PRACTICING IN FEDERAL COURT

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I. APPLYING STATE LAW IN FEDERAL COURT

A. Does Federal or State law apply?

According to the Rules of Decision Act, federal courts must apply state substantive law unless otherwise required by the federal Constitution, statutes, or treaties. 28 U.S.C. § 1652. Thus, in diversity cases, a federal court must apply state substantive law and federal procedure since the Supreme Court has prescribed rules of procedure and evidence. *See Erie v. Tompkins*, 304 U.S. 64, 78 (1938); *see Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

In diversity cases then, two questions often arise. First, how does a federal court tell the difference between state substantive law that it must apply and state procedural law that is pre-empted by federal procedural rules? Next, how does the federal court determine state substantive law, particularly if state law is unsettled? The answers to these questions are not always clear.

1. Substance vs. procedure.

The federal courts apply three tests to resolve the difference between substance and procedure. First, in accordance with the Rules Enabling Act, 28 U.S.C. § 2072, if there is a specific federal procedural statute or rule that is "sufficiently broad to cover the situation," federal law applies. *See Hanna*, 380 U.S. at 470-471 (holding that Fed. R. Civ. P. 4(d)(1), and not state law, governed service of process of a complaint).

If there is no controlling federal statute or rule, the so-called "outcome-determinative" test applies. Under this test, if there is a state law that applies to an issue that would determine the outcome of the case, the federal court will apply state law. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109-110 (1945). A state law is outcome-determinative if it would affect the plaintiff's choice of forum. *See Hanna*, 380 U.S. at 468-469; 17 *Moore's Federal Practice* §

120.31 (2000).

Finally, even if the first two tests seem to dictate applying state law, the federal court will apply federal law if there is an overriding federal interest in the particular matter. *See Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-539 (1958). In *Byrd*, the Court held that the overriding federal interest in trial by jury meant that a federal court could not apply a state practice that allowed a judge to determine certain factual issues. *See id.*

Federal courts in the Eleventh Circuit have applied these tests to various staples of Florida state practice. For example, in *Cohen v. Office Depot, Inc.*, 184 F.3d 1292 (11th Cir.1999), *vacated in part*, 204 F.3d 1069 (11th Cir.2000), the Eleventh Circuit held that the pleading rules set forth in Fed.R.Civ.P. 8(a)(3) preempt the requirement in section 768.72, Florida Statutes that a plaintiff must seek leave to amend to assert punitive damages. *See Cohen*, 184 F.3d at 1299. The court subsequently held, however, that in *Cohen* it did not address whether the federal rules preempt section 768.72's prohibition on discovery of financial worth. *See Porter v. Ogden, Newell & Welch*, 241 F.3d 1334 (11th Cir. 2001). At least one district court within the circuit has held that this aspect of section 768.72 also is preempted. *See Ward v. Estaleiro Itajai S/A*, 21 Fla. L. Weekly Fed. D 191 (S.D. Fla. Mar. 31, 2008).

It is also settled that although Fed. R. Civ. P. 68 provides for offers of judgment, the rule only allows prevailing parties to recover costs and not attorney's fees. Consequently, parties can collect attorney's fees pursuant to offers of judgment made under section 768.79, Florida Statutes. *See Tanker Management, Inc. v. Brunson*, 918 F.2d 1524, 1528 (11th Cir. Fla. 1990); *but see Keesee v. Bank of Am.*, NA, 371 F. Supp. 2d 1370, 1372 (M.D. Fla. 2005) (holding that section 768.79 did not apply in an employment discrimination case brought under both state and

federal law on grounds that the statute conflicted with substantive federal discrimination law holding that fees are to be awarded to prevailing defendants only in frivolous cases).

Although the Federal Rules of Evidence generally govern the admissibility of evidence in diversity cases, some state evidentiary presumptions are deemed substantive. *See* Fed. R. Evid. 302; *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) (under *Erie*, presumptions and their effects, and burdens of proof, are substantive issues); *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 739 (5th Cir. 1980) (applying res ipsa loquitur). The burden of proof or persuasion is substantive. *See Palmer v. Hoffman*, 318 U.S. 109, 116-117 (1943).

Finally, it is important to remember that in diversity cases the federal court will apply Rule 56 of the Federal Rules of Civil Procedure to summary judgment motions. The summary judgment standard is among the most significant differences between state and federal practice. In Florida, the standard is very difficult to satisfy, as a summary judgment will be denied if the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist. *See Nard, Inc. v. Devito Contr. & Supply, Inc.*, 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000) (citations omitted).

