

# Appellate Malpractice Outline

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Emil Lippe, Jr., P.C.  
LIPPE & ASSOCIATES  
2323 Bryan Street  
Suite 2323  
Dallas, Texas 75201-2637

Phone: 214-720-6076  
Fax: 214-720-6074

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Disclaimer

Throughout this outline, and in the oral presentation, numerous examples, either from reported or unreported decisions or personal experience, will be utilized. Nothing contained in either this outline or the oral presentation should be construed as an opinion or conclusion that any of the acts or omissions to which reference is made constitute legal malpractice, negligence, breach of warranty, or violation of the Texas Deceptive Trade Practices Act. Such examples are illustrative only, and the speaker does not presume to state an opinion as to malpractice where all of the relevant facts and circumstances are not known.

I. SCOPE OF OUTLINE

The question of whether an appeal will be won or lost is very frequently decided by whether error was properly preserved in the trial court, e.g., by (a) proper, timely objection to evidence, (b) proper objection to jury issues and instructions, and submission of the same in substantially correct form where required, or (c) timely motions for instructed verdict, for new trial, etc. See generally, outlines preceding this one in course notebook. Therefore, in one sense, the entire course of pretrial and trial conduct could be relevant to questions of possible "appellate" malpractice. This topic will focus on postjudgment

acts and omissions only, and not discuss the events which occurred

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prior to the entry of the judgment or order in question. Since many aspects of an appellate result may be dictated by such matters as pleadings, motions for summary judgment and timely responses, objections to evidence, making of proper bills of exception or proper offers of proof, motions for directed or instructed verdict, motions for new trial, or other actions, often the outcome of the appeal is really decided by pretrial and trial events, and the appellate practitioner's control over the ultimate outcome is minimal.

This outline will focus exclusively on civil appeals, and will not address criminal appeals or special problems relating to administrative appeals.

## II. THE MOST COMMON "MALPRACTICE" PROBLEMS

### A. MISSED DEADLINES

It is the author's opinion, confirmed by discussions with several appellate judges, that most examples of alleged or potential appellate malpractice have arisen from failure to meet critical deadlines, in both state and federal court.

#### 1. State Court

In Texas state appellate court practice, several key rules govern the most critical deadlines for appellate purposes.

a. Key Rules

These "key rules" are as follows:

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Rule 306a, Provides that date of signature of order or  
Tex.R.Civ.P. judgment starts time periods for postjudgment  
motions

Rule 5(b)(1), Provides that date of signature of judgment  
or Tex.R.App.P. order starts time periods for appellate  
matters

Rules 296,297, Provide deadlines for filing requests for  
and 298, finding of fact and conclusions of law in non  
Tex.R.Civ.P. -jury cases, action by the court in response,  
and follow-up action by requesting party or  
requests for additional findings

Rule 329b, Provides deadlines for filing motion for new  
Tex.R.Civ.P. trial, amended motion for new trial, plenary  
power of trial court, and time for overruling  
by operation of law NOTE: APPELLATE DEADLINES  
REFERENCED BELOW WILL CHANGE, DEPENDING UPON  
WHETHER OR NOT A TIMELY MOTION FOR NEW TRIAL  
IS FILED.

Rule 41(a), Deadline for perfecting appeal by the filing  
Tex.R.App.P. of cost bond, cash deposit, or affidavit of  
inability NOTE: 41(a)(2) ALLOWS 15-DAY GRACE  
PERIOD WITHIN WHICH TO FILE COST BOND AND  
MOTION FOR EXTENSION OF TIME "REASONABLY  
EXPLAINING" THE NEED FOR THE EXTENSION

Rule 40(a)(4), Deadline for filing notice of limitation of  
Tex.R.App.P. appeal

Rule 52 Sets forth procedure for bills of exception  
Tex.R.App.P. for preservation of error

Rule 51(b),  
Tex.R.App.P.

Provides that "at or before" the time for perfecting appeal, must file written designation of additional items to be included in transcript

Rule 53(a),  
Tex.R.App.P.

Provides that "at or before" the time for perfecting appeal, must make written request to court reporter for preparation of statement of facts

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Rule 53(d), Tex.R.App.P.	Provides procedure for requesting <u>partial</u> statement of facts which avoids disastrous pro-affirmance presumptions
Rule 54, Tex.R.App.P.	Deadline for filing transcript and statement of facts, with 15-day extension period provided in Rule 54(c)
Rule 74(k) and (m), Tex.R.App.P.	Deadlines for filing of appellant's and appellee's briefs, respectively
Rule 4(b), Tex.R.App.P.	Provides that "any matter relating to taking an appeal" will be deemed filed on time if sent by (1) <u>first class, U.S. Mail</u> , (2) <u>on or before due date</u> , and (3) <u>actually received by the clerk no later than ten (10) days late</u>
Rule 41(c), Tex.R.App.P.	Provides that prematurely filed appeal bonds or substitutes, or notices of limitation of appeal, will be deemed filed after the judgment was signed. <u>See also</u> T.R.A.P. 58, dealing with appeals filed prematurely, but which may be applicable to a subsequently signed properly appealable order

b. Cost Bond

The filing of the cost bond, or other permissible substitute, within the time period set forth in Rule 41(a), Tex.R.App.P., is jurisdictional, and failure to file timely, or within the 15-day extension period, will result in

dismissal of the appeal. Stevens v. McLure, 732 S.W.2d 115, 116 (Tex.App. - Amarillo 1987, no writ); Downs v. Trevathan, 783 S.W.2d 689, 690 (Tex.App. - Houston [1st Dist.] 1989, no writ).

