Transitioning from Trial to Appeal and Post Trial Motions

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CHAPTER 11

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TRANSITIONING FROM TRIAL TO APPEAL AND POST TRIAL MOTIONS

I. INTRODUCTION

There are many procedural steps that must be followed in the period between the judgment in the district court and submission of a case to the court of appeals. Along the way there are numerous possible ways to waive complaints of error and sacrifice strategic advantages. The following paper is presented in hopes of helping advocates avoid these pitfalls.

This paper will discuss the steps that should be taken in transitioning from the district court to the court of appeals, and the attention that must be directed towards preserving error. The focus of the paper will be on practice in the federal district courts before appealing to the Fifth Circuit Court of Appeals. Special consideration will be given to the potential procedural pitfalls on the path to appeal and the local rules of the Fifth Circuit that vary from the general Federal Rules of Appellate Procedure.

The first step on the path to appeal is deciding whether to appeal at all. In evaluating a case for appeal, the process should include: analysis of the record to determine what error has occurred and whether it was preserved at trial; consultation with the client regarding chances of success on appeal; consultation with the trial attorney, if different than the attorney handling the appeal; prospects of post-judgment settlement; the ability to supersede the judgment; and the economic realities of prosecuting an appeal.

To decide whether to appeal, it may be helpful to refer to the statistics provided in the "Practitioner's Guide to the U.S. Court of Appeals for the 5th Circuit" (http://www.ca5.uscourts.gov/clerk/docs/pracguide.htm). The practitioner's guide reports that for the 12 month period ending June 30, 2003, the Fifth Circuit docketed 8,684 actions and had reviewed over 11,700 briefs on the merits of a case. About 8% of the 4,000 cases decided on the merits were reversed. About 75% were affirmed in whole or in part; 15% were dismissed or remanded. About 9.5% of non-prisoner "U.S. Civil Cases," and about 14.8% of non-prisoner "Private Civil" cases were reversed. Civil appeals were generally decided in a median time of about 10.3 months.

II. PRESERVATION OF ERROR

To appeal a case, it is essential that appealable error be preserved. Although not jurisdictional, courts of appeals usually will not consider error that has not been properly preserved. *McDonald's Corp. v. Watson*, 69 F.3d 36, 44 (5th Cir. 1995).

Matters that must be preserved at trial

Certain matters must be preserved at trial through a timely objection. Those matters generally include attacking admission and exclusion of evidence and charge error. *U.S. v. Pettigrew*, 77 F.3d 1500, 1516 (5th Cir. 1996) ("In order to preserve error for appellate review, defendant's objection to admission of evidence must adequately apprise the district court judge of the grounds for objection."); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988) (objection to exclusion of evidence); *Brown v. Ames*, 201 F.3d 654, 662 (5th Cir. 2000) (objection to charge error). There are, however, exceptions that may permit unpreserved error in these areas to still be raised for the first time on appeal. FED. R. EVID. 103(d); *see also Permian Petroleum v. Petroleos Mexicanos*, 934 F.2d 635, 648 (5th Cir.1991) (when a party fails to object to the admission of evidence, the appellate court can still conduct a plain error review); FED R. CIV. P. 51(d)(2) ("[C]ourt may consider a plain error in the instructions affecting substantial rights that has not been preserved.").

Sufficiency of the evidence complaints usually must be preserved by a motion for judgment as a matter of law made at trial and renewed after judgment, although an objection to submission of a jury issue on the grounds of insufficient evidence may substitute for the motion at trial. *See Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1244-45 n.7 (5th Cir. (1997) (objection or combination of objections to the charge based on insufficiency of the evidence can serve as the functional equivalent of a formal motion for judgment as a matter of law).

Other errors that generally require a timely objection to preserve the matter for appeal include improper jury argument and improper comments by the district court judge. *Miller v. Johnson*, 200 F.3d 274, 283 n.5 (5th Cir. 2000) (improper jury argument); *Peel v. Am. Fid. Assur. Co.*, 680 F.2d 374,377 (5th Cir. 1982) (improper comment by district court judge).

