Error Preservation Planning for Trial and Appellate Litigation: Begin with the End in Mind[1] and Avoid "Gotchas"[2]

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Benjamin Franklin said, "If you fail to plan, you are planning to fail!"[3] Franklin's rule is especially applicable to litigation. That planning must begin with the "end" in mind.[4] Of course, the "end" is success at both trial and on appeal. Achieving that "end" requires crafting strategies, immediately, at the very outset of the litigation that address all the foreseeable challenges. That takes time, but defaulting from solid, prompt planning and waiting until the "eleventh hour" to prepare can easily cause one to overlook critical, strategic decisions. Then, the "end" you seek can be lost.

Comprehensive litigation planning requires a litigation team to make tough calls early, regarding at least these questions:

- What are the objectives of the litigation for one's client and the adversary?
- What are the possible "gotchas" that must be avoided?
- What jurisdiction and venue are correct for the case?
- What claims and defenses must be asserted for the client?
- What will the adversary assert as its claims and defenses?
- What is the law regarding the claims and defenses?
- What proof can be offered to successfully assert the claims and defenses?
- What pivotal decisions will a trial court have to make?
- How can the client's position, *i.e.,* trial court error, be preserved for appeal?

The last point, preservation of error for appeal, can be the most important of the planning decisions, and it cannot take a back seat to trial phase preparation. Preservation of trial court error must be considered in conjunction with trial phase planning because the appellate phase, where trial court error is asserted, is where a trial win can become a loss, and a trial loss can become a win. So, the comprehensive litigation plan must anticipate the pivotal rulings that will be made by the trial court, the positions that will be taken on those issues by all parties, and critically, how one must present one's position precisely and clearly to the trial court at the time a ruling is made. If that preparation is accomplished and if the trial court errs in its ruling, one will be able to make the record clear that the trial court was made aware of the client's legal position. Then, a potential appellate point may be preserved, and it may be raised on appeal.

This article is separated into two sections. Each section addresses aspects of strategic planning of litigation matters that are akin yet distinct. The first section consists of a series of basic foundational considerations that typically arise well before the meat of the litigation is underway. Those considerations are, in effect, a lengthy checklist of where and how litigation will commence and progress as well as potential roadblocks. The second section addresses the specific planning of trial strategy, error preservation, and strategy for appeal. Those points typically require lawyers to bore into the substance of the case, anticipate the adversary's tactics, and plan for successful presentation in the trial court and on appeal.

II. The Foundational Tasks and Strategy Points: A Checklist

The points set out below address overarching, foundational considerations about where and how litigation will proceed and potential roadblocks to a smooth process.

1. "Gotchas" Checklist

Sometimes, one may inadvertently ignore obvious rule and statutory "tripwires," or "gotchas." It happens. The suggested "Gotcha" Checklist attached to this paper can provide part of a baseline for a trial and appellate plan.[1] Simply reviewing a list of those potential "gotchas" can jog one's memory to address a particular potential problem. While the points on the "checklist" may seem elementary, there is no substitute for double-checking. The adage "measure twice, saw once" is appropriate for the trial and appellate practice.

2. Other Foundational Checklist Items Regarding Jurisdiction, Venue, Removal, or Arbitration

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.

First, you must determine whether the selected court has jurisdiction over the parties. Second, the law of the possible available forums must be 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 put a "cap" or statutory limit on the amount that can be recovered.[2] 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 selected court has jurisdiction.[3] If the court has no jurisdiction, it has no power to act.[4] A defendant must raise valid jurisdictional questions by an appropriate motion or pleading requesting that the court dismiss the case.[5]

Of course, the question of whether there is personal jurisdiction is governed by "due process" under the United States Constitution.[6] Further, the question of whether there is subject matter jurisdiction is determined by 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, stating: "[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)."[7]

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.[8] Once jurisdiction has been established, the venue must be selected.[9] A 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.[10] 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.[11]

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, and different jury pools. Additional reasons for removing a case may include: favorable and strict adherence to procedural rules, different trial procedures such as very limited voir dire,[12] obtaining greater expertise on federal questions, and more likely enforcement of arbitration[13] and jury waiver clauses.[14]

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.[15] 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.[16] In addition, a party whose case has been removed by an adversary should consider whether to seek remand.[17]

d. Enforcing or Blocking the Enforcement of Arbitration Agreements

The foundational issue as to whether arbitration may be compelled is: do the parties have a valid, enforceable agreement to arbitrate.[18] That question, in itself, is the subject of an abundance of litigation. 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.[19] For instance, an arbitration agreement procured by fraud, or that is unconscionable, is unenforceable.[20] 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."[21]

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.[22] Once the motion to compel arbitration is filed, as indicated above, the moving party has the burden to prove the agreement is valid.[23] Then, the burden shifts to a party opposing enforcement of the agreement to raise affirmative defenses to enforcement.[24] Should the trial court deny the motion to compel, the aggrieved party may perfect an interlocutory appeal.[25] However, should the trial court grant the motion to compel arbitration, the Federal Arbitration Act (FAA) does 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.[26]

In the case of *Smith v. Spizzirri*, the Supreme Court decided to speak again about the appealability of an order of the district court compelling arbitration.[27] The Court pointed out that where a district court renders an order compelling arbitration and a party requests a stay of the proceeding pending arbitration, the district court does not have discretion to dismiss the case. The Court determined "Congress made clear in the statute that, absent certification of a controlling question of law by the district court under 28 U.S.C. § 1292(b), the order compelling arbitration is not immediately appeal-

able. See 9 U.S.C. § 16(b)."[28] The choice to "provid[e] for immediate interlocutory appeals of orders *denying*—but not of orders *granting*—motions to compel arbitration,"[29] is consistent with Congress's purpose in the FAA 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible [].'"[30] The Court observed when a case is stayed pending arbitration, the parties may avail themselves of the assistance authorized by the FAA. That is, "for example, appointing an arbitrator, see 9 U.S.C. § 5; enforcing subpoenas issued by arbitrators to compel testimony or produce evidence, see § 7; and facilitating recovery on an arbitral award, see § 9."[31]

Two critical point may be gleaned from the Court's discussion of legislative intent. First, a district court cannot dismiss a case when arbitration is compelled when a party requests the action be stayed. Second, even if the case is stayed, a party can press for an immediate appeal by seeking certification of a controlling question of law by the district court under 28 U.S.C. § 1292(b). That process in itself is complex, both the district court and the court of appeals have broad discretion, and an appeal is definitely not automatic, but it may be necessary to pursue under the right circumstance.[32]

III. Steps to Planning for Error Preservation and Avoiding Error

A. Anticipate Your Moves and the Adversary's Tactics

Most points in litigation that require error preservation can be anticipated, but consideration must be accorded to the following: a) plotting out what a client must do to present its case or defend against a claim, i.e., planning precisely what evidence will be presented and what witnesses will present that evidence, b) understanding what the adversary will likely do to prosecute its claim or defend against a claim, and c) anticipating objections to the opponent's evidence that one's team should make, anticipating objections that are likely to be made to the evidence you will present for the client, and preparing a specific response with authorities to make a record regarding the trial court's ruling. As discussed hereafter, to preserve a point for appeal, the record must show that the issue was brought to the trial court's attention, that the trial court had the opportunity to correct the erroneous ruling or order at the time, and that the judge actually ruled.[33] Otherwise, the error may be deemed waived or forfeited.

