and Fed.R.App.Proc. 28.1 as to contents and length.

In light of the limits on the length of briefs, a party must be precise. At least three point are important here: a) The law cited must be on point and concisely explained, b) The statement of facts must not include irrelevant information, and c) The argument must get to the point, quickly and clearly. Imprecise or even excessive treatise style analysis in briefs may leave a judge unimpressed.

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[71] *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 725 (7th Cir. 1999); See also *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States Co.,* 195 F.3d 765, 774 (5th Cir. 1999). ("W]e will not disturb the judgment unless the error could have affected the outcome of the trial.").

[72] "In any event, we need not reach whether the court was required to allow the requested additional evidence, or otherwise abused its discretion in denying its submission, because E.R. fails to brief (including in her reply brief) how the claimed error affected a substantial right. See *Jones*, 800 F.2d at 1400; *Conn. Gen. Life Ins. Co. v. Humble Surgical Hosp., L.L.C.*, 878 F.3d 478, 487 n.4 (5th Cir. 2017) (citing Yohey, 985 F.2d at 224-25) (noting when an issue is "insufficiently briefed" it is "abandoned"), cert. denied 138 S. Ct. 2000, 201 L. Ed. 2d 251 (2018). Instead, E.R., in a footnote, simply lists by whom the briefly-described additional evidence would have been provided; again, E.R. made no attempt to show how the evidence would have made a difference in district court." *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 764 (5th Cir. 2018).

[73] Fed.R.App.Proc. 32 (a) (7) (B) (ii).

[74] See Fed.R.App.Proc. 32 **(f) "Items Excluded from Length**. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- cover page;
- disclosure statement;
- table of contents;
- table of citations;
- statement regarding oral argument;
- addendum containing statutes, rules, or regulations;
- certificate of counsel;
- signature block;
- proof of service; and
- any item specifically excluded by these rules or by local rule."

[75] Fed.R.App.Proc. 32 (e).

Parties to an appeal must be aware of what must or may be included in an appendix to the brief. Appellant is required to file an appendix that includes: "(**A**) the relevant docket entries in the proceeding below; (**B**) the relevant portions of the pleadings, charge, findings, or opinion; (**C**) the judgment, order, or decision in question; and (**D**) other parts of the record to which the parties wish to direct the court's attention."[76] Memoranda of law filed in the trial court must not be included in the appendix "unless they have independent relevance."[77] The parties to the appeal are "encouraged" to agree on the contents of the appendix, but absent agreement, within 14 days of when the record is filed, appellant must serve on appellee a designation of the contents of the appendix.[78] Then, appellee must serve on appellant a designation of any additional items to be included in the appendix.[79] Unless the parties agree otherwise, appellant must pay the cost of the appendix.[80] Other form requirements are expressly identified in the rule.[81]

n. Motions for Rehearing.

When an opinion is issued in a case, a motion for rehearing by the panel first hearing the case may be filed within 14 days of the "entry of judgment."[82] The motion may not exceed 3,900 words.[83] A motion for hearing en banc, to request an en banc hearing as the initial hearing for the case, must be filed when the appellee's brief is due.[84] Rehearing en banc must be requested by a motion filed within 14 days of the "entry of judgment."[85] An en banc hearing or rehearing may be ordered by a majority of the active service judges of the court.[86] However, en banc hearings are not favored. Whether the court orders en banc hearing on its own motion or a party requests it, the grounds that must be satisfied to order the hearing are essentially the same: 1. En banc consideration is necessary to "secure or maintain uniformity of the court's decisions" or 2. The proceeding involves a "question of exceptional importance."[87] A motion for rehearing or motion for rehearing en banc that very precisely sets out how the panel erred could persuade the panel to

[76] Fed.R.App.Proc. 30 (a) (1). Many judges print copies of the briefs when they prepare. So, providing pivotal materials in an appendix can allow a judge to consider case law, statutes, and documents without having to search the trial court record.

[77] Fed.R.App.Proc. 30 (a) (2).

[78] Fed.R.App.Proc. 30 (b) (1).

[79] *Id.*

[80] Fed.R.App.Proc. 30 (b) 2).

[81] Fed.R.App.Proc. 30 (c)-(f).

[82] Fed.R.App.Proc. 40 (a) (1).

[83] Fed.R.App.Proc. 40 (b) (2) (A).