Please note the special provisions for filing an affidavit of inability to file cost bond set forth in Rule 40, Tex.r.App.P. If your client potentially

qualifies for this special treatment, be sure to follow the procedures exactly as set forth in this rule.

c. Transcript and Statement of Facts

While the failure to file timely the transcript and statement of facts is not jurisdictional (R.54(a), Tex.R.App.P.), such a failure can have a devastating impact upon the appeal. The appellant has the burden to bring forward a record demonstrating the error of the trial court, and the duty to be certain that everything material to the appeal is actually received by the appellate court. T.R.A.P.50(d). Bayoud v. Bayoud, 797 S.W.2d 304, 313 (Tex.App. - Dallas 1990, writ den'd). The appellant has the basic duty to exercise diligence in timely procurement of the record on appeal, and an attorney may not properly accept employment if he may not timely perfect an appeal. McRae Oil Corp. v. Guy, 495 S.W.2d 31 (Tex.Civ.App. - Houston [14th Dist.] 1973, no writ).

A court of appeals cannot find reversible error on an incomplete record unless T.R.A.P. 53(d) is followed, and therefore must affirm. Christiansen v. Prezelski, 782 S.W.2d 842 (Tex. 1990). The transcript must reveal that Rule 53(d) was complied with, and post-submission supplementation may be denied. Nuby v. Allied Bankers Life Ins. Co., 797 S.W.2d 396, 398-399 (Tex.App. - Austin 1990). If you find that you have missed this

deadline be sure to

catch it within fifteen (15) days and file a proper motion for extension of time meeting the standards of R.54(c), Tex.R.App.P.

d. Filing of Briefs

Rule 74(k) and (m), Tex.R.App.P., sets forth the deadlines for filing the briefs of the appellant and appellee, respectively. It has been the author's experience that the appellate courts are usually quite lenient in granting motions to reschedule brief deadlines under R. 74(n), Tex.R.App.P., so long as there is no interference with the court's schedule for submission of cases. Also, most appellees' counsel will usually agree on reasonable extensions if you agree ahead of time to allow your opponent an equal number of days.

The failure of the appellant to file a brief may result in dismissal of the appeal. R.74(1), Tex.R.App.P.; Weirich v. Weirich, 796 S.W.2d 513, 514 (Tex.App. - San Antonio 1990, writ granted). If the appellee fails to file a brief, factual assertions in the appellant's brief may be deemed as true and the appellee not be allowed to challenge them, Navistar Inter. Corp. v. Valles, 740 S.W.2d 4, 6 (Tex.App. - El Paso 1987, no writ), the right to oral argument will be waived, R.75(a), Tex.R.App.P., and any opportunity to assert crosspoints of error will be lost.

In a recent case, the ten-day grace period in T.R.Civ.P. 5, similar to T.R.A.P.4(b), for filing of a motion for new trial if mailed on or before deadline, via first class United States mail, was held not to apply where the motion was sent by a private carrier other than the U.S. Postal Service. Carpenter v. Town & Country Bank, \_\_\_\_\_ S.W.2d \_\_\_\_\_ (Tex.App. - Eastland 1991) (Cause No. 11-91-048-CV). It would be prudent, therefore, to use the U.S. Mail, even if you believe an alternative carrier would be faster.

e. Determination of "finality"

Generally speaking, of course, a judgment or order appealed from must be "final" to be appealable. Many times, an order which counsel may not even think is "final" for purposes of appeal may nevertheless be final. In such a situation, even though you do not think the time for appeal has begun running, it may be doing so. The test in state court for finality of a judgment is that it must dispose of all issues and all parties in the case. North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966). Every order which is at least partially dispositive of some parties and some claims, and which is either too sloppily or too craftily drafted is a potential "final order" which should be carefully read by the attorney.

A closely related problem is the final order or judgment which is clearly final, but which for some reason is never actually sent to or received by the attorney. See T.R.A.P.5(b) (4) for special provisions extending appellate deadlines by up to 90 days if no notice of judgment is actually received within 20 days of signing. Where this is due to the attorney having moved and failing to give notice of a new address, the potential for malpractice is alarming.

By law, however, certain categories of "interlocutory", or non-final, orders may be appealed. These include an order which:

- (1) appoints a receiver<sup>1</sup> or trustee;
- (2) overrules a motion to vacate an order that appoints a receiver or trustee;
- (3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure; or
- (4) grants or refuses or grants or overrules a motion to dissolve a temporary injunction.

§ 51.014, Texas Civil Practice & Remedies Code.

Where interlocutory appeals are allowed by

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<sup>1</sup>For a discussion of the extent of the time period within which a trial court may issue orders during a receivership, see Bayoud v. Bayoud, 797 S.W.2d 304 (Tex.App. - Dallas 1990, writ den'd).

law, all appellate deadlines, such as filing of cost bond,

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filing of record on appeal, and briefs, are shortened. See R.42(a)(3), Tex.R.App.P., for these shortened deadlines.

In some types of proceedings, which by their very nature may involve ongoing court supervision, or numerous discrete actions from time to time, you must prosecute an appeal before the case is closed, or lose forever your right to appeal. Examples include:

- (1) Certain interim receivership orders.

Bergeron v. Session, 554 S.W.2d 771, 773-775  
(Tex.Civ.App. - Dallas 1977, no writ) (Holding that receivership court order awarding fees to receiver and his accountant was final even though it did not terminate the receivership).

- (2) Probate. Ashmore v. North Dallas Bank & Trust, 804 S.W.2d 156 (Tex.App. - Dallas 1990) (Holding that probate court orders awarding attorneys fees and trustee fees were final and appealable).

- (3) Partition orders. The first judgment or decree determining the rights of the parties is final and appealable. Benson v. Fox, 589 S.W.2d 823, 828 (Tex.Civ.App. - Tyler 1979, no writ).

(4) Garnishment. An order quashing a writ of garnishment is final. Shiflett v. Associated

Oil & Gas Co., 412 S.W.2d 705, 706 (Tex.Civ.App. -  
Houston 1967, no writ).

In Texas state appellate practice, as a practical matter the only "appellate" remedy for seeking correction of erroneous pretrial discovery rulings by the trial court is by way of mandamus proceedings filed, usually, with the Court of Appeals. The circumstances under which such mandamus proceedings should be filed, and the procedure for doing so, are beyond the scope of this outline. Nevertheless, the dangers of waiver of a privilege, or the prospect of proceeding to trial without critical evidence, coupled with the often-short deadlines imposed by an angry trial judge, should strongly urge you to consider such an appellate action immediately, and make a careful decision whether or not to pursue an appeal.