As stated above, a litigation plan must "begin with the end in mind." The "end" is the final appeal and preserving your client's position for appeal. Some may question, or even disregard, the need to plan for appeal before the trial phase begins. However, the point is this: obviously, at the beginning of a lawsuit, no one knows who will win and if the judgment in the case will be appealed. If, at the beginning of a well-planned trial court phase, one has failed to carefully plan to preserve error by proper objections, motions, or responses and, after trial, one is on the losing side, the failure to preserve error means *you lose on appeal.*

B. Marshall the Evidence and Plan the Order of Proof

Knowing what evidence is on hand and identifying what evidence is needed to prove one's case is, perhaps, the most critical early step for a litigation plan. It follows on the heels of the basic pivotal questions listed above. Organization of the evidence must not wait until all of the evidence is collected. Rather, one should prepare a chart that lists each element of each claim or defense, lists the evidence in hand and needed through discovery,[34] and sets forth in detail precisely how to introduce the evidence at trial.[35]

When the evidence is catalogued and ready to present at trial, one must prepare to preserve error should an objection block admission into the record of the evidence.

C. Preservation of Error

1. Strategy for Trial Phase and Appellate Phase are Different but Complementary

The strategy for preserving error for appeal is interwoven with the trial phase plan for discovery, pretrial motions, and actual trial presentation. Those trial phase plans are directed at obtaining evidence, evaluating the evidence, constructing a plan to prove the elements of a claim or defense, and ultimately presenting the evidence at trial in a credible, convincing manner. On the other hand, error preservation and appeal plans require a party to anticipate what the adversary might do and how the trial court might rule. It is an exercise in considering "what ifs" regarding issues that may necessitate a ruling during trial.

"What ifs" can include, among other things, erroneous rulings by a trial court that sustain an objection to presentation of one's evidence or overrule one's objection to evidence offered by an adversary or an adverse ruling on a motion of virtually any type. The list of "what ifs" on material points should be developed by considering the strategy for discovery, pretrial motions, and case presentation by one's own team as well as anticipating the strategy of and proof that will be presented by the adversary. Sometimes rulings by the trial court on the "what if" propositions can be the difference between winning or losing both at trial and on appeal.

2. Making the Record

a. In General

As a general rule, appellate courts decline to review an issue that was not preserved.[36] The United States Supreme Court has defined error preservation in these broad terms: "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." This general rule ensures that parties "'have the opportunity to offer all the evidence they believe relevant to the issues'" and litigants are "'not [ ] surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'"[37]

More specifically, the record must show that the litigant "timely rais[ed] claims and objections" such that the district court had the "opportunity to consider and resolve them."[38] Otherwise, the litigant's "claim for relief from the error is forfeited."[39]

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."[40] That is, the party complaining about the error must show it is "harmful error."[41] These rules apply to any trial court error.

3. Critical Steps to Make the Record

b. Documentary and Testimonial Evidence

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 also offer the evidence to the court for the record in order to complain of the exclusion on appeal.[42]

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.[43] 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.[44]

2. Motions and Responses

In order for written motions and responses to motions to be understood and effective, one must prepare them with proper citations to and discussion of the law and cite to and attach copies of any relevant evidence, case law, statutes, or rules.[45] Once again, this process will clearly advise the trial court of the parties' positions and show the appellate court that the trial court was fully appraised of the position for which error is claimed on appeal. For instance, a party's arguments in opposition to a motion for summary judgment can be forfeited if "perfunctorily presented" or presented in a conclusory or underdeveloped manner."[46] Even if the opponent defended against a perfunctory argument out of an abundance of caution, the argument may still be forfeited on appeal because entertaining the argument "would ... punish the opponent" for their thoroughness.[47]

3. Jury Instructions

Each party must meet its burden to submit jury instructions in accordance with the law.[48] Any requested question, definition, or instruction must be submitted to opposing counsel and the trial court in writing.[49] Objections to the proposed jury instructions 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 instructions or the objections made to the adversary's proposed instructions.[50] Any such request must be separate and apart from the party's objections.[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 jury instruction in accordance with the law.[52] If the instructions were erroneous, the party must still show the error was harmful before the appellate court may reverse.[53]

4. 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 succinct (*i.e.*, does not contain meritless arguments). As in the instances set out above, the claimed error must be clearly described to demonstrate that the trial court was informed and had a full opportunity to correct the error.[54] Such motions will also be useful to focus the appellate courts on the error claimed to be prejudicial.[55]

IV. Exceptions-When a Court Will Consider Unpreserved Error

There are two separate sets of exceptions to the proposition that a sufficient objection must made at trial to preserve error for appeal. The first is common law developed by each of the circuit courts of appeals. The federal rules provide the second set of exceptions.

The United States Supreme Court acknowledged the federal common law exceptions in the case of *Singleton v. Wulff*.[56] In *Singleton*, the Supreme Court determined that it was up to the circuit courts as to how they would address exceptions to the general rule. The Court said "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule."[57]

The rules of the circuit courts vary. The assortment of separate rules include some of the following concepts: "plain error,"[58] "extraordinary circumstances,"[59] purely legal questions in "extraordinary circumstances" or where a "miscarriage of justice would result from the failure to consider,"[60] "manifest error,"[61] and simple appellate court discretion.[62] In order to be sure of the applicable standard, one must review the case law in the relevant circuit.

The second set of exceptions to the general rule of error preservation focus on "plain error" that "affects substantial rights." Interpretation of the standards of these two rules creates at least some uniformity among the circuits.

Rule 51 of the Federal Rules of Civil Procedure addresses how one must preserve error respecting jury instructions. Error may be "assigned" if a timely objection was made to the instruction before the instructions and argument are delivered to the jury.[63] However, Rule 51 also provides that "plain error" in the "instructions" may be considered when the error "affects substantial rights."[64]

The second "plain error" rule pertains to evidence and is set out in Fed. R. Evid. 103(e).[65] Pursuant to that rule, unpreserved error will be addressed on appeal if, as with Rule 51, the plain error affects a substantial right.

Remedies for Error Aside from Appeal on the Merits

A. Collateral Orders

Generally, appellate courts have jurisdiction only over appeals from final judgments.[66] However, Section 1291 has been given a "'practical rather than a technical construction.'"[67] Thus, it "encompasses not only judgments that 'terminate an action,' but also a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'"[68] This is known as the collateral order doctrine. To be within the doctrine and appealable as a final order, the decision must be "conclusive," it must "resolve important questions separate from the merits," and those questions must be "effectively unreviewable on appeal from the final judgment in the underlying action."[69]

B. 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.[70] However, some statutes authorize interlocutory appeals in limited situations. In federal court, 28 U.S.C. § 1292 affords litigants the *right* to appeal an interlocutory order in three instances and the ability to seek permission to appeal under certain specific conditions.