[84] Fed.R.App.Proc. 35 (c).

[85] *Id.*

[86] Fed.R.App.Proc. 35 (a)

[87] Fed.R.App.Proc.. 35 (a), (b).

issue a revised opinion or that an en banc hearing should be conducted. Additionally, a well-crafted motion for rehearing may lend support for a petition for review to the Supreme Court.[88]

4. Conclusion

Effective trial and appellate practice is accomplished by hard work and attention to detail. That detail must include meticulous planning of each stage of the litigation and expressly for preservation of error for review. Without careful and thorough attention to error preservation, an appeal is lost before it begins. Write it down, or it never will happen.

[88] As to contents of an appendix to a petition for writ of certiorari, see USCS Supreme Ct R 14 (1) (i), (i) (copy of the opinion or order entered in conjunction with the judgment sough to be reviewed, (vi) "any other material the petitioner believes essential to understand the petition."

DORSEY
always ahead

Attachment 1: Federal Court Gotchas and Other Dilemmas- Checklist

(Caveat: Other federal rules and local rules not listed may apply to your case!)

1. ***Always-Always* review the local rules for each judge, district, or circuit**.

Those rules may modify or simply add to the requirements of the federal rules. Failure to adhere to those local rules can be fatal.

See Fed.R.Civ.Proc. 83 (authorizes local rules that "must be consistent with" federal statutes and rule). *Cf.* Bromberg, Myron J. and Korn, Jonathan M. (1994) "Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure," *St. John's Law Review:* Vol. 68 : No. 1 .

(Available at: https://scholarship.law.stjohns.edu/lawreview/vol68/iss1/1 last accessed January 23, 2020).

2. **Pleading**

- Fed.R.Civ.Proc. 7(a) (complaint, answer to complaint, answer to counterclaims, answer to cross-claim, answer to third-party complaint).
- Fed.R.Civ.Proc. 8(a) (claim for relief-grounds, statement showing entitlement to relief, demand for relief).
- Fed.R.Civ.Proc. 8(b) (answer, specific admissions and denials of each allegation and claim; specific affirmative defenses).
- Fed.R.Civ.Proc. 13 (counter claims, cross claims)
- Fed.R.Civ.Proc. 14 (third party practice. Defendant may file without leave of court if filed within 14 days after serving its answer.).
- Fed.R.Civ.Proc. 10 (state claims or defenses in separate numbered paragraphs).
- Fed.R.Civ.Proc. 15 Amended and supplemental pleadings (party may amend once within 21 days after serving pleading, otherwise must obtain leave of court or written agreement of adverse parties).

3. **Agreements Between Attorneys Regarding a Case.**

The federal rules do not specifically deal with the form and filing of record of agreements. Local rules may address this. See Local Rules for Southern District of Texas.

4. **Statute of limitations.**

There are many different ones! See both state and federal law. This is "A Death Knell *Gotcha*!".

5. **Constitutional Challenge to a Statute—Notice, Certification, and Intervention.** (Fed.R.Civ.Proc. 5.1).

- A party that challenges the constitutionality of a federal or state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it, if: a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

- serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

- The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.

- Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

- A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

6. **Disclosure Statement.**

Fed.R.Civ.Proc. 7.1 (Two copies of the statement must be filed at first appearance of corporate entity that identifies any corporation owning 10% or more of its stock or that there is no such corporation.).

7. **Lawyers and "Warranted".**

Representations to the Court. Fed.R.Civ.Proc. 11 (Counsel signing any document directed to the court "certifies that to the best of the person's knowledge" the document and positions stated are not presented for any improper purpose, the claims defenses and positions are "warranted by

existing law or by non-frivolous argument," factual contentions have or are likely to have evidentiary support, and denials of factual contentions "are warranted" based on the evidence or on reasonable belief or lack of information. Sanctions may be imposed for violations.)

8. **More Signature Warranties of Lawyers.**

Signing Disclosures and Discovery Requests, Responses, and Objections. (Fed.R.Civ.Proc. 26(g)) (Look out-Gotacha! Your signature is your bond!

- Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record.

- By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

    - with respect to a disclosure, it is complete and correct as of the time it is made; and

    - with respect to a discovery request, response, or objection, it is:

        - consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

        - not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

        - neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

a. **Failure to Sign.**

Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

b. **Sanction for Improper Certification.**

If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

9. **Petition to remove to federal court and remand**.