## 2. Federal Court

As in state appellate practice, knowledge of the key rules for perfecting and prosecuting an appeal in federal court is critical. These key rules include:

### a. Key Rules

Rule 4(a)(1),                      Deadline for filing notice of appeal  
F.R.A.P.

Rule 4(a)(5),  
F.R.A.P.

Allows district court, upon showing of "excusable neglect" or "good cause", to extend time for filing notice of appeal if motion is filed within 30 days of deadline

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Rule 26(b), F.R.A.P.	Provision for Court of Appeal to allow enlargement of time for "good cause", except for notice of appeal
Rule 26(c), F.R.A.P.	Allows three days' additional time when service of paper in question was by mail
Rule 4(a)(4), F.R.A.P.	Effects upon deadline for notice of appeal if timely motions are filed under Rules 50(b) (motion for judgment n.o.v.), 52(b) (motion to amend findings of fact), or 59 (motion for new trial or to alter or amend judgment), F.R.Civ.P.
Rule 10(b), F.R.A.P.	Deadline for filing written order of transcript <u>and</u> making "satisfactory arrangements" for payment with the court reporter
Rule 31, F.R.A.P.	Provides deadlines for appellants' and appellee's briefs
Rule 30, F.R.A.P.	Requires that appendix be filed <u>with</u> appellant's brief, unless deferred pursuant to Rule 30(c), F.R.A.P.
Rule 25, F.R.A.P.	Provides that briefs and appendices (but nothing else) will be deemed filed upon mailing "if the most expeditious form of delivery, excepting special delivery, is utilized"

Fifth Circuit  
Local Rule 42  
(see also I.O.P.  
under F.R.A.P.26)

Provides for dismissal, sua sponte and  
without notice, of appeals which are not  
timely prosecuted

Timely filing of the notice of appeal is  
jurisdictional. Browder v. Director, Dept. of Corrections, 434  
U.S. 257, 264 (1978).

A special problem is present in federal appellate practice where there are multiple appellants. The courts have strictly construed Rule 3(c)'s requirement that "the notice of appeal shall specify the party or parties taking the appeal". The use of the "et al." designation is not sufficient; all parties seeking to appeal must be specifically named in the notice of appeal. Morales v. Pan American Life Ins. Co., 914 F.2d 83 (5th Cir. 1990).

If an order had granted Rule 11 sanctions against the attorney, and the notice of appeal names only the parties but not the attorney, the Court of Appeals lacks jurisdiction over the attorney's appeal. DeLuca v. Long Island Lighting Co., Inc., 862 F.2d 427, 429-430 (2d Cir. 1988); F.T.C. v. Amy Travel Service, Inc., 875 F.2d 564, 577 (7th Cir. 1989).

c. Transcript Order Form

The transcript order form is typically given by the clerk to any party filing a notice of appeal. It is a one-page form with easy-to-follow instructions. See Appendix A. By way of contrast with state court practice, where the burden is always on the appellant to "bird-dog" the clerk to prepare the transcript, and the court reporter the statement of facts, and then file these items, in federal appeals you generally discharge such obligations by filing this one-page form

and by making "satisfactory" payment

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arrangements with the court reporter, within ten days after filing the notice of appeal. See F.R.A.P.11(a). Once you have done this, the burden shifts to the court reporter, who, if slow, will have to explain his or her excuses to the Fifth Circuit Clerk's office:

The monitoring of all outstanding transcripts and the problems of delay in filing, will be done by the Clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

Rules of the United States Court of Appeals for the Fifth Circuit, Internal Operating Procedure, F.R.A.P.11.

d. Filing of Briefs

Rule 31(c), F.R.A.P., sets forth the consequences for failure to file briefs timely. If the appellant fails to file a brief in timely fashion, the appeal may be dismissed, but not necessarily. Marcaida v. Rascoe, 569 F.2d 828 (5th Cir. 1978). If the appellee fails to file a brief, it may lose the right to be heard at oral argument. Furthermore, the appellee's ability to contest factual assertions by the appellant will be severely hampered, even if allowed to present oral argument. U.S. v. Everett, 700 F.2d 900 (3rd Cir. 1983).

The Internal Operating Procedures for  
the Fifth Circuit provide important information concerning the

exact manner in which the days are counted for purposes of determining the dates for filing briefs:

Appellant's brief must be mailed to the Clerk not later than 40 days after the date of the briefing notice. Appellee has 33 days from the date of the certificate of service to place the brief in the mail. The certificate of service required by F.R.A.P. 25(d) must be shown at the conclusion of the brief and should be dated. Since briefs are deemed filed on the day of mailing or transmission, if sent by the most expeditious form of delivery short of special, the cost of expensive special and express delivery cannot be allowed as taxable or recoverable costs on appeal.

Rules of the United States Court of Appeals for the Fifth Circuit, Internal Operating Procedures, F.R.A.P.31.

e. Determination of "finality"

In certain types of cases, orders which might otherwise seem to be interlocutory are in actuality deemed "final" for purposes of appeal, and therefore an immediate appeal must be taken, or the right to do so is forever lost. See e.g., Leahy v. Bd. of Tr. of Com. College Dist. No. 508, 912 F.2d 917, 923 (7th Cir. 1990) (Order granting attorneys fees under Rule 11).

This is an especially difficult test to apply in bankruptcy court, since many apparently interlocutory orders will be deemed final for purposes of appeal, and must therefore be appealed from immediately. For

a discussion of the general test, see Matter of Texas Extrusion Corp., 844 F.2d 1142, 1154-1156 (5th Cir. 1988), cert. den., 488 U.S. 926.

f. Special "mootness" problems in certain appeals

In some appeals, unless the relief ordered by the trial court is stayed pending appeal, the courts will hold that the appeal is moot and will dismiss the appeal, often before the appellant can file its brief. The most common example of this problem occurs in appeals from bankruptcy court orders authorizing, in one form or another, the sale of real or personal property. In Re: Sewanee Land, Coal & Cattle, Inc., 735 F.2d 1294 (11th Cir. 1984).