In federal court, on the other hand, the non-moving party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

Summary judgment may be granted if the nonmovant fails to adduce evidence which, when viewed in a light most favorable to him, would support a jury finding in his favor. *Anderson*, 477 U.S. at 254-55. The nonmoving party must "make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

2. Determining state substantive law.

Deciding whether the law is substantive or procedural is only half the battle. If the federal court decides that state substantive law must be applied, it then has to determine the law. Under *Erie*, federal courts generally must apply the law as decided by the state's highest court. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237-238 (1940). When the highest court has not ruled, the federal court must examine lower court decisions and decide how the highest court would rule – the so-called "*Erie* guess." *See Davis v. Nat'l Med. Enters.*, 253 F.3d 1314, 1322 n.11 (11th Cir. 2001).

Over the years, a substantial body of case law has developed to aid federal courts in determining state law, but the Eleventh Circuit can avoid guessing by certifying a question to the Florida Supreme Court if it "is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." Fla. Const. art. V, § 3(b)(6); *see also Tobin v. Mich. Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005) ("Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary Erie guesses and to offer the state court the opportunity to interpret or change existing law.").

II. THE LOCAL RULES OF THE FEDERAL COURTS

Rule 83(a) of the Federal Rules of Civil Procedure authorizes district courts to adopt local rules governing practice before the court. The rules must be consistent with, but not duplicate, federal statutes and the Federal Rules of Civil Procedure. A local rule imposing a requirement of

form must not be enforced in a way that causes a party to lose a substantive right because of a nonwillful failure to comply with the rule. Despite this last caveat, familiarity with a district court's local rules is critical to successfully handling a federal case. The pertinent Local Rules of the Middle District of Florida are included in these materials. Some of the more important aspects of the rules dealing with civil proceedings are discussed below.

A. Filing and service of documents.

The Middle District consists of five divisions: Jacksonville, Ocala, Orlando, Tampa, and Ft. Myers. Local Rule 1.02 states that civil cases must be filed in the division with "greatest nexus." M.D. Fla. Loc. R. 1.02. Cases may be transferred to another division for trial, and related cases may be transferred and consolidated before one judge. M.D. Fla. Loc. R. 1.02(e), 1.04(b), (c). Counsel have a continuing duty to inform the court of the existence of any related cases. M.D. Fla. Loc. R. 1.04(d).

Rules 1.05 and 1.06 govern the form of pleadings, and the rules should be followed scrupulously, as the court will not hesitate to reject non-conforming pleadings.

Rule 1.07(b), which deals with service of process, also requires that motions for default must be filed promptly if no answer or appearance is made. Otherwise, the case will be dismissed without prejudice within sixty days.

Rule 1.07(c) governs service of pleadings by mail or facsimile, but the rule was essentially rendered irrelevant with the advent of electronic filing. The rules governing electronic filing are found on the court's website. Electronic filing is mandatory, and attorneys are required to register with the court for electronic service. In civil cases, only the original summons and complaint may be filed via a paper document, although a CD containing the

complaint is preferred. When a document is filed electronically, it is automatically served electronically on all counsel who have appeared in the case, and paper service is necessary only on a party who has not registered to be served electronically. For purposes of computation of time, electronic service is considered service by mail.

As reflected in Local Rule 1.09, filing documents under seal is disfavored. The rule requires a motion and memorandum addressing the rule's stringent requirements before any item is filed under seal. Settlement agreements will not be sealed absent extraordinary circumstances.

B. Attorneys

No Florida attorney may appear as counsel in the Middle District without first being admitted to practice before the court. M.D. Fla. Loc. R. 2.01. Unlike the Northern and Southern Districts, the Middle District has no admission test, and any member in good standing with the Florida Bar or the Middle or Southern District is eligible for admission. Being a member in good standing of the Middle District does not entitle one to membership in the Northern and Southern Districts, however, as passing the applicable test is required. Attorneys from outside Florida may appear pro hac vice so long as they file a written designation and consent-to-act on the part of a resident member of the court, who will act as local counsel. M.D. Fla. Loc. R. 2.02.

