

Winning at Pretrial

Effective Use of Appellate Counsel Before Trial

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Two parts to every case:

- ▶ **Fact strategy**
- ▶ **Law Strategy**

1. Fact Strategy

▶ **Discovery, evidence, the story**

Fact Strategy

► Principal audience: the jury



2. Law Strategy

- ▶ **Principal audience: the judge**



“Law Strategy”

- 1. Preparing for appeal in the trial court**
- 2. Using law strategy to help win the trial**



Goal:

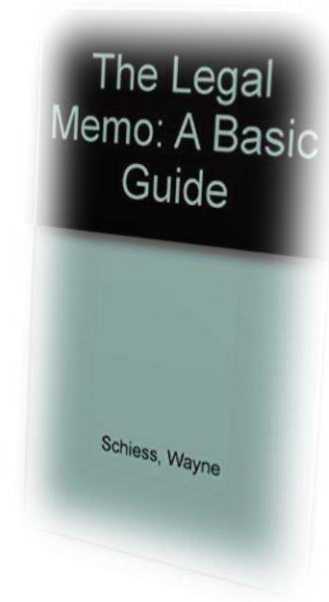
- ▶ Identify law issues early as a template for discovery and evidence

Three Tools:

- ▶ **Law memo**
- ▶ **Draft charge**
- ▶ **Statement of facts**

The law memo should:

- ▶ List elements of causes of action and defenses



The law memo should:

- ▶ **Identify what evidence is**
 - 1. Conclusive**
 - 2. Insufficient**

Advantages to law memo:

- ▶ Roadmap to develop evidence, win the legal rulings, and the appeal
- ▶ Evidence to win as a matter of law: MSJ, directed verdict, charge, JNOV, appeal

The draft charge should:

- ▶ **Identify potential charge issues**
 - ▶ **Instructions?**
 - ▶ **Granulation?**

The draft charge should:

- ▶ **Give best/worst case for questions and instructions**

Advantages to Draft Charge for Trial and Appellate Strategy



Advantages:

- ▶ **Identify evidence you might not know you need for appeal**
- ▶ **See issues/problems the legal memo might not catch**

Advantages:

- ▶ **Identify key words and phrases to use in discovery and evidence**
- ▶ **Ask experts the right questions, using the right words**

The statement of facts:

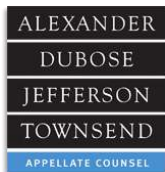
- ▶ **Living document guided by law memo, developed with discovery**
- ▶ **Annotated to assist briefing of issues in trial and appellate courts**
- ▶ **Checklist for examining witnesses and introducing evidence at trial**

The statement of facts:

Let me tell you a story...



Summary Judgment



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Benefits of total or partial summary judgment:

- ▶ **Avoid time, expense, risk, and potential bad publicity of trial**
- ▶ **Narrow the scope of trial**
- ▶ **Pressure the other side to settle by exposing weaknesses of their case**

Why involve a law lawyer in summary judgment briefing?

- ▶ Enhance the odds of winning at trial by signaling that ruling will be challenged on appeal

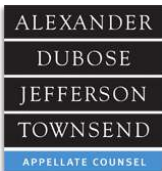
Why involve a law lawyer in summary judgment briefing?



Why involve a law lawyer in summary judgment briefing?

- ▶ **Develop both legal and visceral arguments**

Pretrial Appellate Proceedings



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Permissive Appeal of Interlocutory Ruling



Three requirements of trial court's order:

1. Expressly permits appeal
2. Identifies “controlling question of law as to which there is a substantial ground for difference of opinion”
3. States “why an immediate appeal may materially advance the ultimate termination of the litigation”

Petition for permissive appeal to Court of Appeals:

- ▶ **Explain why permissive appeal warranted**
- ▶ **Discretionary with court of appeals**
- ▶ **If granted, treated as accelerated appeal**

Interlocutory Appeal by Right



Interlocutory appeal by right:

- ▶ **Appointment of receiver or trustee**

Interlocutory appeal by right:

► Class Certification



Interlocutory appeal by right:

▶ Temporary Injunction

Interlocutory appeal by right:

▶ Special Appearance

Interlocutory appeal by right:

- ▶ **Plea to the jurisdiction by governmental unit**

Interlocutory appeal by right:

- ▶ **Expert report in suit against physician / health care provider**

Interlocutory Appeal by Right:

► TCPA (anti-SLAPP) Motion



Interlocutory appeal by right:

▶ Arbitration

Interlocutory appeal by right:

- ▶ **Venue in suit by multiple plaintiffs**

Interlocutory appeal by right:

- ▶ **Certificate of merit in suit against architect, engineer, land surveyor, or landscape architect**

Interlocutory appeal by right:

- ▶ **Sealing or unsealing court records**

Mandamus



Mandamus:

▶ Apex deposition

Mandamus:



Mandamus:

▶ Privileged documents

Mandamus:

- ▶ **Overly broad/burdensome discovery**

Mandamus:

- ▶ Denying discovery

Mandamus:

- ▶ **Death-penalty sanction**

Mandamus:

- ▶ **Mandatory venue provision**



Mandamus:

- ▶ **Forum-selection clause**

Mandamus:

- ▶ **Contractual waiver of jury trial**

Mandamus:

- ▶ **Forum non conveniens**

Mandamus:

▶ Disqualification of Judge

Mandamus:

- ▶ **Disqualification of counsel**

Mandamus:

► Void order

Motions in Limine



Motions in limine:

- ▶ **Exclude evidence in support of legal claim or defense that is legally untenable (in tandem with MPSJ)**

Motions in limine:

- ▶ Educating judge on unfamiliar legal matters and alerting to potential evidentiary problems that may require later rulings

Conclusion: Winning at Pretrial