Where preliminary injunctions have been granted or denied, you should take particular care, as a part of your analysis whether or not to appeal to determine whether you will face legal or practical "mootness" problems if you fail to appeal, or fail to obtain a stay pending such an appeal.

B. PRESERVATION OF ERROR

Since the topic of preservation of error has been dealt with extensively earlier in this course, it will not be dealt

with here in detail. It will merely be observed that in many cases an appeal is lost because the error complained of has not been properly preserved for review. The failure

to preserve claimed error in a jury charge in the mammoth case of Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 820, 825-826 (Tex.App. - Houston [1st Dist.] 1987) is but one noteworthy example.

D. BRIEFING PROBLEMS

1. State Court

State appellate court practice, while it has been streamlined somewhat, nevertheless remains a much more hypertechnical area of practice than federal, and is fraught with more landmines and pitfalls.

a. Assignment of Points of Error

Points of error must be succinct, and must specifically identify the error complained of. T.R.A.P.74(d); Smith v. Valdez, 764 S.W.2d 26, 27 (Tex.App. - San Antonio 1989). Furthermore, there must be a record reference with the point of error to the place in the record where such error was preserved. Miller v. Kendall, 804 S.W.2d 933, 938 (Tex.App. - Houston [1st Dist.] 1990).

The clerk of the Dallas Court of Appeals requires that points of error be copied, in full, in the table of

contents. Be sure to do this, or your brief may be returned to you unfiled.

b. Briefing Points of Error

Points of error must be briefed, with supporting argumentation and authorities, or they will be

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waived. Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 815 (Tex.App. - Houston [1st Dist.] 1987); Peterson v. Dean Witter Reynolds, Inc., 805 S.W.2d 541, 552 (Tex.App. - Dallas 1991); National Bonding Agency v. Demeson, 648 S.W.2d 748, 751 (Tex.App. -Dallas 1983, no writ); Charter Builders v. Durham, 683 S.W.2d 487, 489 (Tex.App. - Dallas 1984, no writ).

c. Length of Briefs

The Texas Rules of Appellate Procedure specifically provide for page limitations. Recent decisions striking briefs for exceeding the page limits, and denying leave to file briefs in excess of the normal page limits, see White Bud Van Ness Partnership v. Major-Gladys Joint Venture, \_\_\_\_\_ S.W.2d \_\_\_\_\_, 34 Tex.S.Ct.Jrnl. 446 (Tex. 1991) (Docket No. D-0502), demonstrates that the page limits in state court will be enforced. Furthermore, the courts are clearly signalling that they want briefs to be shorter.

2. Federal Court

Federal appellate practice is much less technical, although the courts do expect high quality briefing.

Points not argued in a brief will be deemed abandoned. In Re: Municipal Bond Reporting Antitrust Lit., 672 F.2d 436, 439 n. 1 (5th Cir. 1982). Points must be

specified in the brief. Burns v. Travelers Ins. Co., 344 F.2d 70, 75 (5th Cir. 1965).

A reference to a statement of undisputed facts filed in the district court, and attached as an appendix to the appellate brief, does not comply with the requirements of F.R.A.P. 28 for a statement of facts. Skagen v. Sears, Roebuck & Co., 910 F.2d 1498, 1500 n. 2 (7th Cir. 1990).

The clerk of the Fifth Circuit has the authority to refuse to file briefs which do not meet with very specific requirements for number of pages, type size, and page margins. See F.R.A.P.28 and 32, and Fifth Circuit Local Rules and Internal Operating Procedures thereunder; Neeley v. Bankers Trust Co. of Texas, 757 F.2d 621, 634 n. 18 (5th Cir. 1985). The Fifth Circuit is also in the process of promulgating a new rule giving even more detailed restrictions on type size and acceptable fonts, to keep up to date with all of the new means available with word processors and laser printers to cram more words on a page of paper. See Appendix B.

D. TO APPEAL OR NOT TO APPEAL?

Few trial lawyers like to lose or give up, and therefore the inclination to appeal is naturally strong. In the heat of the moment, both the losing party and counsel will feel that the judge and jury were clearly wrong, and that any intelligent appellate judge will instantly agree with them. The recent trend in both state and federal court tending to enforce the rules against frivolous appeals makes it imperative that you make a careful and well-considered decision whether to appeal the trial court judgment.

1. Texas Rules of Appellate Procedure 84

T.R.A.P. 84 allows the appellate court to award damages to the appellee if it determines that "an appellant has taken an appeal for delay and without sufficient cause". Although there are very few appeals in which damages for delay have been assessed under T.R.A.P. 84, it is a rule which the appellate courts will utilize where deemed appropriate. In Salley v. Houston Lighting and Power Co., 801 S.W.2d 230 (Tex.App. - Houston [1st Dist.] 1990, the court awarded \$6,000.00 as damages against plaintiff-appellant whose suit had been dismissed with prejudice as a discovery sanction for failing to

produce documents after repeated court orders requiring their production, and who had failed to bring forward a record of the hearing at which the dismissal was ordered.

The test that will be applied is that the Court of Appeals must look at the case from the point of the advocate and determine whether he had reasonable grounds to believe that the case would be reversed. Triland Inv. Group v. Tiseo Paving Co., 748 S.W.2d 282, 285 (Tex.App. - Dallas 1988, no writ); Daniel v. Esmaili, 761 S.W.2d 827, 831 (Tex.App. - Dallas 1988, no writ) ("[W]e emphasize that we do not award delay damages merely for 'poor lawyering'. Ineptitude in the presentation of an appeal is not an adequate ground for assessment of a frivolous appeal penalty.").

In some cases, the courts have merely emphasized the overall frivolous nature of an appeal, often in appeals from the granting of summary judgment. Dolenz v. A B, 742 S.W.2d 82 (Tex.App. - Dallas, 1987, no writ) (Awarding delay damages in legal malpractice case where summary judgment had been granted for the lawyer); Hill v. Thompson & Knight, 756 S.W.2d 824, 826 (Tex.App. - Dallas 1988, no writ); Young v. Young, 765 S.W.2d 440, 444 (Tex.App. - Dallas 1988, no writ).