An interlocutory appeal "as of right" is available for interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," interlocutory orders "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof," and interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."[71] The party seeking appellate review of one of these types of interlocutory orders would follow the procedure laid out in Rule 4(a) of the Federal Rules of Appellate Procedure.

A permissive appeal may be available when the order at issue "involves a controlling question of law as to which there is substantial ground for difference of opinion" and an immediate appeal "may materially advance the ultimate termination of the litigation."[72] A party

seeking a permissive appeal first must seek an order certifying the issue (or issues) for interlocutory appeal from the district court. That order must both identify the controlling question of law and state why an immediate appeal would materially advance the termination of litigation.[73] The trial court also may initiate a permissive appeal on its own.[74]

Next, the party seeking review of the "question of law" must file a petition for permissive appeal in the court of appeals "within ten days after the entry of the order" by the trial court.[75] The application must explain "the reasons why the appeal should be allowed and is authorized by a statute or rule."[76] Should the court of appeals render an order "granting permission" to appeal, the appellant must pay the clerk the required fees and file a cost bond required by Rule 7.[77] No notice of appeal is necessary; 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.[78] 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."[79]

It is worth noting that there is no provision for appeal of a trial court's denial of a motion to certify an interlocutory appeal. However, should the trial court refuse to recommend a permissive appeal, one might consider mandamus[80] and, if that is unsuccessful, petition the United States Supreme Court for review and a stay.[81]

C. 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.[82] Mandamus relief should be considered when a trial court is believed to have erred as to virtually any ruling.[83] However, the petitioner's burden when seeking mandamus relief is onerous.[84] The Supreme Court has identified three prerequisites to granting mandamus relief:

1. The party seeking the writ must "have no other adequate means to attain the relief he desires,"
2. The party seeking the writ must show that his "right to issuance of the writ is 'clear and indisputable,'" and
3. The issuing court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[85]

When a court of appeals denies relief, then, as indicated above, one may consider petitioning the United States Supreme Court.[86] 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" by federal courts.[87]

V. Appeals on the Merits

A. Three Requisites to Obtain Relief from Trial Court Error

Assuming one has preserved trial court error in the record by timely objection, the party seeking relief from the error must persuade the court of appeals of two additional points in order for the trial court error to constitute reversible error. The party must convince the court of appeals that the trial court's ruling was actually erroneous and must show that the error was harmful.

The standard of review employed by the court of appeals depends on the error claimed. "Traditionally, decisions on 'questions of law' are 'reviewable *de novo,*' decisions on 'questions of fact' are 'reviewable for clear error," and decisions on 'matters of discretion' are "reviewable for 'abuse of discretion.'"[88]

A clear error has occurred when the court of appeals is "left with the definite and firm conviction that a mistake has been committed."[89] However, if "a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."[90] In other situations, the question will be whether the trial court abused its discretion in making the ruling. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[91]

The error also must be "harmful." That is, "[the] error has caused substantial prejudice to the affected party (or, stated somewhat differently, affected the party's 'substantial rights' or resulted in 'substantial injustice')."[92] This third requirement is vital. A trial court error is not reversable error unless the appellate court is convinced that the error caused the requisite harm.[93]

B. Issues Stated in Briefs

The issues presented for appeal must identify the trial court error and make clear that the error affects the litigant's substantial rights, *i.e.,* that the error is harmful and "'there is a significant chance that it has affected the result of the trial.'"[94] The issues on appeal must be carefully designed to grasp and hold the attention of the reader, *i.e.,* the appellate court. The issues should be drafted to 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, courts of appeals will be skeptical of a party that raises, for instance, a dozen issues, when there are only three real, pivotal issues. One must be aware that any issues not included in a party's opening brief are waived.[95]

C. Appellate Briefs

The appellate rules set limits on the length of briefs. The length of the appellant's or appellee's initial brief is limited according to Fed. R. App. P. 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)."[96] Many parts of a full submission are excluded from these word or line limits.[97] 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.[98] Any briefs filed in cross appeals and responses must comply with both Fed. R. App. P. 28 as to contents and Fed. R. App. P. 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 points 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.

Parties to an appeal must be aware of what is required to be included in an appendix to the brief. The 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, instructions, 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."[99] Memoranda of law filed in the trial court must not be included in the appendix "unless they have independent relevance."[100]

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, the appellant must serve on the appellee a designation of the contents of the appendix.[101] Then, the appellee must serve on the appellant a designation of any additional items to be included in the appendix.[102] Unless the parties agree otherwise, the appellant must pay the cost of the appendix.[103] Other form requirements are expressly identified in the rule.[104]

D. Motions for Hearing En Banc and Rehearing at the Courts of Appeals

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.[105] A motion for rehearing by the panel first hearing the case may be filed within 14 days of the "entry of judgment."[106] The motion may not exceed 3,900 words.[107] Rehearing en banc must be requested by a motion filed within 14 days of the "entry of judgment."[108] An en banc hearing or rehearing may be ordered by a majority of the active service judges of the court.[109] 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."[110] A motion for rehearing or rehearing en banc that very precisely sets out how the panel erred could persuade the panel to 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 by the Supreme Court.[111]

VII. Caution: Litigation Must Be Pursued with Ethical Conduct and Professionalism

The above considerations and those described later in this article are required to create an effective trial and appellate strategy, but the strategy will be to no avail if it is performed by sharp practices, unethical conduct, and unprofessional means. A federal court will not stand for those practices.

An overarching consideration in any litigation is that it proceeds speedily and inexpensively. The federal rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[112] This enables courts to "carry out [their] responsibilities in the most prompt and efficient manner."[113] When lawyers and their clients introduce unnecessary contention and employ sharp practices, however, they delay litigation and increase costs, contrary to the federal rules. "[J]ustice delayed, and justice obtained at excessive cost, is often justice denied."[114] As the United States Supreme Court has concluded, "'[a]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct.' *Nix v. Whiteside*, 475 U.S. 157, 168, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986)."[115]

The *Dondi* opinion, issued in 1988 by the U.S. District Court for the Northern District of Texas, *en banc*,[116] is instructive of a district court's powers to regulate the conduct of lawyers who practice in those courts. In *Dondi*, the Court declared standards and rules of professional conduct that would be enforced routinely to compel civil conduct. *Dondi* and its directives remain in force and a part of the fabric of rules in the Northern District, other federal districts of Texas, and other federal districts across the county.[117]

In no uncertain terms, the *Dondi* court reminded all who come before the court of the powers it possesses to "protect attorneys and their clients" from actions that may cause "annoyance, embarrassment, or oppression,"[118] its authority to compel civil conduct,[119] and of its "inherent power to regulate the administration of justice."[120]

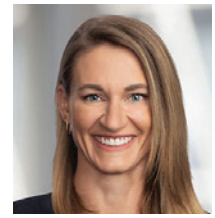
Finally, the court made it clear:

> "We think the standards we now adopt are a necessary corollary to existing law, and our system of justice and to emphasize that a lawyer's conduct, *both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play*." [121]

Do lawyers always play by the rules identified in *Dondi*?[122] Many lawyers and judges claim those rules and others regarding ethics, civility, and professionalism are frequently ignored.[123] Never the less, the mandate, admonition, and actual enforcement of civility pursuant to *Dondi* endures.[124] The Fifth Circuit Court of Appeals, in 2024, commended Texas's efforts "to instill a greater sense of professionalism among attorneys" through *Dondi*.[125] The Fifth Circuit, however, was not without its own words of caution to the bar: "We remind all practitioners in our court that zealous advocacy must not be obtained at the expense of incivility. As Judge Reavley aptly explained, 'Although earnest, forceful, and devoted representation is both zealous and proper, Rambo and kamikaze lawyers lead themselves and their clients to zealous extinction.'"[126]

VIII. Conclusion

Effective trial and appellate practice are accomplished by hard work and attention to detail. This 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, but be sure to begin planning with the end in mind. ⊙



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Endnotes

[1]*See* Hon. Douglas S. Lang and Kathleen E. Kraft, *Checklist: Federal Court Gotchas and Other Dilemmas*, The Fed. Law., Summer 2025, at 59, *infra*.