C. Motions

Unlike in state court, motion hearings federal court are rare, as motions typically are decided on the parties' written submissions. If a party wishes to be heard, it must file a separate request for oral argument. M.D. Fla. Loc. R. 3.01(j). Local Rule 3.01 governs motions and supporting memoranda. A motion must state the relief requested and the basis for the request and must be accompanied by a memorandum of law. The motion and memorandum must be

included in a single document no longer than twenty-five pages. The opposing party must file its memorandum in response to the motion within ten days, and the response may not exceed twenty pages. M.D. Fla. Loc. R. 3.01(a), (b). Absent leave of court, no further or longer memoranda are permitted, and motions requesting leave to file such memoranda cannot exceed three pages and cannot attach the proposed filing. M.D. Fla. Loc. R. 3.01(d). Letters to the judge are not permitted unless invited. M.D. Fla. Loc. R. 3.01(f).

All motions, except for certain dispositive ones, must contain a certificate that counsel have conferred and whether the motion is opposed. The moving party has a continuing duty to contact opposing counsel and supplement its motion if opposing counsel was unavailable at the time the motion was filed. M.D. Fla. Loc. R. 3.01(g).

If the court does not rule on a dispositive motion within 180 days of the responsive filing, the movant must file a "Notice to the Court," reminding the judge of the pending motion, with a copy to the Chief Judge. M.D. Fla. Loc. R. 3.01(h).

The local rules also contain specific rules for certain motions. For example, motions for leave to join a third party generally must be filed within six months from a defendant's answer. *See* M.D. Fla. Loc. R. 4.03.

Local Rule 4.04 specifies the requirements for class actions and mandates that class certification motions must be filed within ninety days following filing of the initial complaint. This deadline typically is extended and is usually included in the parties' case management report discussed below, along with procedures for class discovery.

Local Rules 4.05 and 4.06 contain detailed requirements for temporary restraining orders and preliminary injunctions. Since the court typically does not have the time to hold a hearing on

a motion for temporary restraining order, such motions must comply with the rule and include, among other things, a verified complaint or accompanying affidavits. Motions for preliminary injunctions must comply with all procedural requirements of a motion for temporary restraining order, and in addition, the moving party must serve notice and all supporting documents on the other side at least five days in advance of the hearing. Opposing documents must be served by close of business the day before the hearing. M.D. Fla. Loc. R. 4.06.

Motions for attorney's fees must be filed no later than fourteen days following entry of judgment. M.D. Fla. Loc. R. 4.18.

D. Case Management

Local Rule 3.05 contains detailed case management procedures. When a case is filed, the clerk designates it for future management on one of three tracks depending on the nature of the case and its relative complexity. Most civil cases are track two cases, which are expected to go to trial within two years. Track one cases are typically simple administrative cases overseen by a magistrate, and track three cases are complex.

In track two and track three cases, counsel must meet and prepare a case management report which suggests a discovery plan and trial date and proposes deadlines for various pre-trial matters, including dispositive motions, joinder of parties, and completion of discovery. No discovery can occur before the case management conference, and the court can dismiss the case for lack of prosecution if it is not held in a timely manner. Once the case management report is filed, the judge will enter a scheduling order, which typically adopts the deadlines in the case management report. M.D. Fla. Loc. R. 3.05.

It is important to pay careful attention to these scheduling orders, as they are not uniform

among the judges and they often modify requirements found in the local rules and in the Federal Rules of Civil Procedure. Rule 1.01(c) of the local rules states that the court may suspend application and enforcement of the local rules by written order, and when a judge issues any order which is not consistent with the local rules, the order supersedes the rules. For example, one judge in the Middle District routinely enters a scheduling order that requires responses to motions be filed in eleven days and not the usual ten. The order therefore has the effect of eliminating weekends and holidays from the time computation. *See* Fed. R. Civ. P. 6(a)(2).

Other judges modify the summary judgment procedure by dispensing with a hearing and requiring the parties to confer and file statements of disputed and undisputed facts with the motion and response.

Finally, given the court's focus on case management and deadlines, it should not be surprising that continuances are disfavored. If failing to complete discovery is the reason for a continuance request, the failure must be brought to the court's attention at least sixty days before trial, and the failure must not be due to lack of diligence. M.D. Fla. Loc. R. 3.09.

E. Discovery

Discovery must be conducted in accordance with the parties' case management report and requests must be served so that responses are due before the discovery cut-off. The parties can extend the discovery cut-off by agreement, but the court typically will not intervene in any post-deadline discovery disputes. Parties are expected to give at least ten days notice of a deposition. A non-resident plaintiff or non-resident defendant who intends to be present at trial may each be deposed once within the district. M.D. Fla. Loc. R. 3.02, 3.04(b). Motions to compel discovery must quote the request or question in full, followed by the objection, and then argument. M.D.

Fla. Loc. R. 3.04.