(Generally, notice of removal must be filed within 30 days after the receipt by the defendant of a copy of the initial pleading or within 30 days after the service of summons, whichever period is shorter. See 28 U.S.C. § 1446(b)).

10. **Motion to Dismiss. Fed.R.Civ.Proc. 12**

- Defenses that must be included in pre-answer motion (except where no answer is required, 21 days after service of pleading).
  - Fed.R.Civ.Proc. 12(b):

    "(1) lack of subject-matter jurisdiction;

    (2) lack of personal jurisdiction;

    (3) improper venue;

    (4) insufficient process;

    (5) insufficient service of process;

    (6) failure to state a claim upon which relief can be granted;

    (7) failure to join a party under Rule 19." and

  - **Motion for more definite statement**. Fed.R.Civ.Proc. 12(e).

  - **Motion to strike**. Fed.R.Civ.Proc. 12(f).

- Defenses identified in Fed.R.Civ.Proc. 12(b)(2)-(5) not raised by preanswer motion are generally waived. Fed.R.Civ.Proc. 12(h)(1). *Cf*. Fed.R.Civ.Proc. 12 (h)(2).

11. **Motion to transfer venue**. (28 U.S.C. §§1391, 1404, 1406).

- 28 U.S.C. §1391 (Venue generally-residence, where "substantial part of" the acts or omissions occurred or where "substantial part of" the property is located.).

- 28 U.S.C. §1406 (court may dismiss or transfer where chosen venue is improper, but when an objection to venue is not "timely and sufficient," the objection may be waived.).

- 28 U.S.C. §1404 (a court may order transfer to another venue for the convenience of the parties and witness "in the interest of justice. A contractual, mandatory forum selection clause may be enforced, unless the plaintiff shows the agreement is not enforceable or it is "unwarranted.").

12. **Pretrial Conferences, Scheduling, Management. Fed.R.Civ.Proc. 16.**

- After the court receives the Fed.R.Civ.Proc. 26(f) "report" of the parties (Fed.R.Civ.Proc. 26 (f) requires parties to confer no later than 21 days before a scheduling conference "is to be held), a conference will be set. When they confer, the parties must consider their claims and defenses, settlement possibilities, make arrangements for the disclosures (Fed.R.Civ.Proc. 26 (a)(1)), agree on a discovery plan, other point identified in the Rule 26 and 16, and submit a "report" pursuant to a submitted plan. (deadlines are critical!).

    - Types, nature, and timing of discovery must be mapped out.

    - Parties should work out ways to avoid a waiver "Gotcha".

- A "Quick Peek Agreement" See Fed.R.Civ.Proc. 26 (2006 notes to rule). By agreeing to protocols that minimize the risk of waiver, the parties may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection—sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Fed.R.Civ.Proc. 26(b)(5)(A).

- "Claw back Agreement." See Fed.R.Civ.Proc. 26 (b)(5)(B) ("Claw back" procedure for claiming privilege of inadvertently produced materials. See 2006 notes to Fed.R.Civ.Proc. 26 that could be less adversarial. "Parties may enter agreements that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.").

    - Be aware, a district court may alter the deadlines for filing the report or, the content of the report, by local rule or order. (Fed.R.Civ.Proc. 26 (f)(4)).

13. **Discovery methods, procedures, and compliance**.

- Deposition to Perpetuate Testimony-Pre-suit depositions. (Fed.R.Civ.Proc. 27) ("Gotacha"-the petition requesting this discovery (and possibly other presuit discovery) must be "verified.").

- As provided in Pretrial report and Pretrial order: depositions (Fed.R.Civ.Proc. 30, 31), Interrogatories (Fed.R.Civ.Proc. 33), requests for admissions (Fed.R.Civ.Proc. 36), document discovery (Fed.R.Civ.Proc. 34), experts.

- **ESI-electronic discovery-"Gotcha**" (Complex, but *see Sedona Conference, The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf.* J. 1 (2018). Available at https://thesedonaconference.org/publications (last accessed January 31, 2020)).[89]

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[89] The principles are directly tied to the rules, are not a "restatement" of the rules, but intended to "serve as best practice recommendations and principles for addressing ESI issues in disputes " *Id*. at 29. The "Third Edition" provides detailed charts that correlate the principles with the rules. *Id*. at 54-55. Know the principles and the rules! "THE SEDONA PRINCIPLES, THIRD EDITION.