[2]*See, e.g.,* Tex. Civ. Prac. & Rem. Code Ann. § 41.008.

[3]Consider the amount in controversy, subject matter, and any other limits on a court's authority. 28 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).

[4]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 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). *See also Boechler, P.C. v. Comm'r.*, 596 U.S. 199 (2022); *Ex parte McCardle,* 74 U.S. (7 Wall) 506, 514 (1868) ("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."). "[C]hallenges to subject-matter jurisdiction may be raised by the defendant 'at any point in the litigation,' and courts must consider them *sua sponte*." *Fort Bend Cnty., Texas v. Davis*, 587 U.S. 541, 548 (2019) (internal citation omitted).

[5]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. P. 12(b)(1) (subject matter jurisdiction), Fed. R. Civ. P. 12(b)(2) (lack of personal jurisdiction over defendant).

[6]"'[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). *See also Walden v. Fiore,* 571 U.S. 277, 285 (2014) ("But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.").

[7]*Fort Bend Cnty., Texas*, 587 U.S. at 548; *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

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

[9]*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.).

[10]28 U.S.C. § 1404(a); *see also Atl. Marine Const. Co. v. United States Dist. Court*, 571 U.S. 49, 52 (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.").

[11]28 U.S.C. §§ 1441-1446.

[12]Fed. R. Civ. P. 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 courts is conducted by the judge. Any questioning by lawyers is typically limited in scope and time allotted.

[13]*See* 9 U.S.C. §§ 3, 4.

[14]"While the right to a jury trial is fundamental, 'a contractual waiver is enforceable if it is made knowingly, intentionally, and voluntarily.'" *Aquino v. Alexander Cap. LP,* No. 23-1109 (L), 2024 WL 2952497, at *2 (2d Cir. June 12, 2024) (quoting *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007)). *See also Pizza Hut L.L.C. v. Pandya,* 79 F.4th 535 (5th Cir. 2023). "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 (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*, No. 3:13-CV-4841-L, 2014 WL 4055475, at *11 (N.D. Tex. Aug. 14, 2014) (citing *Powell*, 191 F. Supp. 2d at 813), reconsideration denied, 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, if 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 Lamosa, S.A. v. De La* Rosa, 328 F. Supp. 3d 598, 619 (N.D. Tex. 2018).

[15]28 U.S.C. § 1446(d).

[16]*Id.* § 1446(b).

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

[18]*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("We have described this provision [of the Federal Arbitration Act] as reflecting both a 'liberal federal policy favoring arbitration,' ... and the 'fundamental principle that arbitration is a matter of contract,' ... In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, ... and enforce them according to their terms, ...") (internal citations omitted).

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

[20]*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (Interpreting § 4 to permit federal courts to adjudicate claims of "fraud in the inducement of the arbitration clause itself."). *See also Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

[21]*Prima Paint Corp.*, 388 U.S. at 403-04. *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."); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019) (the parties may "agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes."); *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." (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)).

[22]*See* 9 U.S.C. §§ 3, 4.

[23]*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).
[24]*See AT&T Mobility LLC,* 563 U.S. at 339.
[25]*See* 9 U.S.C. § 16.
[26]*Mire v. Full Spectrum Lending Inc*., 389 F.3d 163, 165-67 (5th Cir. 2004) (Administrative closure of case is not a final judgment and case no appealable); *Green Tree Financial Corp. Alabama v. Randolph,* 531 U.S. 79, 87 (2000) (order compelling arbitration and dismissing suit with prejudice is a final judgment subject to appeal).
[27]*Smith v. Spizzirri,* 601 U.S. 472, 478 (2024).
[28]*Id.*
[29]*Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023).
[30]*Smith,* 601 U.S. at 478.
[31]*Id.*
[32]Consider the situation where a party seeks a stay rather than dismissal respecting a wrinkle in the law as to for example whether the issues are subject to arbitration. The process has two steps. First, the district court must agree with a party that the issues should be certified to the court of appeals. Second, the court of appeals must determine in its discretion whether it will accept the submission.
[33]*See* § III, *infra*.
[34]*See, e.g.*, Fed. R. Civ. P. 16 (pretrial conference and order); Fed. R. Civ. P. 26(a) (disclosures; when required); Fed. R. Civ. P. 26(f) (discovery conference, schedule); Fed. R. Civ. P. 27-28, 30 (depositions); Fed. R. Civ. P. 31 (depositions by written questions); Fed. R. Civ. P. 33 (interrogatories to parties); Fed. R. Civ. P. 34 (production of documents and electronically stored data); Fed. R. Civ. P. 35 (physical and mental examinations); Fed. R. Civ. P. 36 (requests for admissions); Fed. R. Civ. P. 37 (failure to make disclosures, cooperate in discovery, sanctions); Tex. R. Civ. P. 192.7 (requests for production); Tex. R. Civ. P. 199.2, 205.1(c) (non-party production at oral deposition); Tex. R. Civ. P. 194.2(j), (k), 204, 510(d)(5) (medical records); Tex. R. Civ. P. 191, 192, 194 (request for disclosure); Tex. R. Civ. P. 197 (interrogatories); Tex. R. Civ. P. 198 (requests for admissions); Tex. R. Civ. P. 199, 200 (depositions); Tex. R. Civ. P. 202 (depositions before suit or to investigate claims); Tex. R. Civ. P. 205.3(b) (non-party notice of production). *See also* Tex. R. Evid. 509(e)(4).
[35]Fed. R. Evid. 901-1008.
[36]"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 ... except in exceptional circumstances." *Pounds Photographic Labs, Inc. v. Noritsu America Corp*., 818 F.2d 1219, 1226 (5th Cir. 1987) (citing *Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir. 1983)). Exceptional circumstances exist "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." *Id*. (citing *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1145 (5th Cir. 1981)). *See also Longoria v. Hunter Express, Ltd*., 932 F.3d 360, 363 (5th Cir. 2019).
[37]*Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (quoting *Hormel v. Helvering,* 312 U.S. 552, 556 (1941)); *Polara Eng'g, Inc. v. Campbell Co.,* 894 F.3d 1339, 1355 (Fed. Cir. 2018).
[38]*Puckett v. United States*, 556 U.S. 129, 134 (2009).
[39]*Id.*
[40]*McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (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, 501-02 (5th Cir. 2019). *See also* Fed. R. Civ. P. 61; Fed. R. Evid. 103(a), (e).
[41]*See* Fed. R. Civ. P. 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). *See also* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").
[42]Fed. R. Evid. 103(a)(2).
[43]*Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285, 1287 (8th Cir. 1995); *See, e.g., Cuff v. Trans States Holdings, Inc.,* 768 F.3d 605, 609 (7th Cir. 2014) ("When a district judge excludes evidence, the party aggrieved by that decision must make an offer of proof if it wants to raise the issue on appeal. Fed. R. Evid. 103(a)(2). An offer of proof in a situation like this would be something along the lines of: "Manager X would testify that, had he known Fact Y [the fact excluded from evidence], he would have fired Cuff.'").
[44]*Bommarito v. Penrod Drilling Corp*., 929 F.2d 186, 191 (5th Cir. 1991) (without a proffer of the documentary evidence, court of appeals was unable to evaluate whether the trial court erred).
[45]*See* Fed. R. Civ. P. 7, 11, 12, 56. One is not obliged to attach documents, but attachments can clarify a party's position.
[46]*Pond v. Michelin North America, Inc.,* 183 F.3d 592, 597 (7th Cir. 1999).
[47]*Williams v. Dieball,* 724 F.3d 957, 962 (7th Cir. 2013).
[48]Fed. R. Civ. P. 51 (a), (b).
[49]*Id.*
[50]Fed. R. Civ. P. 51 (c), (d).
[51]*Id.*
[52]*Id.; 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]*See* Fed. R. Civ. P. 51(d) (as to Instructions to the Jury); Fed. R. Civ. P. 61 (errors are to be disregarded as to any ruling, judgment, or order "that do not affect any party's substantial rights"). *See also Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States Co*., 195 F.3d 765, 774 (5th Cir. 1999) ("We will not disturb the judgment unless the error could have affected the outcome of the trial."); *Thomas v. Hughes,* 27 F.4th 995, 1009 (5th Cir. 2022) ("'To show reversible error, the party challenging the instruction 'must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.' ... We 'will not reverse unless the instructions taken as a whole do not correctly reflect the issues and law.'") (internal citations omitted).
[54]*See ORP Surgical, LLC v. Howmedica Osteonics Corp.,* 92 F.4th 896, 922 (10th Cir. 2024) ("Under Rule 59(e), a party may move the