In addition to the local rules, the court has promulgated a discovery handbook, which is intended to supplement the local rules and decisions and reflects local customs. According to the handbook's introduction, it is "highly persuasive in addressing discovery issues." Middle District Discovery (2001), at Introduction. The handbook can be found on the court's website.

F. Pretrial and trial

Final pretrial conferences typically are held about a month before trial. Three days before the pretrial conference, the parties must file a comprehensive joint pretrial statement, into which all prior pleadings are deemed merged. The court will then enter a pretrial order, which may not be amended except in furtherance of justice. M.D. Fla. Loc. R. 3.06; *see also* Fed. R. Civ. P. 16(e)(pretrial order may be modified only to prevent "manifest injustice").

Trials are conducted according to the individual judges' preferences. Although most federal judges limit voir dire, federal jury trials are conducted in a similar manner to state court trials. Counsel should be aware of Local Rule5.03, which governs courtroom decorum.

G. Proceeding Before a U.S. Magistrate

Magistrate judges in the Middle District conduct much of the court's day-to-day work. Consistent with 28 U.S.C. § 636, magistrates in civil cases may be charged with supervision and determination of all pretrial proceedings and motions, including all procedural and discovery motions. A judge may reconsider any pretrial matter upon a showing that the magistrate's ruling was clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). Absent a stipulation, magistrates cannot appoint a receiver, issue an injunction, or rule on class certification, summary judgment, or any other dispositive matter. *See* M.D. Fla. Loc. R. 6.01(c)(18).

Magistrates can make recommendations to the judge on any dispositive motion. *See id.* The parties have ten days to file written objections to the report and recommendation with the district judge. *See* M.D. Fla. Loc. R. 6.02. When a magistrate judge issues a report and recommendation, the district judge must make a *de novo* determination of the findings and/or recommendations to which any party objects. *See* 28 U.S.C. § 636(b)(1)(C). "This requires that the district judge 'give fresh consideration to those issues to which specific objection has been made by a party.' " *Lacy v. Apfel*, 2000 WL 33277680, *1 (M.D.Fla. Oct. 20, 2000) (quoting *Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 512 (11th Cir.1990)). "In the absence of specific objections, there is no requirement that a district judge review factual findings *de novo.*" Regardless of whether objections are filed, however, a district judge must review a magistrate's legal conclusions *de novo.* After reviewing a report and recommendation, objections, and responses thereto, the district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. *See Tran v. Waste Management, Inc.*, 290 F.Supp.2d 1286, 1291 (M.D. Fla. 2003).

Under Local Rule 6.05 and 28 U.S.C. § 636(c), the parties can consent to a trial by magistrate. Upon the parties' written consent, the magistrate judge presides over the case, including the trial, and any appeals are taken directly to the Eleventh Circuit. *See* 28 U.S.C. § 636(c)(3).

III. ALTERNATIVE DISPUTE RESOLUTION

As in state court cases, alternative dispute resolution in federal court typically comes in the form of mediation and non-binding or binding arbitration. District courts are authorized and

required to provide litigants in all civil cases with at least one alternative dispute resolution process, including but not limited to, mediation, early neutral evaluation, mini-trial, and arbitration. The district court, however, may only require mediation, early neutral evaluation, and, with the parties' consent, arbitration. 28 U.S.C. § 652(a).

A. Non-binding arbitration

Chapter 8 of the Middle District Local Rules implements 28 U.S.C. §§ 654-658, which provides for non-binding arbitration of certain civil cases involving claims less than $150,000.00. The presiding judge may order court-annexed non-binding arbitration or the parties may consent to the procedure. The arbitration hearing is informal, and cases are expected to be presented primarily through statements and arguments of counsel, with testimony to be kept to a minimum. M.D. Fla. Loc. R. 8.04(c).

The arbitration award is filed with the clerk within ten days of the hearing, and the parties have thirty days to request a trial de novo. If a trial de novo is requested, the arbitration is essentially ignored and the case proceeds. The parties are free to use any testimony adduced during the arbitration as by the rules of evidence. If no request for a trial de novo is made, the award becomes a final judgment.

B. Mediation

In the Middle District, mediation is the preferred method of alternative dispute resolution, and mediations typically are conducted in the same manner as in state court. One significant difference is the availability of magistrate judges as mediators.