Matters that do not require a post-trial motion to be preserved for appeal

Although most error must be preserved by post-trial motion, there are certain matters that may be raised on appeal without any prior steps to preserve the error. Those matters include attacks on subject matter jurisdiction, mootness, and plain error in the charge or

admission and exclusion of evidence. *In re McCloy*, 296 F.3d 370, 373 (5th Cir. 2002) ("[A] lack of subject matter jurisdiction may be raised at any time, and we can examine the lack of subject matter jurisdiction for the first time on appeal."); *Harris v. City of Houston*, 151 F.3d 186, 189 n.4 (5th Cir. 1998) (noting that the issue of mootness, even if raised for the first time on appeal, must be addressed by the court); *U.S. v. Miller*, 600 F.2d 498, 500 (5th Cir. 1979) ("Objections to the admission of evidence cannot be raised for the first time on appeal in the absence of plain error."). Conflicts in the jury's answers to special issues may also be appealed without any preservation. *Fugitt v. Jones*, 549 F.2d 1001, 1004-05 (5th Cir. 1977) (explaining that a failure to move for reconsideration by jury of special verdict answers which were inconsistent would not bar the right to raise issue of inconsistency of answers on appeal). Other matters may also be considered, but "only if the issue is a purely legal issue and if consideration is necessary to avoid a miscarriage of justice." *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1289 (5th Cir. 1992).

III. POST-TRIAL MOTIONS

After a trial has ended, arguments are preserved for appeal through post-trial motions. Filing a post-trial motion is not a prerequisite to appeal; however, some arguments may be waived if not preserved by a post-trial motion. The following is a discussion of the post-trial motions available and the effects each has on the appellate process.

A. Motion for New Trial

- When to file: When challenging the verdict as against the great weight and preponderance of the evidence, *Pelt v. U.S. Bank Trust Nat'l Ass'n*, 359 F.3d 764, 766 (5th Cir. 2004); when attacking the damages as inadequate or excessive, *Seidman v. Am. Airlines*, 923 F.2d 1134, 1140 (5th Cir. 1991); when raising an erroneous evidentiary ruling, *McNeese v. Reading & Bates Drilling Co*., 749 F.2d 270, 272 (5th Cir. 1985); when arguing charge error, *Pelt v. U.S. Bank Trust Nat'l Ass'n*, 359 F.3d 764, 766 (5th Cir. 2004); when opposing counsel has committed incurable jury argument, *U.S. v. Andrews*, 22 F.3d 1328, 1332 (5th Cir. 1994); when asserting jury misconduct, *Yarbrough v. Sturm, Ruger & Co.*, 964 F.2d 376, 380 (5th Cir. 1992); when asserting jury coercion, *N. Tex. Producers Ass'n v. Metzger Dairies Inc*., 348 F.2d 189, 193 (5th Cir.1965); when asserting newly discovered evidence, *Diaz v. Methodist Hosp.*, 46 F.3d 492, 496 (5th Cir. 1995); when asserting unfair surprise at trial, *Genmoora Corp. v. Moore Bus. Forms, Inc.*, 939 F.2d 1149, 1156 (5th Cir. 1991); when asserting trial was unfair, *Seidman v. Am. Airlines*, 923 F.2d 1134, 1140 (5th Cir. 1991).

A motion for new trial may be filed independently or in conjunction with a renewed motion for judgment as a matter of law. In either case, the motion must be received by the clerk within 10 days of entry of judgment, excluding intervening weekends and legal holidays. FED. R. CIV. P. 59(b); FED. R. CIV. P. 6(a). The deadline for filing the motion cannot be extended. FED. R. CIV. P. 6(b); *U.S. Leather, Inc. v. H&W P'ship*, 60 F.3d 222, 225 (5th Cir. 1995). The motion serves to extend the time for filing the notice of appeal. FED. R. APP. P. 4(a)(4)(A). If the movant wants to asset that there is new evidence that would probably change the outcome of the trial, an affidavit must be filed with the motion. FED. R. CIV. P. 59(c).

In a case tried to a jury, a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." FED. R. CIV. P. 59(a)(1). If the court finds that the damages awarded by the jury are excessive, the court may grant a new trial but condition it upon a remittitur consented to by the plaintiff. *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995); *see also Hetzel v. Prince William Cty*., 523 U.S. 208, 211 (1998) (plaintiff's consent to remittitur required).

In a case tried without a jury, a new trial may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." FED. R. CIV. P. 59(a)(2). Additionally, in a case tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. FED. R. CIV. P. 59(a)(2); *King Fisher Marine Serv. Inc., v. NP Sunbonnet*, 724 F.2d 1181, 1187 (5th Cir. 1984).