court 'to alter or amend a judgment' within 28 days after the entry of judgment. ... A Rule 59(e) motion 'is appropriate where the court has misapprehended the facts, a party's position, or the controlling law.' ...When a party raises one of these challenges, the motion preserves that issue for appellate review.'") (internal citations omitted). *Cf. Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1219 (10th Cir. 2013) (deciding that a Rule 59(e) motion could preserve issues for appeal where the appellant neglected to renew its motion for judgment as a matter of law).

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

[56]*Singleton v. Wulff,* 428 U.S. 106 (1976).

[57]*Id.*

[58]*Clausen v. Sea-3, Inc.,* 21 F.3d 1181, 1190–91 (1st Cir. 1994).

[59]*Vogel v. Veneman*, 276 F.3d 729, 733 (5th Cir. 2002) (contrasting the Fifth Circuit standard with that of the Ninth Circuit described in *United States. v. Patrin,* 575 F.2d 708, 712 (9th Cir. 1978) and stating that court would review claims not pressed before the trial court when the issue is "purely one of law and either does not affect or rely upon the factual record developed by the parties"); *Kiewit Offshore Services, Ltd. v. Dresser-Rand Global Services, Inc.,* 756 Fed. Appx. 334 (5th Cir. 2018) (citing *Vogel v. Veneman* and *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009) ("Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it.").

[60]*Id.*

[61]*Unicover World Trade Corp. v. Tri-State Mint, Inc.,* 24 F.3d 1219, 1221 (10th Cir. 1994).

[62]*ORP Surgical*, 92 F.4th at 923-24 ("So even though ORP Fumbled the ball under Rule 59(e), we address the legal merits of ORP's cross-appeal.").

[63]Fed. R. Civ. P. 51(c)(1)(2).

[64]Fed. R. Civ. P. 51(d)(2).

[65]Fed. R. Evid. 103(e) ("Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.").

[66]Fed. R. App. P. 4 (appeal as of right); 28 U.S.C. § 1291 (appeal from final judgment or order).

[67]*Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

[68]*Mohawk Indus., Inc.*, 558 U.S. at 106 (quoting *Cohen*, 337 U.S. at 545-46).

[69]*Mohawk Indus., Inc.*, 558 U.S. at 106 (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)).

[70]Generally, appellate courts have jurisdiction only over appeals from final judgments. *See* Fed. R. App. P. 4 (appeal as of right); 28 U.S.C. § 1291 (appeal from final judgment or order); Fed. R. App. P. 5 (appeal by permission); 28 U.S.C. § 1292(a) (some interlocutory orders as to injunctions, receiverships, admiralty); 28 U.S.C. § 1292(b) (certification of question for appeal). "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 (1999).

[71]28 U.S.C. § 1292(a).

[72]*Id.* § 1292(b).

[73]*Id.* Rule 5 of the Federal Rules of Appellate Procedure is silent on this requirement.

[74]*Id. Cf.* Fed. R. App. P. 5(a).

[75]28 U.S.C. § 1292(b); Fed. R. Civ. P. 5(a)(2) (provides for filing with the court of appeals within the "time specified by the statute.").

[76]*Id.*

[77]Fed. R. Civ. P. 5(d)(1).

[78]Fed. R. Civ. P. 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."

[79]Fed. R. App. P. 5(b)(1)(D); 28 U.S.C. § 1292(b).

[80]*Mohawk Indus., Inc.,* 558 U.S. at 105 (district court declined to certify order for interlocutory appeal, but it stayed its ruling requiring production of documents so party could seek mandamus relief).

[81]*See, e.g.*, *In re United States*, 586 U.S. 983, 983 (2018) (noting that district court declined to certify orders for interlocutory review and finding that the "he 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"). *See also Ex parte Peru*, 318 U.S. 578, 585 (1943) (mandamus petition 'ordinarily must be made to the intermediate appellate court')."

[82]*See* The All Writs Act, 28 U.S.C. § 1651; Fed. R. App. P. 21.

[83]*E.g., Mohawk Indus., Inc.,* 558 U.S. at 105 (mandamus applied to attorney-client privilege rulings); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (issuing writ of mandamus regarding venue-transfer order); *In re Micron Technology, Inc.,* 875 F.3d 1091, 1095 (Fed. Cir. 2017) (citing *In re Queen's Univ.*, 820 F.3d 1287, 1291 (Fed. Cir. 2016) ("mandamus may be appropriate to 'further supervisory or instructional goals' regarding 'issues [that] are unsettled and important.'"); *Cheney v. United States Dist. Court,* 542 U.S. 367, 380-81 (2004) ("'This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government,' ... or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations.'").

