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## **Clearing the Hurdles**

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## CLEARING THE HURDLES

### **Dealing with procedural bars to adjudication on the merits in the Fifth Circuit and beyond**

Lawyers prefer to spend their time thinking about the merits of their case. No surprise. In the end, the merits are what should make the difference between winning and losing. But on appeal, before you get to the goal of achieving a ruling on the merits, a lawyer must run a daunting gauntlet of procedural bars to consideration of her case. That's especially true when you represent an appellant seeking review of a novel question—particularly one that raises constitutional questions or puts into jeopardy a federal statute. In the Supreme Court's words, “[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.” *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944).

Being a historical type, I like to imagine appellate courts as a medieval knight at a Renaissance Faire or in a video game. What you want, as the knight's jousting opponent, is to hit the

target. But the knight is clad in heavy armor. He bears a shield, gauntlets cover his hands, a gorget his neck. You have to defeat those defenses before striking true. So too when preparing an appeal. Your goal might be an exciting new doctrine that you've laid awake thinking of for months. But mundane considerations of jurisdiction and error preservation can block your path. It's the lawyer's job to make sure these hurdles do not prevent you from making your argument.

Why can courts seem defensive? Remember: when the Fifth Circuit makes a ruling, that makes law for three states. Moreover, barring future en banc consideration, the Fifth Circuit's iron-clad Rule of Orderliness prevents future reconsideration of that ruling. *United States v. Davila*, \_\_ F.3d \_\_, 2018 WL 2246180, at \*8 (5 Cir. May 16, 2018). There's a serious cost to ruling unnecessarily on an important legal question. And as for errors the trial court might have made on matters within its traditional discretion, those are even less likely to attract the Court's attention.

These hurdles to a merits ruling are an important part of appellate practice, particularly in the Fifth Circuit. This paper

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