C. Binding Arbitration

The Federal Arbitration Act, 9 U.S.C. § 1 et seq., applies to any "written provision in any

maritime transaction or a contract evidencing a transaction involving commerce" 9 U.S.C. § 2. The Supreme Court has held that the FAA reaches the fullest extent of Congress's commerce power. *See Allied-Bruce Terminix Cos., v. Dobson,* 513 U.S. 265 (1995). The FAA sets forth the substantive law that applies even in diversity cases. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

1. Enforcing arbitration agreements

Under section two of the FAA, arbitration agreements are "valid, irrevocable, and enforceable" unless avoided "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This language has led to much litigation that has resulted in several general rules and principles.

First, an arbitration clause in a contract is considered a separate, independent agreement, and the courts are to decide whether an arbitration clause is enforceable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Where an arbitration agreement satisfies the statutory language, courts have no discretion and must enforce the agreement. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The scope of the arbitration agreement is decided under federal law, not state law, and any doubts are resolved in favor of arbitration. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Since there is no federal contract law, however, federal courts must necessarily look to state contract interpretation principles in construing an arbitration clause. But in doing so, the courts must apply any state law contract interpretation principles "with due regard" to the federal policy favoring arbitration, and ambiguities must be resolved in favor of arbitration. *See Volt Info. Servs., Inc. v. Board of Trustees*, 489 U.S. 468, 475-476

(1989). Thus, for example, federal law favoring arbitration will trump contrary state law that may require ambiguities to be construed against the drafter. *See* 10 *Bus. & Commercial Litig. in Fed. Courts* § 10:9, at 720 (2d ed. 2005)(citations omitted).

Consistent with the doctrine of separability, arbitrators, and not the court, must decide whether the contract as a whole is enforceable. *See Prima Paint*, 388 U.S. at 402-403. In *Prima Paint*, the Court held that arbitrators, and not a court, must decide whether a party was fraudulently induced to enter into a contract. *See id.*; *see also Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210 (U.S. 2006) (challenges to the validity of the contract as a whole must go to the arbitrator).

Common defenses to arbitration agreements include fraud, duress, unconscionability. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *but see AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010) (holding that the Federal Arbitration Act preempted a California statute making class action waivers unconscionable). In addition, under some circumstances, parties may waive the right to arbitrate by actively participating in litigation. *See Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir. 1990) (party may waive its right to arbitrate when it substantially invokes the judicial process to the detriment or prejudice of the other party).

2. Confirming or vacating awards

Motions to confirm an arbitration award must filed within one year of the award. 9 U.S.C. § 9. An award must be confirmed unless the award is vacated, modified or corrected. Thus, if a party wishes to contest an arbitration award, it cannot simply oppose a motion to confirm and must affirmatively seek to vacate the award. *See id.* A motion to vacate, however,

must be filed within three months of the award, and so prevailing parties often wait three months before moving to confirm the award in hopes of taking advantage of the FAA's automatic confirmation provision. 9 U.S.C. § 12.

The FAA does not create federal jurisdiction, and therefore a motion to confirm or vacate must have an independent basis for jurisdiction. *See Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1471 (11th Cir. 1997).

Section 10 of the FAA lists the four very limited grounds for vacating an arbitration award, as follows:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

In addition to those four statutory grounds for vacatur, the Eleventh Circuit has held that there are three non-statutory grounds. An award may be vacated if it is arbitrary and capricious, *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), if enforcement of the award is contrary to public policy, *Delta Air Lines, Inc., v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 671 (11th Cir. 1988), or if the award was made in manifest disregard for the law. *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997).

In *B.L. Harber Intl., LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006), the court limited the "manifest disregard for the law" standard to the facts in *Montes*, in which (1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; (2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel's award; (3) neither in the award itself nor anywhere else in the record was there any indication that the panel disapproved or rejected the suggestion that it rule contrary to law; and 4) the evidence to support the award was at best marginal. *See id.* at 911 (citing *Montes*, 128 F.3d at 1464).

IV. FEDERAL APPEALS

A. Jurisdiction

Under 28 U.S.C. § 1291, courts of appeals have jurisdiction over appeals of district court "final decisions." There are some exceptions to this final judgment rule. For example, under Fed. R. Civ. P. 54(b), in cases involving multiple parties or claims, a district court can enter final judgment as to one or more claims or parties upon an express finding that there is no just reason for delay. Fed. R. Civ. P. 54(b). In addition, interlocutory review is available for certain class certification orders under Fed. R. Civ. P. 23(f), certain "collateral orders," *see Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), and injunctions. 28 U.S.C. § 1292(a). Some nonfinal orders may be reviewed with the permission of the district court and the court of appeals, or by extraordinary writ. *See* 28 U.S.C. § 1292(b); Fed. R. App. P. 5; 28 U.S.C. § 1651(a).