B. Renewed Motion for Judgment as a Matter of Law

- When to file: When challenging the legal sufficiency of the evidence, *Tex. Farm Bureau v. U.S.*, 53 F.3d 120, 123 (5th Cir. 1995); when the jury's verdict is inconsistent with its answers to special issues, *Porter v. Eckert*, 465 F.2d 1307, 1310 (5th Cir. 1972); or when some other legal bar to plaintiff's recovery exists, such as res judicata, collateral estoppel, or the statute of limitations. *Flemister v. U.S.*, 260 F.2d 513, 515 (5th Cir. 1958).

If a party wishes to attack the sufficiency of the evidence supporting a judgment, it is necessary that the party move for judgment as a matter of law at trial and renew that motion after entry of judgment. FED. R. CIV. P. 50(b); *Polanco v. City of Austin*, 78 F.3d 968, 974 (5th Cir. 1996). The only grounds that may be asserted in the post-judgment motion for judgment as a matter of law are grounds that were asserted in the motion for judgment as a matter of law filed during trial. *Allied Bank-W. v. Stein*, 996 F.2d 111, 115 (5th Cir. 1993). The motion must be received by the clerk within 10 days of entry of judgment, excluding intervening weekends and legal holidays. FED. R. CIV. P. 59(b); FED. R. CIV. P. 6(a). The deadline for filing the motion cannot be extended. FED. R. CIV. P. 6(b); *U.S. Leather, Inc. v. H&W P'ship*., 60 F.3d 222, 225 (5th Cir. 1995).

In ruling on a renewed motion for entry of judgment as a matter of law, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law;

or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

FED. R. CIV. P. 50(b).

The filing of the motion for judgment as a matter of law extends the time for filing the notice of appeal. FED. R. APP. P. 4(a)(4)(A).

C. Motion to Alter or Amend the Judgment

- When to file: When seeking a change in the judgment because of an intervening change in the law, *Schiller v. Physicians Res. Group, Inc.*, 342 F.3d. 563, 567-68 (5th Cir. 2003); when asserting newly discovered evidence, *Lavespere v. Niagara Mach & Tool Works,, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990); when asserting that a clear error of law exists or to prevent manifest injustice, *Pluet v. Frasier*, 355 F.3d 381, 385 n.2 (5th Cir. 2004).

The motion must be received by the clerk within 10 days of entry of judgment, excluding intervening weekends and legal holidays. FED. R. CIV. P. 59(e); FED. R. CIV. P. 6(a). The deadline for filing the motion cannot be extended. FED. R. CIV. P. 6(b); *U.S. Leather, Inc. v. H&W P'ship*, 60 F.3d 222, 225 (5th Cir. 1995). The motion serves to extend the time for filing the notice of appeal. FED. R. APP. P. 4(a)(4)(A).

> [**Practice Tip**: post-trial motions relating to prejudgment interest can serve as a motion to alter or amend for the purpose of determining the deadline for filing a notice of appeal; *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176-77 (1989); however, a motion for costs does not delay the time for filing the notice of appeal. *Samaad v. City of Dallas*, 922 F.2d 216, 217 (5th Cir. 1991) (per curiam).]

D. Motion to Amend Findings in a Non-Jury Case

- When to file: When asserting that the findings include a manifest error of law or fact, *Fontenot v. Mesa Pet. Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986); or when arguing that newly discovered evidence should be considered, *id*.

A motion to amend findings in a non-jury case may be filed independently or in conjunction with a motion for new trial. In either case, the motion must be received by the clerk within 10 days of entry of judgment, excluding intervening weekends and legal holidays. FED. R. CIV. P. 52(b); FED. R. CIV. P. 6(a). The deadline for filing the motion cannot be extended. FED. R. CIV. P. 6(b); *In re Tex. Extrusion Corp.*, 836 F.2d 217, 220 (5th Cir. 1988). The motion serves to extend the time for filing the notice of appeal. FED. R. APP. P.

4(a)(4)(A).

Unlike a jury trial, in a non-jury trial attacks on the sufficiency of the evidence supporting the judgment may be made on appeal regardless of whether the appealing party objected to the findings at trial or a motion to amend the findings was made at trial. FED. R. CIV. P. 52(b).