In other cases, the courts have listed

factors deemed significant. Radio Station WQCK v. T.M. Communications, Inc., 744 S.W.2d 676, 677 (Tex.App. - Dallas 1988, no writ) (Appellant failed to file statement of facts, and counsel requested oral argument but failed to appear).

In Daniel v. Esmaili, 761 S.W.2d 827 (Tex.App. - Dallas 1988, no writ), the court listed four factors which it considered:

In summary, the following four factors lead us to the conclusion that this appeal was filed for delay and without sufficient cause: (1) the unexplained absence of a statement of facts; (2) the unexplained failure to file a motion for new trial when it is required for successfully asserting factual insufficiency on appeal; (3) a poorly written brief raising no arguable points of error; and (4) the appellant's unexplained failure to appear for oral argument. Based on all these factors, we conclude that the likelihood of a favorable result on appeal was so improbable as to make this an appeal taken for delay and without sufficient cause.

Id. at 831

2. Federal Rule of Appellate Procedure 38

There appears to be a growing trend among the federal courts of appeals to apply F.R.A.P.38 with more frequency. Although the rule appears to be applied most often to prisoner and tax protest cases, the appellate practitioner should be aware of this rule.

The Fifth Circuit examines the record to determine whether issues are raised which are "so devoid of worth as to merit sanctions". Federal Deposit Insurance Corp. v. Lanier, 926

F.2d 462, 467 n. 4 (5th Cir. 1991). Other circuits have announced various factors which will be considered. See e.g., Kowalski v. Gagne, 914 F.2d 299, 309

(1st Cir. 1991); Leahy v. Bd. of Tr. of Com. College Dist. No. 508, 912 F.2d 917, 924 (7th Cir. 1990); Rodgers v. Wood, 910 F.2d 444, 449-450 (7th Cir. 1990); United States v. Kruger, 923 F.2d 587, 588 (8th Cir. 1991); Rostad & Rostad v. Investment Mgmt. & Research, 923 F.2d 694, 697 (9th Cir. 1991); Amwest Mortg. Corp. v. Grady, 925 F.2d 1162, 1165 (9th Cir. 1991); Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 581-582 (10th Cir. 1990); Pelletier v. Zweifel, 921 F.2d 1465, 1519-1523 (11th Cir. 1991) (RICO case); Romala Corp. v. U.S., 927 F.2d 1219, 1222-1227 (Fed.Cir. 1991).

It is now clear that F.R.Civ.P. 11 cannot be utilized, directly or indirectly, to award sanctions for a frivolous appeal. Cooter & Gell v. Hartmarx Corp., \_\_\_\_\_ U.S. \_\_\_\_\_, 110 S.Ct. 2447, 2461-2462 (1990); Partington v. Gedan, 923 F.2d 686, 687-688 (9th Cir. 1991).

### III. HOW CAN YOU CORRECT A MISTAKE BEFORE IT IS TOO LATE?

#### A. MISSED DEADLINES

##### 1. State Court

##### a) Extended Time for Filing

If the deadline for filing a cost bond

or notice of appeal, or the transcript or statement of facts, is missed, you may still save the day if you catch the problem in fifteen (15) days. For the cost bond or notice of appeal, it must be filed 15 days after the last day allowed,

and, within the same period "a motion is filed in appellate court reasonable explaining the need for such extension".

T.R.A.P.41(a)(2). If these are not filed within 15 days, the appellate court has no jurisdiction.

For a transcript or statement of facts, all that is necessary is a motion "reasonable explaining" the need within 15 days after the last date for filing the record. T.R.A.P.54(c). The "reasonable explanation" should include an explanation of any delay in ordering the statement of facts as required by T.R.A.P.52(a). If a brief is filed late, a motion for extension of time and/or for leave of court, giving a "reasonable explanation" for the delay should be filed as soon as possible. See T.R.A.P.74(m) and (n).

b) Ten-day grace period if sent by U.S.

Mail

T.R.A.P.4(b) provides that if "any matter relating to an appeal" is mailed by first class U.S. Mail postmarked by the date for filing, it will be deemed filed on the date due if received no more than ten days late. This provision will not help you, however, if you send the material via a

private carrier rather than the U.S. Mail. Carpenter v. Town and Country Bank, \_\_\_\_\_ S.W.2d \_\_\_\_\_ (Tex.App. - Eastland 1991) (Cause No. 11-91-048-CV) (Interpreting T.R.Civ.P.5, where appellant had sent a motion

for new trial via UPS, and it was received and filed six days late).

c) Solutions for Recalcitrant Court Reporters

In state appellate practice, the burden is always on the parties (and, for legal malpractice purposes, their attorneys) to file instruments in timely fashion. Schafer v. Conner, 805 S.W.2d 554, 556-557 (Tex.App. - Beaumont 1991). Therefore, even if you order a statement of facts within the time prescribed by T.R.A.P.53(a), and file a proper designation of items to be included in the transcript within the time period prescribed by T.R.A.P.51(b), IT IS STILL YOUR RESPONSIBILITY TO FOLLOW UP AND MAKE CERTAIN THAT THE ITEMS ARE COMPLETED AND FILED TIMELY. You may have been spoiled at some time in the past by a court reporter who filed the statement of facts for you, or a transcript clerk who called to advise you that the transcript was ready. Such courtesies are nice, but you should not rely upon them. If you calendar the due dates, and either call regularly or have your secretary call regularly to check on the progress of the work, you can avoid an unpleasant last-minute surprise, and have time to file a motion for extension of time.

For the rare court reporter who simply refuses to do his/her work, the Court of Appeals will issue a writ of mandamus to require preparation of a

complete, accurate statement of facts, even if the court reporter no longer holds an official position. Chase Oil & Gas, Ltd.-Hill Pipeline v. Dearen, 801 S.W.2d 3 (Tex.App. - Waco 1990). If a court reporter loses all notes of the trial testimony, the appeal court is required to reverse without consideration of any other points of error. Wolters v. Wright, 623 S.W.2d 301 (Tex. 1981). If the court reporter loses some notes, the appeals court will reverse if the appellant has sufficiently challenged the trial court results to make the lost portion essential to proper review. Wilkins v. Reisman, \_\_\_\_\_ S.W.2d \_\_\_\_\_ (Tex.App. - Houston [\_\_\_ Dist.] 1991) (No. B14-89-01125-CV).