1. Electronically stored information is generally subject to the *same preservation and discovery requirements* as other relevant information.

2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the *proportionality standard embodied* in Fed.R.Civ.Proc. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and

whether the burden or expense of the proposed discovery outweighs its likely benefit.

3. As soon as practicable, *parties should confer and seek to reach agreement* regarding the preservation and production of electronically stored information.

4. Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the

scope and limits of the production.

5. The *obligation to preserve electronically stored information requires reasonable and good faith efforts* to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.

6. *Responding parties are best situated to evaluate the procedures,* methodologies, and technologies appropriate for preserving and producing producing their own electronically stored information.

7. The *requesting party has the burden on a motion to compel* to show that the responding party's steps to preserve and produce relevant electronically stored information were *inadequate*.

8. *The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course.* Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.

9. *Absent a showing of special need and relevance*, a responding party *should not be required* to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.

10. Parties *should take reasonable steps to safeguard* electronically stored information, the disclosure or dissemination of which is subject to *privileges, work product protections, privacy obligations, or other legally enforceable restrictions.*

11. *A responding party may satisfy its good faith obligations* to preserve and produce relevant electronically stored information *by using technology and processes, such as sampling, searching, or the use of selection criteria.*

12. The *production of electronically stored information* should be made in the *form or forms in which it is ordinarily maintained or that is reasonably usable* given the nature of the electronically stored information and the proportional needs of the case.

13. The costs of preserving and producing relevant and proportionate electronically stored information ordinarily *should be borne by the responding party.*

- **Privileges** (Know what-state and federal-privileges are recognized, See Fed. R. E. 501).[90]
    - Preserving/asserting (Fed.R.Civ.Proc. 26(b)(5)(A)),
    - Protective orders (Seeking orders and types possible Fed.R.Civ.Proc. 26 (c))
    - Waiver and inadvertent production (Fed.R.Civ.Proc. 26(b)(5)(B)) preserve after production by notice, move the court to preserve the privilege, and protect material from use.).
    - Documents and ESI-
        - Production (Fed.R.Civ.Proc. 34 ((b)(2) Within 30 days after request, either state as to each request production will be made).
        - Objection and Withhold (If object, must specify objection and that the materials are withheld).
        - Submission by requesting party to court for determination.
        - Mandatory Disclosure (Fed.R.Civ.Proc. 26 (a)(1)). "*Gotcha*"-watch the deadline and assure full disclosure required by the rules.
    - Initial Disclosures (Fed.R.Civ.Proc. 26 (a)(1)).
        - The *rule lists in detail what must be disclosed*. Carefully scrutinize the requirements. See local rules for any additional requirements or time limits.
        - Initial Disclosures must be made *within 14 days after the Fed.R.Civ.Proc. 26 (f) conference* unless otherwise stipulated or ordered.
    - Final Pretrial Disclosures. Fed.R.Civ.Proc. 26 (a) (3) (a) (b).

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14 *The breach of a duty to preserve* electronically stored information may be addressed by *remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party* of the use of relevant electronically stored information." The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 51 (2018). https://thesedonaconference.org/publications (last accessed February 3, 2020) (emphasis added).

[90] "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

- Must make final disclosures at least 30 days before trial other than as to evidence to be used solely for impeachment. Fed.R.Civ.Proc. 26 (a) (3) (a)

- Disclosures must be as expressly identified in Fed.R.Civ.Proc. 26 (a) (3) (b).

- Duty to Supplement. Fed.R.Civ.Proc. 26 (e) (Responding party must supplement in a timely manner discovery disclosures, discovery responses to interrogatories, requests for production, requests for admissions, and information in expert reports and depositions).

14. **Jury demand.**

F.R.C.P. 38 (Demand in pleading raising issue to be tried or within 14 days after the pleading raising the issue to be tried. *Grant or denial of motion for jury trial filed out of time is within the discretion of court.*).

15. **Selecting Jurors.**

Fed.R.Civ.Proc. 47 (Does the court allow voir dire by lawyers or will the court do it all? Find out what the court allows.)

16. **Number of Jurors.** Fed.R.Civ.Proc. 48. (Must be at least six and no more than

17. **What do you want?** What will court press for?).