A party invokes appellate jurisdiction to review final decisions by filing a notice of appeal

with the district court clerk within thirty days after entry of the judgment. Fed. R. App. P. 3, 4. Certain post-judgment motions toll the time for filing the notice. Fed. R. App. P. 4(a)(4)(A). Upon receipt of the notice of appeal and a list of docket entries from the district court, the clerk for the court of appeals dockets the appeal and assigns it a number. Counsel must then file an appearance of counsel form within ten days. Fed. R. App. P. 12(a); 11th Cir. R. 12, I.O.P. 2.

B. The appellate record

Within ten days after filing the notice of appeal, the appellant must order any necessary transcripts and make satisfactory payment arrangements. Fed. R. App. P. 10. The Eleventh Circuit has a prescribed form for ordering the transcript. 11th Cir. R. 10-1. It is the appellant's duty to comply with Rule 10 and "do whatever else is necessary to enable the clerk to assemble and forward the record." Fed. R. App. P. 11. The district court clerk is responsible for determining whether the record is complete and transmitting it to the court of appeals. 11th Cir. R. 11-2, 11-3. Notably, unlike in state court, the appellant is not required to seek extensions of time for preparing the transcript, as that is a matter "between the reporter, the clerk of the Eleventh Circuit, the clerk of the district court, and the district judge." 11th Cir. R. 11, I.O.P 1.

The appellant must separately file record excerpts in lieu of an appendix with the initial brief. 11th Cir. R. 30-1.

C. Appellate briefs

The appellant's initial brief is due within forty days after the record is deemed filed. Fed. R. App. P. 31(a). Although the court provides the parties with a briefing schedule, the parties are responsible for complying with the rule. 11th Cir. R. 31, I.O.P. 1. The appellee's answer brief is due thirty days after service of the initial brief, and the appellant's reply brief is

due fourteen days after the answer brief. Fed. R. App. P. 31(a). Certain pending motions toll the time for service of the briefs. *See* 11th Cir. R. 31-1(b).

Motions for time extensions to file briefs are not favored, and the Eleventh Circuit has detailed requirements for such motions. For example, a party's first request for a time extension of more than seven calendar days must be filed at least seven calendar days in advance of the due date. *See* 11th Cir. R. 31-2. The clerk is permitted to grant short first extensions of less than seven days by telephone, but extensions of a greater amount of time, and second extensions, must be in writing and are acted upon by the court. *See id.*

The Eleventh Circuit has detailed form requirements for briefs in addition to those found in Fed. R. App. P. 28 and 32, and the court's clerks examine the briefs carefully for compliance with the rules. *See* 11th Cir. R. 28-1.

D. Oral argument

A party's brief must include a statement as to whether or not oral argument is desired, and if so, the reasons why oral argument should be heard. 11th Cir. R. 28-1(c). Rule 34(a)(2), Federal Rules of Appellate Procedure, states that the court must hear oral argument unless the three judge panel reviewing the briefs unanimously determines that oral argument is unnecessary because (1) the appeal is frivolous; (2) the dispositive issue or issues have been authoritatively decided; or (3) the briefs adequately presented the issues and oral argument would not significantly aid the decisional process. Fed. R. App. P. 34(a)(2); 11th Cir. R. 34-3(b). Most cases in the Eleventh Circuit are decided without oral argument.

If the court grants oral argument, it will be held, if possible, at a location convenient to the parties. *See* 11th Cir. R. 34, I.O.P. 4. Regular and special sessions of the court may be held in

Atlanta, Jacksonville, Miami, Montgomery, Tallahassee, and Tampa. 11th Cir. R. 34-1(b).

If the court grants oral argument, that means that a judge of the court has determined that oral argument would be helpful. Consequently, requests to waive oral argument after it has been granted are disfavored, and counsel may be excused only by the court for good cause shown. 11th Cir. R. 34, I.O.P. 9. The court will notify the parties of the time each side is allotted for oral argument. In the notice, the court sometimes will advise the parties of a particular issue it wishes the parties to address.

At the conclusion of each day's arguments, the panel usually holds a conference in which the panel reaches a tentative decision and determines the kind opinion that is necessary. If the presiding judge is in the majority, he or she makes opinion writing assignments. Writing assignments are made so as to equalize the judges' workload, and the judges do not specialize. 11th Cir. R. 34, I.O.P. 9.