## 2. Federal Court

Under F.R.A.P.4(a)(5), if you discover that you have missed the deadline for filing the notice of appeal, you may still be saved by filing a motion with the district court within 30 days of the original deadline, and making a showing of "good cause" or "excusable neglect". You must file a motion meeting the standards of the rule. Campos v. LeFevre, 825 F.2d 671 (2d Cir. 1987); U.S. ex rel. Leonard v. O'Leary, 788 F.2d 1238 (7th Cir. 1986).

"Excusable neglect" has been applied strictly

in the Fifth Circuit, although the court has hinted that "good cause" may be applied with more flexibility. Allied Steel v. City of Abilene, 909 F.2d 139 (5th Cir.

1990); Chipser v. Kohlmeyer & Co., 600 F.2d 1061 (5th Cir. 1979).

For a while, a "uniquire circumstance" doctrine emerged which was utilized by some courts to extend leniency to appellant. This doctrine has now been limited severely by the Supreme Court to the rare situation where a judicial officer was responsible. Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989). This holding has been followed in a strict manner. In Re: Slimick, 928 F.2d 304, 309-310 (9th Cir. 1990).

As indicated above, once you have filed the transcript order form (which requires making satisfactory financial arrangements with the court reporter), the burden shifts from the appellate attorney to the court reporter for the transcript and the district clerk for the record. Problems may still arise, however, such as when the "satisfactory financial arrangement" are not compiled with by your client. In such a situation, the Fifth Circuit Clerk has an immense amount of power and discretion. You (and not your secretary or paralegal) should develop a cooperative, honest, and cordial working relationship with the appropriate person in the clerk's office. If you are honest, cooperative, and courteous, with the clerk's office, it will help you greatly when you need some information or an extension of time.

B. PRESERVATION OF ERROR

Since this topic is dealt with extensively in several other presentations in this conference, it will not be dealt with here at length. Preservation of error is, obviously, essential to a successful appeal. As a general rule, however, you should include in a timely filed motion for new trial, all complaints which such a motion can preserve, even if you think you may have preserved the point elsewhere. All that is necessary is that you include the points and file the motion for new trial on time. You do not have to "present" the motion to the judge and obtain a ruling, as is necessary for findings of act or bills of exceptions. Cecil v. Smith, \_\_\_\_\_ S.W.2d \_\_\_\_\_ 34 Tex.S.Ct.Jrnl. 383 (Tex. 1991).

C. BRIEFING

1. State Court

Under T.R.A.P.55(b) and 74(n), the appeals court has broad discretion to allow amendment or supplementation of the record or the briefing whenever it appears just. Please be aware, however, that although it is possible for the court to allow supplementation after oral argument or submission, the odds of this actually happening are quite limited. Also, the closer

you are to the date for oral argument or "submission", the less likely the court will be to grant a motion for supplementation. On the other hand,

if there will be plenty of time for your opponent to respond and the judges and briefing attorneys then to review the entire appellate file prior to oral argument, your chances of supplementation being granted are greatly increased.

2. Federal Court

As with state court, you should act promptly to correct errors in the record so as not to delay the appellate judges' preparation for oral argument. You do not want to disrupt their schedule! Correction of the record can be done fairly freely, often by agreement and approval by the clerk.

Correction of errors in a brief, such as citation errors to cases or the record, changing of writ or subsequent history, or even grammatical errors which change the meaning of what you were trying to say, can be done by filing a motion and submitting the proposed revised pages. If your briefing is already at the maximum page limit, do not expect the Fifth Circuit to allow you to file a "supplemental" brief which effectively evades the page limits. The best you can hope for is to submit a letter citing new decisions to be sent to the clerk about two or three weeks prior to oral argument. These usually will be considered by the court.

D. DECIDING WHETHER TO WITHDRAW APPEAL

If you have an appeal which is shaky at best, and decides at some point that it is not worth pursuing, the author believes that you should withdraw the appeal as soon as possible. The more attorneys' fees your adversary expends, and the more time spent by the appellate court in administering your appeal, or reading the briefs, the greater the danger of sanctions. Of course, try not to be in this position in the first place.

#### IV. WHEN IS IT "MALPRACTICE"?

##### A. ELEMENTS OF LEGAL MALPRACTICE

##### 1. Nature of the Cause of Action

Thankfully, not every mistake by an attorney is necessarily "legal malpractice". Generally speaking, a claim for legal malpractice is deemed an action in tort, arising from negligence amounting to a breach of duty, which proximately causes damage to the client. Woodburn v. Turley, 625 F.2d 589 (5th Cir. 1980); Oldham v. Sparks, 28 Tex. 425 (1866); Gabel v. Sandoval, 648 S.W.2d 398 (Tex.App. - San Antonio 1983, writ dism'd).

There is no implied cause of action for breach of the Texas Disciplinary Rules of Professional Conduct. Comment 15, Preamble: Scope, Texas Disciplinary Rules of

Professional Conduct; Martin v. Trevino, 578 S.W.2d 763  
(Tex.Civ.App. - Corpus Christi 1978, writ ref'd n.r.e.).

The Texas Deceptive Trade Practices Act (DTPA) does provide a cause of action for an attorney's unconscionable conduct, DeBakey v. Staggs, 612 S.W.2d 924 (Tex. 1981), and the DTPA may also be extended to claims that an attorney breached some implied duties of good and workmanlike performance. Compare, Willis v. Maverick, 755 S.W.2d 84, (Tex. 1988), and Cosgrove v. Grimes, 774 S.W.2d 662, 666 (Tex. 1989), with Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988), and Melody Homes Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987).