[84]*Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36 (1980) ("In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: 'What never? Well, *hardly* ever!'"); *see also Cheney,* 542 U.S. at 380-81 (citing *Will v. United States, 389* U.S. 90, 107 (1967) ("The preemptory common-law writs are among the most potent weapons in the judicial arsenal. 'As extraordinary remedies, they are reserved for really extraordinary causes.' *Ex parte Fahey*, 332 U.S. 258, 260, 67 S.Ct. 1558, 1559 (1947).").

[85]*See also Cheney,* 542 U.S. at 380–81 (citations omitted).

[86]*See* Fed. R. App. Proc. 5(b)(1)(D); 28 U.S.C. § 1292(b).

[87]"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).

[88]*Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

[89]*June Medical Services L.L.C. v. Russo*, 591 U.S. 299 (2020).

[90]*Pullman -Standard v. Swint*, 456 U.S. 273, 287 (1982).

[91]*Highmark Inc.*, 572 U.S. at 563 n.2 (2014).

[92]*Martin's Herend Imports Inc.,* 195 F.3d at 774.

[93]*Stansell v. Revolutionary Armed Forces of Colombia,* 120 F.4th 754, 768 (11th Cir. 2024) (citing *Palmer v. Hoffman*, 318 U.S. 109,

116 (1943) "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.").

[94]*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) ("We will not disturb the judgment unless the error could have affected the outcome of the trial.").

[95]*E. R. by E. R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 764 (5th Cir. 2018) ("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... 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."); *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.F (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 (2018).

[96]Fed. R. App. P. 32 (a)(7)(B)(ii).

[97]*See* Fed. R. App. P. 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.").

[98]Fed. R. App. P. 32(e).

[99]Fed. R. App. P. 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.

[100]Fed. R. App. P. 30(a)(2).

[101]Fed. R. App. P. 30(b)(1).

[102]*Id.*

[103]Fed. R. App. P. 30(b)(2).

[104]Fed. R. App. P. 30(c)-(f).

[105]Fed. R. App. P. 35(c).

[106]Fed. R. App. P. 40(a)(1).

[107]Fed. R. App. P. 40(b)(2)(A).

[108]*Id.*

[109]Fed. R. App. P. 35(a).

[110]Fed. R. App. P. 35(a), (b).

[111]As to the contents of an appendix to a petition for writ of certiorari, *see* U.S. Sup. Ct. R 14(1)(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.")

[112]Fed. R. Civ. P. 1.

[113]*Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D 284, 286 (N.D. Tex. 1988)

[114]*Id.*

[115]*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 559 U.S. 573, 600 (2010).

[116]*Dondi*, 121 F.R.D. at 290 (N.D. Tex. 1988) (emphasizing the importance of upholding ethical standards); *C.f. In re Anonymous Member of the S.C. Bar*, 709 S.E.2d 633, 638 (S.C. 2011) (stating South Carolina's obligatory lawyer civility oath is meant to protect "the administration of justice and integrity of the lawyer-client relationship").

[117]*See In re Bradley*, 495 B.R. 747, 783 n. 22 (Bankr. S.D. Tex. 2013) ("In 2001, the District Judges of the Southern District of Texas voted to adopt these Guidelines for Professional Conduct, to be observed by all attorneys appearing before any district judge, bankruptcy judge, or magistrate judge presiding in the Southern District of Texas. General Order 2001-7. The guidelines are derived from the decision rendered in [*Dondi*]."); *In re Armstrong*, 487 B.R. 764, 773 (E.D. Tex. 2012) ("The implication that the Northern District encourages an attorney to advance claims the attorney knows are baseless is especially ironic. The standards of conduct governing conduct in the Eastern District of Texas, set out in Eastern District Local Rule AT-3, are those enumerated in [*Dondi*]."); *In re Mortg. Analysis Portfolio Strategies, Inc.,* 221 B.R. 386, 389 (Bankr. W.D. Tex. 1998) ("Under Local Rule 1001(g) all counsel are to observe the standards of conduct set out in [*Dondi*]."); *see also, e.g., In re Shell Oil Refinery*, 143 F.R.D. 105, 108 (E.D. La. 1992) (citing *Dondi* as to reason for discovery conferences.); *Kohlmayer v. AMTRAK*, 124 F. Supp. 2d 877, 883 (D.N.J. 2000) (denying *pro hac vice* application of attorney who consistently acts in an uncivilized manner.); *Nazar v. Harbor Freight Tools United States*, 2019 U.S. Dist. LEXIS 226428 at *5 (E.D. Wash. 2019) (citing *Dondi* regarding need for discovery dispute conference by attorneys pursuant to Fed. R. Civ. Proc. 37(a) to foster "a frank exchange between counsel to resolve issues by agreement"); *Williams v. Williams,* Case No. 2:18-cv-01363-APG-NJK, 2021 WL 4186692, at *2 (D. Nev. Apr. 29, 2021) (citing *Dondi* as to need for "meet and confer" and failure of movant to actually meet and confer as grounds to deny motion); *Liberty Insurance Underwriters, Inc. v. Beaufurn, LLC,* 1:16CV1377, 2021 WL 185580, at *5 (M.D.N.C. Jan. 19, 2021) (Court cited *Dondi* as to the need for "meet and confer' prior to filing opposed motions and failure of counsel to meet and confer as reason for denial of motion.).

[118]"We are authorized to protect attorneys and litigants from practices that may increase their expenses and burdens (Rules 26(b)(1) and 26(c)) or may cause them annoyance, embarrassment, or oppression (Rule 26(c)), and to impose sanctions upon parties or attorneys who violate the rules and orders of the court (Rules 16(f) and 37)." *Dondi,* 121 F.R.D. at 287. "We likewise have the power by statute to tax costs, expenses, and attorney's fees to attorneys who unreasonably and vexatiously multiply the proceedings in any case," and "we are also granted the authority to punish, as contempt of court, the misbehavior of court officers." *Id.* (citing 28 U.S.C. § 1927 (2012)).

[119]*Id.* (citing 18 U.S.C. § 401 (2012)).

[120]*Id.*

[121]*Id.* at 288–89 (emphasis added).

[122]David L. Hudson Jr., *I Pledge to Be Civil: Lawyer Speech Triggers Both Civility and Constitutional Concerns*, ABA J., September/October 2019, at 35; *see In re Anonymous Member of the S.C. Bar*,

709 S.E.2d 633, 636–38 (S.C. 2011) (disagreeing with respondent's argument that the civility clause contained "within the lawyer's oath is unconstitutionally vague and overbroad"). The Texas "Oath of Attorney" includes an important description of a lawyer's responsibilities and requires the lawyer to state he will "honestly demean" himself and he will conduct himself "with integrity and civility in dealing and communicating with the court and all parties." Tex. Gov't. Code Ann. § 82.037(a) (West 2015).