E. Motion for Relief from Judgment

- When to file: When seeking to overturn a judgment based on mistake, inadvertence, surprise, or excusable neglect, FED. R. CIV. P. 60(b)(1); *Jones v. Anderson-Tully Co.*, 772 F.2d 211, 212-13 (5th Cir. 1984); newly discovered evidence, FED. R. CIV. P. 60(b)(2); *Gov't Fin. Servs. v. Peyton Place*, 62 F.3d 767, 772 (5th Cir. 1995); fraud, misrepresentation, or other misconduct of an adverse party, FED. R. CIV. P. 60(b)(3); *Gov't Fin. Servs. v. Peyton Place*, 62 F.3d 767, 772 (5th Cir. 1995); the judgment is void, *N.Y. Life Ins. Co. Brown*, 84 F.3d 137, 143 (5th Cir. 1996); an intervening event that justifies relief, *U.S. v. Gould*, 301 F.2d 353, 356 (5th Cir. 1962); any other reason justifying relief, *U.S. v. Gould*, 301 F.2d 353, 356 (5th Cir. 1962).

The motion for relief from judgment provides a broader time in which to file for relief than the other post-judgment motions and provides relief on similar grounds; however, the party moving for relief from judgment under Rule 60(b) must satisfy more rigorous substantive requirements, such as demonstrating mistake or inadvertence. FED. R. CIV. P. 60(b). There are several grounds on which a motion for relief from judgment must be made and there are different time restrictions on when they should be made:

Motions for relief from judgment based on the following grounds must may be raised within a reasonable time, but no later than one year from entry of judgment:

- Mistake, inadvertence, surprise, or excusable neglect;
- Newly discovered evidence;
- Fraud, misrepresentation, or other misconduct of an adverse party.

FED. R. CIV. P. 60(b).

Motions for relief from judgment based on the following grounds must may be raised within a reasonable time, but not necessarily within one year from entry of judgment:

- The judgment is void;
- The judgment was satisfied, released or otherwise discharged;
- An earlier judgment upon which the judgment was based was reversed or vacated;
- It is no longer equitable that the judgment should have prospective application;
- Any other reason justifying relief.

FED. R. CIV. P. 60(b).

Motions under Rule 60(b) do not extend the time for filing a notice of appeal. *Lancaster v. Presley*, 35 F.3d 229, 231-32 (5th Cir. 1994).

F. Motion to Correct Clerical Error in the Judgment

- When to file: When seeking to correct a clerical error in the judgment that doesn't affect the substantive rights of the parties, such as, correcting a mathematical error, *In re W. Tex. Mktg.*, 12 F.3d 497, 504-05 (5th Cir. 1994); or adding liquidated damages that were inadvertently omitted, *Chavez v. Balesh*, 704 F.2d 776-77 (5th Cir. 1983).

Clerical mistakes in judgments may be corrected by the court at any time of its own initiative or on the motion of any party. FED. R. CIV. P. 60(a). The district court retains power to make such corrections during the pendency of an appeal until the appeal has been docketed in the court of appeals, after which time any such error may be corrected only with leave of the court of appeals. FED. R. CIV. P. 60(a).

If the motion to correct clerical error in the

judgment is filed within 10 days of when the judgment is entered, the deadline to file the notice of appeal will be extended as it would for a motion filed to alter or amend the judgment. FED. R. APP. P. 4(a)(4)(A).

IV. OVERCOMING BARRIERS TO PERSUASION IN POST TRIAL MOTIONS

Obtaining post-trial relief is often an uphill battle for the party that lost the verdict or judgment. The judicial system is designed to make a reversal of a judgment a rare exception rather than a common occurrence. The system is designed to promote the values of deference to the district court, preservation of judicial resources, and finality. These values result in a judicial resistance to such post-trial relief as a judgment as a matter of law, a new trial, or a modification of a judgment. Because of this resistance to post-trial relief, post-trial arguments must be persuasive and compelling for a party to have any chance of obtaining relief.

Two significant barriers to persuasion arise in most post-trial situations. First, there is a conflict between the lawyers' impulse to preserve numerous potential errors post-trial and the lawyers' ability to persuade the district court about the best arguments for relief. Second, in most instances, the district court has already heard the party's best arguments during trial. District courts are naturally resistant to hearing the same argument repeated, particularly when the court has already made up its mind.

The conflict between preservation and persuasion

After trial, lawyers typically assert numerous post-trial complaints. This tendency is understandable. Often it is not clear to the lawyer at the post-trial stage which potential errors will be the best arguments to develop on appeal. As a result, lawyers tend to preserve every colorable complaint — regardless of whether the complaint appears to have any significant chance of success with the district court.