## 2. Existence of the Attorney-Client Relationship

Existence of an attorney-client relationship is an essential prerequisite. Shropshire v. Freeman, 510 S.W.2d 405 (Tex.Civ.App. - Austin 1974, writ ref'd n.r.e.). Privity is generally necessary. Bell v. Manning, 613 S.W.2d 335 (Tex.App. - Tyler 1981, writ ref'd n.r.e.). See Annotation, 45 A.L.R.3d 1181 (1972), discussing attorney's liability to one other than his client for attorney's negligence.

There are special problems attending the conduct of an appeal in determining when the relationship begins or ends. The classic rule has been stated as follows:

The mere fact that an attorney represents a

client at trial does not obligate the attorney to appeal the verdict absent an agreement.

The general rule is that an attorney's implied authority ends with entry of a final judgment in the trial court. An attorney has no automatic duty to perfect an appeal or investigate the case to determine if a ground for appeal exists. However, where the attorney knows of a ground for an appeal, he should inform the client of the possible basis for the appeal and then indicate to the client whether he is willing to pursue the appeal.

§ 19.04 Attorney Malpractice: Prevention and Defense, Horan and Spellmire (1989), at p. 19-18; Accord, § 350 Legal Malpractice, Mallen and Levit (1977), at 442-443.

Ordinarily, the trial attorneys' duties terminate upon the rendition of a final judgment. Franke v. Zimmerman, 526 S.W.2d 257, 258 (Tex.App. - Austin 1975, no writ). But see, Porter v. Kruegel, 106 Tex. 29, 155 S.W. 174 (1913), where the Supreme Court held that a petition alleging that there was a contract between attorney and client to handle two cases in the district court and on appeal, stated a cause of action. 155 S.W. at 175. See also, Lucas v. Nesbitt, 653, S.W.2d 883, 885-886 (Tex.App. - Corpus Christi 1983), where the attorney had falsely represented to the client that he failed the necessary papers to perfect an appeal.

Despite this rule, if you have represented a

client in the trial court, and for whatever reason have not been retained to prosecute an appeal, CONFIRM

YOUR NONREPRESENTATION IN WRITING, and notify the client of the applicable deadlines. See "Legal Malpractice: Preventing and Minimizing Claims", Texas Bar Journal, July 1989, at 289.

3. Duties of an Attorney

In Cook v. Irion, 409 S.W.2d 475 (Tex.Civ.App. - San Antonio 1966, no writ), the court summarized an attorneys' duties as follows:

Ordinarily when an attorney engages

in the practice of law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge.

Id. at 477.

An attorney who holds himself out as a specialist may assume a higher standard of care. See King v.

Flamm, 442 S.W.2d 679 (Tex. 1969) (Higher standard of care for specialist in medical malpractice cases). The California courts have applied a higher standard of care to a legal specialist. Wright v. William, 47 Cal.App.3d 802, 121 Cal.Rptr. 194 (1975).

4. Standard of Care

In Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989), the Texas Supreme Court substantially rewrote the much-misunderstood rule providing that a "good faith" error in judgment is not negligence. In its ruling, the court stated:

There is no subjective good faith excuse for attorney negligence. A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney. The jury must evaluate his conduct based on the information the attorney has at the time of the alleged act of negligence. In some instances an attorney is required to make tactical or strategic decisions. Ostensibly, the good faith exception was created to protect this unique attorney work product. However, allowing the attorney to assert his subjective good faith, when the acts he pursues are unreasonable as measured by the reasonably competent practitioner standard, creates too great a burden for wronged clients to overcome. The instruction to the jury should clearly set out the standard for negligence in terms which encompass the attorney's reasonableness in choosing one course of action over another.

If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of

their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect. The standard is an objective exercise of professional judgment, not the

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subjective belief that his acts are in good faith.

774 S.W.2d at 665.

5. Damages and Proximate Cause-The "Case Within a Case"

The attorney's negligence must be found to be the proximate cause of actual damages to the client. Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, 528 S.W.2d 67 (Tex.Civ.App. - Tyler 1975, writ ref'd n.r.e.). If the damage is merely conjectural, the suit will be abated. Philips v. Giles, 620 S.W.2d 750 (Tex.Civ.App. - Dallas 1981, no writ). However, the client need not pay a judgment in order to recover from the attorney. Monfort v. Jeter, 567 S.W.2d 498 (Tex. 1978).

A client whose cause of action was lost due to the attorney's negligence must prove that the suit would have been successful, and how much would have been recovered and collected, but for the attorney's negligence. Jackson, v. Urban,

Coolidge, Pennington & Scott, 516 S.W.2d 948 (Tex.Civ.App. - Houston [1st Dist.] 1974, writ ref'd n.r.e.); Schlosser v. Tropoli, 609 S.W.2d 255 (Tex.Civ.App. - Houston [14th Dist.] 1980, writ ref'd n.r.e.); Gibson v. Johnson, 414 S.W.2d 235, 238-239 (Tex.Civ.App. - Tyler 1968). In an appellate legal malpractice case, the client must prove that the appeal would have been successful, but for the

attorney's negligence, and that damages resulted. Kruegel v. Porter, 136 S.W. 801 (Tex.Civ.App. 1911), aff'd, 155 S.W. 174 (Tex. 1913).

B. DEFENSES TO LEGAL MALPRACTICE CLAIMS

Other than challenging the existence of the elements stated above, there are affirmative defenses to claims for legal malpractice.:

1. Res Judicata

Where the attorney sues for unpaid fees and obtains a judgment, a claim for legal malpractice is a compulsory counterclaim. A later malpractice case will be barred by res judicata. Bailey v. Travis, 622 S.W.2d 143 (Tex.Civ.App. - Eastland 1981, writ ref'd n.r.e.).

2. Statute of Limitation

Legal malpractice claims are governed by the two-year statute of limitations, Tex.Civ.Prac.&Rem.Code Ann. § 16.003 (Vernon Supp. 1987), even if the pleadings attempt to characterize the claim as a breach of contract. Woodburn v. Turley, 625 F.2d 589 (5th Cir. 1980); Gabel v. Sandoval, 648 S.W.2d 398 (Tex.App. - San Antonio 1983, writ disp'd); Citizens

State Bank of Dickinson v. Shapiro, 575 S.W.2d 375 (Tex.Civ.App.  
- Tyler 1978, writ ref'd n.r.e.).