[123]"Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." *Kim v. Westmoore Partners, Inc.* 133 Cal. Rptr. 3d 774, 796 (Cal. Ct. App. 2011) (cited in *Lasalle v. Vogel*, 248 Cal. Rptr. 3d 263, 267 (Cal. Ct. App. 2019)). *See also* Jill Switzer, *The Legal Profession Is Seriously Lacking In Civility* https: //abovethelaw.com/2019/06/the-legal-profession-is-seriously-lacking-in-civility/ (last accessed November 12, 2024).

[124]*See* Hudson Jr.*, supra* note 122, at 36 ("'Since civility is that important, states should follow jurisdictions like South Carolina and Arizona and make civility mandatory,' [Prof. David Grenardo, [St. Thomas University School of Law] says. 'Because incivility runs rampant in society and occurs too often in the legal profession, state bars need rules to change behavior on a large scale to fight the incivility epidemic that permeates the legal profession. Some lawyers are stubborn and will only refrain from attacking others personally or will only treat others with dignity and respect if there is a rule that requires them to refrain from those personal attacks or a rule that requires them to act civilly.'").

[125]*Clapper v. American Realty Investors, Incorporated*, 95 F.4th 309, 319 (5th Cir. 2024).

[126]*Id.*

[127]The principles are directly tied to the rules, but they are not a "restatement" of the rules. Rather, they are intended to "serve as best practice recommendations and principles for addressing ESI issues in disputes." *The Sedona Principles, Third Edition*, 19 Sedona Conf. J. 1, 29. The "Third Edition" provides detailed charts that correlate the principles with the rules. *Id*. at 54-55. Know the principles and the rules!

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. P. 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 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 p*rivileges, 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.*
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. *Id*. at 51-53 (emphases added).

[128]Federal Rule of Evidence 501 says: "The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

Checklist: Federal Court Gotchas and Other Dilemmas

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

1. **Check the Local Rules.** ***Always, always*** review the local rules for each judge, district, or circuit. Those rules may modify or add to the requirements of the federal rules. Failure to adhere to those local rules can be fatal. *See* Fed. R. Civ. Proc. 83(a) (authorizes local rules that are "consistent with" federal statutes and rules). *Cf.* Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, St. John's L. Rev. Vol. 68: No. 1 (1994) (available at: https://scholarship.law.stjohns.edu/lawreview/vol68/iss1/1) (last accessed January 23, 2020).

2. **Know the Pleading Requirements.**
   a. Fed. R. Civ. P. 7(a) (complaint, answer to complaint, answer to counterclaims, answer to cross-claim, answer to third-party complaint)
   b. Fed. R. Civ. P. 8(a) (claim for relief grounds, a statement showing entitlement to relief, demand for relief)
   c. Fed. R. Civ. P. 8(b) (answer, specific admissions and denials of each allegation and claim; specific affirmative defenses)
   d. Fed. R. Civ. P. 13 (counter-claims, cross-claims)
   e. Fed. R. Civ. P. 14 (third party practice; a defendant may file without leave of court if filed within 14 days after serving its answer)
   f. Fed. R. Civ. P. 10 (state claims or defenses in separate numbered paragraphs)
   g. Fed. R. Civ. P. 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. **Make Sure Any Agreements Between Counsel Comply with the Local Rules.** The federal rules do not specifically deal with the form and filing of records of agreements. Local rules may address this. *See, e.g.*, Local Rules for Southern District of Texas, L.R. 83.5.

4. **Know Your Statute of Limitations!** (There are many different ones!!! See both state and federal law. This is "A Death Knell *Gotcha*!").

5. **Are You Challenging the Constitutionality of a Statute?** See Fed. R. Civ. P. 5.1. Among other requirements, you 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. You also must serve the notice and paper on the Attorney General of the United States (for federal statute challenge) or on the state attorney general (state statute challenge) either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose. (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. **Prepare Your Disclosure Statement**. *See* Fed. R. Civ. P. 7.1 (two copies of the statement must be filed at the first appearance of a corporate entity that identifies any corporation owning 10% or more of its stock or that there is no such corporation).

7. **Remember that Your Filings are Representations to the Court.** *See* Fed. R. Civ. P. 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 nonfrivolous 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. **Make Sure You Know Who is Supposed to Sign What (and What It Means).** (Look out-*Gotcha*!). *See* Fed. R. Civ. P. 26(g).

9. **Removal 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. **Know When Your Responsive Pleading Is Due.** *See* Fed. R. Civ. P. 12(a). The general rule is 21 days, but different time limits apply when a defendant has timely waived service or the answering party is the United States, a United States agency, or a United States officer or employee sued in an official capacity or in an individual capacity in connection with duties performed on the United States' behalf. Also, be aware of how a Rule 12 motion impacts the time periods for responsive pleadings.

11. **Do You Have the Grounds for a Motion to Dismiss?** *See* Fed. R. Civ. P. 12(b). Some defenses may be asserted in a pre-answer motion—(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; and (7) failure to join a party under Rule 19. Failing to raise lack of personal jurisdiction, improper venue, insufficient process, or insufficient service of process in a pre-answer motion or responsive pleading generally results in waiver of the defense.

12. **Other Rule 12 Motions.** *See* Fed. R. Civ. P. 12(e) for motion for more definite statement, which must be filed before the responsive pleading. *See* Fed. R. Civ. P. 12(f) for motions to strike, which must be filed before responding to the pleading or if no response is allowed, within 21 days after service.

Checklist: Federal Court Gotchas and Other Dilemmas

13. Venue and Transferring Venue.

a. 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).

b. 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).

c. 28 U.S.C. § 1404 (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").

14. Pretrial Conferences, Scheduling, Management. *See* Fed. R. Civ. P. 16.

a. **Plan for the Rule 26(f) Conference**: Needs to happen as soon as practicable but no later than 21 days before scheduling conference is to be held or scheduling order is due under Rule 16(b). *See* Fed. R. Civ. P. 26(f). Parties must consider their claims and defenses, settlement possibilities, make arrangements for initial disclosures, agree on a discovery plan, address other points identified in the Rule 26 and 16, and submit a "report" pursuant to a submitted plan. Deadlines are critical! Be aware, a district court may alter the deadlines for filing the report or, the content of the report, by local rule or order. (*See* Fed. R. Civ. P. 26 (f)(4)).

b. **Protect against unintended waivers of privilege or protection** (a "*Gotcha*"):

1. "Quick Peek Agreement" (*see* Fed. R. Civ. P. 26, 2006 notes to rule at ¶ 27; 2008 note on Fed. R. Evid. 502 at ¶ 16)— 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 Rule 26(b)(5)(A).
2. "Claw Back Agreement." *See* Fed. R. Civ. P. 26(b)(5)(B) for the "claw back" procedure for claiming privilege of inadvertently produced materials. *See* 2006 notes to Fed. R. Civ. P. 26.

15. Discovery Methods, Procedures, and Compliance.

a. **Pre-suit depositions**: *See* Fed. R. Civ. P. 27. For perpetuating testimony. ("*Gotcha*!" The petition requesting this discovery (and possibly other pre-suit discovery) must be "verified.").

b. **Pretrial order**: May modify general rules for depositions (Fed. R. Civ. P. 30, 31), interrogatories (Fed. R. Civ. P. 33), requests for admissions (Fed. R. Civ. P. 36), document discovery (Fed. R. Civ. P. 34), and experts.

c. **ESI (electronically stored information) and electronic discovery**: A complex "*gotcha*." *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production,* 19 Sedona Conf. J. 1 (2018) (https://thesedonaconference.org/publications (last accessed January 31, 2020)).[127] (Always check for amendments and updates to "The Sedona Principles.").