18. **Motion to compel arbitration** (9 USCS §§ 3, 4),

19. **Motions for summary judgment**. Fed.R.Civ.Proc. 56 (MSJ)

- MSJ may be granted when there is no genuine issue of material fact and movant is entitled to judgment as matter of law. Fed.R.Civ.Proc. 56 (a).

- MSJ may be filed at any time until 30 days after the close of discovery or as set by local rule or the court orders otherwise. Fed.R.Civ.Proc. 56 (b).

- Parties' motion, response, or reply:

  - must cite to the record and present evidence (documents, deposition excerpts, affidavits, self- proving documents in appendix (Fed.R.Civ.Proc. 56 (c)).

  - may supply affidavits or declarations (on personal knowledge) Fed.R.Civ.Proc. 56 (c) (4).

  - Cross motions may be filed.

  - Party may object to evidence, affidavits/declarations, or other submissions in the MSJ. (Fed.R.Civ.Proc. 56 (c) (2)).

- Party unable to timely present evidence to respond to the MSJ may seek a continuance. (Fed.R.Civ.Proc. 56 (d)).

- SJ granted as to all issues is final and appealable. 28 USCS § 1291.

- Denial of MSJ is interlocutory and not appealable. *Plumhoff v. Rickard,* 572 U.S. 765, 771 (2014).

- Party against which SJ was granted, whose cross-MSJ was denied, may appeal the grant of the SJ and the denial of its MSJ. *North River Ins. v. CIGNA Reinsurance Co*., 52 F.3d 1194, 1203 (3rd Cir. 1995).

20. **Motion for Judgment as a Matter** of Law (directed verdict) (Fed.R.Civ.Proc.50(a)).

21. **Jury charge**

- At or before the close of the evidence, parties my submit their proposed "instructions" to the court. (Fed.R.Civ.Proc. 51 (a)(1)).

- Parties may object to instructions or the failure to give an instruction by "stating distinctly the matter objected to and the grounds" (Fed.R.Civ.Proc. 51 (c)(1)).

- A party may "assign error" to

  - Instruction given and objected to (Fed.R.Civ.Proc. 51 (d)(1)(A)).

  - The failure to give an instruction and objected to (Fed.R.Civ.Proc. 51(d)(1)(B)).

  - "Plain error" not objected to that "affects substantial rights." (Fed.R.Civ.Proc. 51 (c) (2)).

22. **Special Verdict** Form. The trial court may submit either a special verdict form of fact finding questions (Fed.R.Civ.Proc. 49 (a)(1)), with explanatory instructions (Fed.R.Civ.Proc. 49 (a)(2)) or a general verdict form with written questions (Fed.R.Civ.Proc. 49 (b)(1)).

23. **Non-jury trial and findings and conclusions.** Fed.R.Civ.Proc. 52

24. **Computation of time**. (Date the judgment is entered is excluded from the calculation of time to act. When the final day of the time is a Saturday, Sunday, or legal holiday, the next day that is not one of those three days is the last day in the period. Fed.R.Civ.Proc. 6(a)(1)(A)). Gotcha!

25. **Time for filing post judgment motions** (Another ***Gotcha*** - times are drop dead dates)

26. **Motion for new trial** (Fed.R.Civ.Proc. 59(a)) and motion to alter or amend judgment (Fed.R.Civ.Proc. 59(e)) must be filed no later than 28 days after the "entry of judgment."

(Fed.R.Civ.Proc. 59 (b)). The court may grant a new trial or alter or amend the judgment on its own motion no later than 28 days "after entry" of the judgment.

27. **Timely filing of Motion for New trial** suspends the finality of the judgment until the motion is denied. Fed. R. App. Proc. 4(a) (4)(A)(v). Party appealing must file notice of appeal within 30 days of an order denying the motion for new trial or the granting of a motion to alter or amend the judgment. Fed. R. App. Proc. 4(a)(1)(A), (a)(1)(B), (a)(4)(B)(ii). (Note: untimely filed motion for new trial does not toll the running of time to file notice of appeal. Fed, R. App. Proc. 4(a)(4)(A).).

28. **Order that Grants Motion for new Trial is not appealable**.

Mandamus may be attempted, but is rarely granted. *Allied Chem. Corp. v. Daiflon Inc*., 449 U.S. 33, 36 (1980).