This tendency to make multiple post-trial complaints creates a barrier to persuading the district court to grant post-trial relief for several reasons. First, most district court judges understandably lack the time and attention to wade through a large volume of post-trial complaints. Second, a long list of merely colorable complaints in a post-trial motion dilutes the force of the complaints that may actually persuade the district court to grant relief. Third, most district courts will see a long list of post-trial complaints for what it really is — an attempt to preserve every possible error without regard to identifying the complaints that actually could result in a reversal.

Solution: separating preservation and persuasion

It is possible to preserve a wide range of post-trial complaints while still focusing the district court's attention on two or three key arguments for post-trial relief that have a significant chance of persuading the district court. This is best done by emphasizing the best arguments for post-trial relief and signaling that other points are raised primarily to preserve an error for appeal. There are several ways to do this:

•*Oral argument in the district court*. At the hearing on the post-judgment motions, it may be possible to focus the district court's attention on the specific post-trial arguments that the court is more likely to accept. For instance, a lawyer could explain in argument that, although she has raised ten arguments for a new trial, there are two particular arguments that will likely be the focus of an appeal. The majority of the lawyer's oral argument would then focus on those two points. The difficulty with using only this approach is that it only works during the oral argument. When the district court reviews the post-trial motions before the hearing, it does not have the benefit of the counsel's oral argument guidance as to which arguments are most significant.

•*Filing briefs in support of potential winning arguments*. A second approach is to file both (1) a post-trial motion that lists all of the complaints sufficiently to preserve error, and (2) a separate brief that significantly elaborates on the best arguments for post-trial relief. The brief on particular arguments signals to the court that those are the arguments it should consider most seriously. This approach increases the chance that the district court will actively consider those arguments, rather than dismissing them along with the other less persuasive

arguments that are raised primarily for preservation. The difficulty with this approach is that the post-trial motion itself must sufficiently explain the error or the error may be waived. *See* FED. R. CIV. P. 7(b)(1) (providing specificity requirements for new trial arguments). If, however, the post-trial motion is sufficiently specific in listing all objections, there presumably should not be any preservation problem with elaborating on the best arguments in a separate brief.

•*Providing signals in the motion about the potential winning arguments*. A third approach is to provide signals in the post-trial motions about which arguments are the potential winners and which arguments are colorable, but are raised primarily for preservation. For instance, a motion for new trial with ten grounds for a new trial could be divided into three sections of argument: one section apiece for each of the two best grounds for new trial and a third section that summarily lists the other new trial grounds sufficiently to preserve them. This is a subtle signal that would suggest to most district court judges that the first two arguments are the most likely grounds for appeal and are the primary grounds the court should consider.

These approaches help to focus the district court's attention on the arguments that have the best chance of granting post-trial relief.

The problem with repeating arguments made during trial

Arguments raised in post-trial motions are often the same as, or slight variations on, arguments made during trial. For instance, grounds for judgment as a matter of law must first be presented by motion at trial. Thus, in most instances, post-trial motions seek relief based on arguments that the court already has heard and rejected.

Because post-trial motions often repeat earlier arguments, they can be very difficult to win. Most district understandably lack both the patience to hear the same arguments again and the desire to reverse themselves.

Solution: bringing new arguments and a new perspective

Judges, like anyone else, are less likely to change their mind unless they are given a new reason to do so. Consequently, in post-trial motions and oral argument of those motions, a party should have a better chance of persuading the court that its earlier ruling was erroneous if that party can present some new twist on the argument, such as new authority or new reasoning. In this respect, it makes sense to highlight the new argument for the judge so that he or she knows it is a new argument. By raising and highlighting a new aspect of the argument, the movant increases the chance the court will give it more attention because (1) unlike a repeated argument, a new argument is less likely to be a waste of the court's time to consider, (2) the reasons the court rejected the old argument may not apply to the new argument, and (3) the presence of a new argument can give the court a justification for changing its previous ruling, even if the court simply changes its mind.