1. Fed. R. Civ. P. 34(b)(2)(D) (can object to requested form for producing ESI)
2. Fed. R. Civ. P. 34(b)(2)(E) (procedures for producing ESI)

d. **Initial disclosures**: *See* Fed. R. Civ. P. 26(a)(1). A "*gotcha*." Watch the deadline and ensure full disclosure as required by the rules.

1. The rule lists in detail what must be disclosed. Carefully scrutinize the requirements. Check the local rules for any additional requirements or time limits.
2. Initial disclosures must be made *within 14 days after the Rule 26(f) conference* unless otherwise stipulated or ordered.

e. **Pretrial disclosures**: *See* Fed. R. Civ. P. 26(a)(3). Must make final disclosures at least 30 days before trial other than as to evidence to be used solely for impeachment. Contents identified in Fed. R. Civ. P. 26(a)(3)(A).

f. **Duty to supplement**: *See* Fed. R. Civ. P. 26(e). The 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.

g. **Privileges**: Know what state and federal privileges are recognized. *See* Fed. R. Evid. 501.[128]

1. Preserving/asserting privilege. See Fed. R. Civ. P. 26(b)(5)(A).
2. Protective orders (asking for them and possible types). See Fed. R. Civ. P. 26(c).
3. Waiver and inadvertent production. See Fed. R. Civ. P. 26(b)(5)(B) (preserve after production by notice, move the court to preserve the privilege, and protect material from use).
4. Objections to production requests on grounds of privilege. See Fed. R. Civ. P. 34(b)(2). Respond within 30 days (but check the pretrial order). If objecting, must specify objection and that materials are being withheld.

16. You Want a Jury Trial? Pay Attention!

a. Jury demand. *See* Fed. R. Civ. P. 38 (Demand in pleading raising issues to be tried or within 14 days after the pleading raising the issue to be tried. *Grant or denial of a motion for jury trial filed out of time is within the discretion of the court.*) *Gotcha!*

b. Selecting jurors. *See* Fed. R. Civ. P. 47 (Does the court allow voir dire by lawyers, or will the court do it all? Find out what the court allows.)

c. Number of jurors. *See* Fed. R. Civ. P. 48. (Must be at least six and no more than 12. What do you want? What will the court press for?).

15. Compelling Arbitration. See 9 U.S.C. §§ 3, 4. Potential for waiver by late request. *Gotcha!*

17. Moving for Summary Judgment. *See* Fed. R. Civ. P. 56. May be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. File at any time until 30 days after the close of discovery or as set by local rule or the court orders otherwise. *Potential Gotcha!* Cross motions may be filed.

a. **Parties' motion, response, or reply**:
   1. Fed. R. Civ. P. 56(c): Must cite to the record and present evidence (documents, deposition excerpts, affidavits, self-proving documents in appendix).
   2. Fed. R. Civ. P. 56(c)(4): May supply affidavits or declarations (on personal knowledge).
   3. Fed. R. Civ. P. 56(c)(2): May object to evidence, affidavits/declarations, or other submissions in the MSJ. (*Potential Gotcha!*—object to improper evidence or declarations. Preserve error).

b. **Not enough evidence to respond?** *See* Fed. R. Civ. P. 56(d). Party unable to timely present evidence to respond to the MSJ may seek a continuance.

c. **Order on MSJ**: SJ granted as to all issues is final and appealable. 28 U.S.C. § 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).

18. Motion for Judgment as a Matter of Law. *See* Fed. R. Civ. P. 50(a). Previously known as "directed verdict." File any time before case is submitted to jury. If denied, *see* Fed. R. Civ. P. 50(b). Can renew motion no later than 28 days after entry of judgment and include alternative or joint request for new trial under Rule 59.

19. Jury Instructions.

a. **Timing**: Submit proposed instructions to court at or before close of evidence. Fed. R. Civ. P. 51(a)(1). After close of evidence, submit requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests or with court permission, untimely requests for instructions on any issue. Fed. R. Civ. P. 51(a)(2).

b. **Objections**: Object to instructions or failure to give instruction on the record by "stating distinctly the matter objected to and the grounds." Fed. R. Civ. P. 51(c)(1).

c. "**Assigning error**":

1. Error in an instruction given, if properly objected to. Fed. R. Civ. P. 51(d)(1)(A).
2. Error in a failure to give an instruction, if instruction was properly requested and if the court rejected the request on the record, objected to rejection. Fed. R. Civ. P. 51(d)(1)(B).
3. "Plain error" not objected to that "affects substantial rights." (Fed. R. Civ. P. 51(c)(2)).

20. Judgment.

a. **Jury trial verdict types.** *See* Fed. R. Civ. P. 49. Special verdict in the form of fact-finding questions with explanatory instructions or a general verdict together with written questions on issues of fact.

b. **Bench trial findings and conclusions.** *See* Fed. R. Civ. P. 52.

21. Post-Judgment.

a. **Computing time**: *See* Fed. R. Civ. P. 6(a)(1)(A). 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. *Gotcha!*

b. **Deadline—28 days after entry of judgment** for motion for new trial, Fed. R. Civ. P. 59(a), and motion to alter or amend judgment, Fed. R. Civ. P. 59(e). (This is a drop-dead time period. "*Gotcha*!") Also, deadline for the court to grant a new trial or alter or amend the judgment *sua sponte*.

c. **Finality**: Timely motion for new trial suspends the finality of judgment until motion is denied. Fed. R. App. P. 4(a)(4)(A)(v). (Untimely-filed motion for new trial does not toll the running of time to file a notice of appeal. Fed. R. App. P. 4(a)(4)(A). *Gotcha!*)

d. **Appealing**:

1. Party appealing must file a notice of appeal within 30 days of entry of judgment. Fed. R. App. P. 4(a)(1)(A). (Time to file a notice of appeal is 60 days for all parties if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former U.S. officer or employee sued in an individual capacity in connection with duties performed on behalf of U.S.)
2. 30-day period suspended for a timely-filed motion for judgment (Fed. R. Civ. P. 50(b)), to amend or make factual findings (Fed. R. Civ. P. 52(b)), to alter or amend the judgment or for new trial (Fed. R. Civ. P. 59), or for relief under Rule 60 if filed within the time period for Rule 59 motion. Time suspended until entry of order disposing of last of any of the aforementioned motions. Fed. R. App. P. 4(a)(4)(A).
3. If one party timely notices an appeal, the other party may file a notice of appeal within 14 days after the first party's notice or 30 days after entry of judgment, whichever is later. Fed. R. App. P. 4(a)(3).
4. Order granting motion for new trial is not appealable.
5. Mandamus may be attempted, but is rarely granted. "[O]ur cases have answered the question as to the availability of mandamus in situations such as this with the refrain: 'What never? Well, *hardly* ever!'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).