The limitations period begins to run when  
"the force wrongfully put in motion produces the injury, the  
invasion of personal or property rights accruing at that

time." Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967); See Annotation, 32 A.L.R.4th 260 (1984), "when statute of limitations begins to run upon action against attorney for malpractice."

The "discovery rule" has been applied to cause of action for legal malpractice, Willis v. Maverick, 755 S.W.2d 84 (Tex. 1988), and such decision applies retroactively. Burns v. Thomas, 790 S.W.2d 1 (Tex. 1990).

Two cases were argued in April, 1991, before the Texas Supreme Court which may result in significant rulings on the statute of limitations/discovery rule issues. In Aduddell v. Parkhill, Docket No. D-0666, 34 Tex.S.Ct.Jrnl. 336 (1991), the attorney had allowed the statute of limitations to expire, and the client's malpractice suit was not filed until more than two years after the initial period had expired. The issue in Aduddell is whether the client's ability to rely upon the discovery rule was waived by failure to obtain leave of court for filing an amended petition raising the discovery rule seven days before a summary judgment hearing which "surprised" the defendant-movant. In Hughes v. Mahaney & Higgins, Docket No. D-0678, 34 Tex.S.Ct.Jrnl. 397 (1991), the issues to be decided is whether the statute of limitations for the malpractice action begins running at the time of the alleged malpractice,

or at the time when all appeals from the alleged malpractice are exhausted.

So long as the attorney continues to represent the client, and fails to disclose his/her negligence to the client, the statute of limitations may be held tolled due to "fraudulent concealment." Anderson v. Sneed, 615 S.W.2d 898 (Tex.Civ.App. - El Paso 1981, no writ); McClung v. Johnson, 620 S.W.2d 644 (Tex.Civ.App. - Dallas 1981); Crean v. Chozick, 714 S.W.2d 61 (Tex.App. - San Antonio 1986).

C. THE JUDGE WILL DECIDE "PROXIMATE CAUSE" IN APPELLATE MALPRACTICE CASES

Obviously, proving that the client would have been successful on an appeal, and either collected a sum of money, or overturned an adverse judgment, but for the attorneys' negligence, is a difficult burden. The Texas Supreme Court has decided that the "proximate cause" issue in appellate legal malpractice cases is to be decided by the trial judge, and not the jury. Millhouse v. Wiesenthal, 775 S.W.2d 626 (Tex. 1989).

V. HOW DO YOU PREVENT APPELLATE MALPRACTICE?

A. BEST METHOD

Be perfect, and do not associate with anyone who is less than perfect.

B. NEXT-BEST METHOD

Be careful. The rules are tricky, and there are many pitfalls. Try to establish safeguards in case your first line of defense fails.

1. State Your Duties, and the Client's, in Writing

Under the new Texas Disciplinary Rules of Professional Conduct, it is definitely advisable to have a written employment agreement with all clients. It is permissible to limit the scope of representation in such agreement. Art.10, § 9, Rule 1.02(b), State Bar Rules. If you are the trial lawyer, negate any duty to prosecute an appeal unless you are certain in advance that you want to assume that responsibility.

One key deadline problem which may arise is the court reporter's refusal to supply the statement of facts/transcript without payment. Generally, the payment responsibility is the client's, unless you agree otherwise. Legal Malpractice, § 350, Mallen and Levit, at 443 (1977). Make it clear in your retention letter that this is the client's responsibility.

2. Make Sure that Error is Preserved

At all stages of the case, the trial lawyer should take all necessary action, subject to trial strategy

consideration, to preserve error. See other outlines in this conference.

3. Review All Potentially Final Orders Carefully

When you are reviewing an order as to form which obviously is not supposed to be a final order, make certain that it does not dispose of all parties and all claims. An express statement that the court reserves ruling on certain remaining issues is often advisable.

When you receive a signed order which may or may not be deemed "final", review it carefully to determine if it does indeed dispose of all parties and all issues. During the period of the trial court's plenary power under Rule 329b, T.R.Civ.P., the trial court can freely modify or vacate the order.

4. Make a Careful Decision Whether to Appeal

Give the client, as soon as possible, your advice and recommendations concerning appeal, including the potential for "frivolous appeal" sanctions. Formulate your advice carefully and thoughtfully. Confirm the client's decision in writing. If the client decides not to appeal, or decides not to use you as appellate counsel, include in your letter critical dates such as deadlines for cost bond, or notice of appeal, ordering statement of facts, etc.

5. Prepare an Accurate Timetable and Calendar All  
Deadlines; Learn What "Filing" Means

CALENDAR ALL RELEVANT DEADLINES, preferably on more than one person's calendar so that, for example, your secretary will remind you ahead of time if you forget, or you can ask an associate how the brief is coming along.

Since "filing" requirements may be somewhat different, depending upon whether you are in state or federal court, and what the instrument is, make your calendar precise, such as "file cost bond with district clerk," or "mail brief to Fifth Circuit."

6. Follow Through on Meeting Deadlines

Remember Murphy's Law. It is not sufficient merely to tell someone in the clerk's office to do something, or to drop something in the mail and forget about it. Send an extra copy to the clerk to be file-stamped and returned to you. Either you or your secretary should follow up with the clerk to make certain that the instrument was received and filed in time. In state court, this should always be done within the 15-day window for filing a motion for extension of time.

7. Develop a Checklist for Briefing

In both state and federal court, develop a checklist for your brief, based upon the rules which list their

requirements. T.R.A.P.74; F.R.A.P.28 and 32, and Local Rules and Internal Operating Procedures promulgated

thereunder. In state court, make certain that you have actually briefed all of your points of error with argumentation and authorities. Give yourself enough time to proofread, revise, and polish your brief.

### Conclusion

The appellate rules, particularly in state appellate practice, contain many traps for the unwary. If you are careful, you can minimize your mistakes. If you double-check your compliance with deadlines, and file a proper motion for extension of time soon enough, even an apparently fatal mistake can be but an embarrassment.

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