Similarly, it helps to bring a new perspective in post-trial motions. This can be accomplished in two ways. First, it often helps to have a different lawyer argue the post-trial motions before the district court. The argument may appear less redundant when it is presented by a different lawyer. The different lawyer also may have the advantage of a different slant on the argument that may persuade the court to change its mind. Second, it often helps to bring an appellate perspective to post-trial motions. During trial, the district court judge is the primary decision maker, and arguments are therefore directed to the judge's beliefs and values about the law, as well as all of the judge's knowledge about the case. In contrast, the arguments raised in post-trial motions are likely to be determined later by an appellate court. It is often helpful to persuade the district court to consider post-trial issues from the perspective of the appellate court whose decision will be based solely on the law and the district court record. Of course, nothing helps explain the perspective of the appellate court better than identifying the reasoning of the appellate court in reported decisions. Providing such a narrow focus on the record and the law sometimes can persuade a district court to grant post-trial relief based on an argument that it has rejected in the past.

V. APPEALABLE FINAL JUDGMENTS

Generally, only final judgments are appealable. For purposes of appeal, a judgment is final if it adjudicates the claims or the rights and liabilities of all the parties, *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 528 (5th Cir. 1996), or contains a certificate that there is no just reason for delay and expressly directs entry of judgment. FED. R. CIV. P. 54(b); *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 (5th Cir. 2000).

> [**Practice Tip**: if attorney's fees available under a fee-shifting statute are left undecided in the judgment, the judgment is still final for purposes of appeal. *First Nationwide Bank v. Summer House Joint Venture*, 902 F.2d 1197, 1199-1200 (5th Cir. 1990).]

Rule 4(a)(7) determines when a judgment is entered, and therefore final for purposes of calculating the deadlines for filing post-judgment motions and the notice of appeal. Rule 4(a)(7) provides:

> A judgment or order is entered for purposes of this Rule 4(a):
>
> (i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or
>
> (ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:
>
> • the judgment or order is set forth on a separate document, or
>
> • 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).
>
> [**Practice Tip**: failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order, it only affects the timing for filing post-judgment motions and the notice of appeal.]

VI. STEPS TO APPEAL

A. Notice of appeal

Format:

The first step in perfecting an appeal is the filing of a notice of appeal. The notice of appeal must be filed with the district clerk, not the clerk for the court of appeals, and must:

> (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"
>
> (B) designate the judgment, order, or part thereof being appealed; and
>
> (C) name the court to which the appeal is taken.

FED R. APP P. 3(c).

> [**Practice Tip**: "Et al" is generally not sufficient designation of the appealing parties, however, appellees do not need to be specifically listed in the notice of appeal. *Lackey v. Atl. Richfield Co*., 990 F.2d 202, 206 (5th Cir. 1993).]
>
> [**Practice Tip**: should the notice of appeal fail to satisfy Rule 3, other properly filed documents, not

designated as a notice of appeal, but which contain the elements required under Rule 3, may be deemed an adequate substitute for the notice of appeal. *Stevens v. Heard,* 674 F.2d 320, 322-23 (5th Cir. 1982).]

The appropriate fee should be paid at the time of filing the notice of appeal. FED. R. APP. P. 3(e). Failure to pay the fee will not prevent the appeal from being docketed, but may result in the appeal being dismissed. 5TH CIR. R. 42.

[**Practice Tip**: the fee for filing the notice of appeal is $255 as established by 28 U.S.C.§§ 1913 and 1917.]

Timing:

If no post-trial motions extending the time to file the notice of appeal are filed, the notice of appeal must be filed within 30 days after the judgment appealed from is entered. FED. R. APP. P. 4(a)(1). If the notice of appeal is filed before the judgment is entered, the notice of appeal "is treated as filed on the date of and after the entry." FED. R. APP. P. 4(a)(2).

[**Practice Tip**: When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.]

Under Federal Rule of Appellate Procedure 4(a)(4)(A), if a party timely files in the district court any of the following motions, the time to file an appeal runs from the entry of the order disposing of the last such remaining motion: (i) for judgment under Rule 50(b); (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment; (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58; (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered. FED. R. APP. P. 4(a)(4)(A).

[**Practice Tip**: Under Fed. R. App. P. 4(a)(5) a party may request an extension of the time to file the notice of appeal for good cause or excusable neglect. The motion must be filed within 30 days from the expiration of the time to file the notice of appeal and include a notice of appeal. If granted, the notice of appeal will be filed as of the date of the court's order granting the extension of time.]

If a party files a notice of appeal after the court announces or enters a judgment, but before it disposes of any motion listed in Rule 4(a)(4)(A), the notice becomes effective to appeal a judgment or order when the order disposing of the last such remaining motion is entered.

[**Practice Tip**: A party challenging an order disposing of a motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal within the time prescribed by Rule 4(a)(4)(A) measured from the entry of the order disposing of the last such remaining motion.]

[**Practice Tip**: If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by Rule 4(a), whichever period ends later. Fed. R. App. P. 4(a)(3).]

B. The record on appeal

The appellant has the duty to order the transcript and arrange for payment within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion authorized by Rule 4(a)(4)(A), whichever is later. Fed. R. App. P. 10(b)(1)&(2). If no transcript will be ordered, the appellant must file a certificate stating so. Fed. R. App. P. 10(b)(1)(B). Be aware that the Fifth Circuit has specific forms and procedures for the above tasks. 5TH CIR. R. 10.1 & 10.2.

The following items constitute the record on appeal:

(1) original papers and exhibits filed in

the district court;

(2) transcript of proceedings, if any; and

(3) certified copy of the docket entries prepared by the district clerk.

FED. R. APP. P. 10(a).

If the appellant intends to argue that a finding or conclusion is unsupported or contrary to the evidence, the appellant must include in the transcript all the evidence relevant to the contested finding or conclusion. FED. R. APP. P 10(b)(2).

Partial transcript

If only a partial transcript of the proceedings is ordered, the appellant must file and serve a statement of the issues the appellant intends to argue. FED R. APP. P. 10(b)(3). The appellee may then designate additional portions of the record as necessary. FED R. APP. P. 10(b)(3).

Unavailable transcript

If the proceedings were not recorded, or if the transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the "best available means, including the appellant's recollection." FED R. APP. P. 10(c). After the appellee has had the opportunity to offer objections to the statement, the statement will be submitted to the district court for approval and, once approved, will be included in the record on appeal. FED R. APP. P. 10(c)

Agreed statement of the case

In place of the record on appeal, the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. FED R. APP. P. 10(d). If the district court approves the agreed statement it will be certified to the court of appeals as the record on appeal. FED R. APP. P. 10(d).

If any differences arises regarding whether the record accurately reflects the district court proceedings, the difference will be submitted to and settled by that court. FED R. APP. P. 10(e)(1).

Correcting clerical errors in the record

If the record contains a material omission or misstatement, the error may be submitted to the district court for correction. FED R. APP. P. 10(e)(2). The district court may then correct the error, and a supplemental record will be certified and forwarded to the court of appeals. FED R. APP. P. 10(e)(2).

C. Suspending enforcement of the judgment while on appeal

Suspending enforcement of a judgment while on appeal is governed by Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8(a). A party seeking to suspend enforcement of judgment must first move for relief in the district court. FED. R. APP. P. 8(a). If the party is seeking to stay a money judgment, posting a bond for the entire amount of the judgment will automatically stay enforcement. FED. R. CIV. P. 62(d). The district court may also grant a stay on enforcement without the posting of a bond if the judgment debtor's ability to pay cannot be reasonably doubted, or if requiring a full bond would result in an undue financial burden. *Poplar Grove Planting and Ref. Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). The district court also has authority to order alternative security, such as a bond for less than the full judgment, or alternative security agreed to between the parties. *Poplar Grove Planting and Ref. Co., Inc.*, 600 F.2d at 1191.

A party may also move to suspend enforcement of injunctive relief as it would in seeking stay relief for a monetary judgment. FED. R. CIV. P. 62(c). The district court may grant relief from an injunction "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." FED. R. CIV. P. 62(c).

Under Federal Rule of Appellate Procedure 8(a) either the judgment debtor or creditor may seek relief in the court of appeals if dissatisfied with the actions taken by the district court to secure the judgment. FED R. APP.

P. 8(a)(2). The judgment debtor may also apply directly to the court of appeals for a stay of enforcement, however the judgment debtor must demonstrate that it was impracticable to first move for such relief in the district court. FED R. APP. P. 8(a)(2)(A).

[**Practice Tip**: Posting a supersedeas bond is not a prerequisite to appeal, however, the judgment debtor risks that the judgment creditor will execute on the judgment while the appeal is pending.]

[**Practice Tip**: If the judgment is a lien upon the property of the judgment debtor and the judgment debtor would be entitled to a stay of enforcement in the forum state, a judgment debtor is entitled to such a stay from the district court as would be granted had the action been maintained in the courts of that state. FED. R. CIV. P. 62(f).]