PRACTITIONERS' GUIDE

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

December 2024

Distributed by:

CLERK'S OFFICE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN MINOR WISDOM UNITED STATES COURTHOUSE

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INTRODUCTION & CONTENTS

We want to make it easier for lawyers to practice in our court. To do that, this Practitioner's Guide walks the reader through an appeal:

ORAL ARGUMENT discusses rules for argument and offers suggestions.

OPINIONS tells you how opinions are issued, when they are published, and what the effect of non-publication is.

POST-DECISION MATTERS discusses petitions for rehearing or reconsideration and issuance of the mandate.

MISCELLANEOUS addresses stays, release pending appeal, certificates of appealability, and habeas corpus.

This guide is not law. For authoritative answers, practitioners should look to the Federal Rules of Appellate Procedure, the Fifth Circuit Rules, our Internal Operating Procedures, and, of course, case law and statutes.

The court's rules and procedures are posted, along with other useful information, on the court's website. In addition, practitioners may want to consult a comprehensive guide to Fifth Circuit practice, George Rahdert and Larry Roth, APPEALS TO THE FIFTH CIRCUIT (2001).

We hope you will find this guide useful. If you have suggestions for improvement, write me at 600 South Maestri Place, Suite 115, New Orleans, LA 70130.

Lyle Cayce

Clerk of Court

THE DECISION TO APPEAL

The first question to consider is whether an appeal is worthwhile. First, ensure that jurisdiction exists over your case. Second, consider whether the error you see will cause this court to reverse. Third, you might consider other factors, such as the cost and time the appeal will take.

DOES THIS COURT HAVE JURISDICTION?

Make sure that this court has jurisdiction over your appeal. We review each new case for jurisdiction. Cases which appear to be before the court improperly are disposed of without briefing or argument.

Generally, this court can review only final orders of the federal district courts within its territorial jurisdiction, *see* 28 U.S.C. § 1291, final orders of certain federal administrative tribunals involving residents of the circuit, and cases within the court's original jurisdiction. Certain district court orders that are final only as to some claims or parties may be appealable under a district court certification order pursuant to FED. R. CIV. P. 54(b). Certain interlocutory orders may be reviewable. *See* 28 U.S.C. § 1292(b).

The court has the power to entertain writs (e.g., mandamus, prohibition) in rare cases. Likewise, the court can elect to review directly certain bankruptcy appeals with proper certification. The court has no power to review decisions of state courts except indirectly in criminal cases or on a habeas corpus petition initiated in federal district court.

WHAT IS THE STANDARD OF REVIEW?

Look at the applicable standard of review this court must employ in deciding your appeal.[1] Although some issues are reviewed de novo, many are subject to more deferential standards of review. For example, one standard requires the court to ask whether the district court's factual determinations are "clearly erroneous." Further, if you are seeking review of an agency determination, you will lose the appeal if the determination was supported by "substantial" evidence. Put yourself in the place of a judge, apply the proper standard of review, and determine the likelihood this court will overturn a decision.

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[1] Many books or other resources discuss the law and give examples of the standards of review. Two that you might find useful are *Federal Standards of Review* by Steven Alan Childress and Martha S. Davis and *Appeals to the Fifth Circuit* by George Rahdert and Larry Roth.

WHAT ARE MY CHANCES FOR SUCCESS?

For the 12-month period that ended on June 30, 2024, and in rounded numbers, this court reversed only about 7.1% of the 3,117 cases decided on the merits. About 2.0% of criminal appeals, 15.2% of non-prisoner "U.S. Civil Cases" (where the United States was a party), and about 17.2% of non-prisoner "Private Civil" (where the United States was not a party) cases resulted in reversal. If you are interested in further statistical information, we post our annual statistical report on our website.

HOW LONG WILL IT TAKE TO GET A DECISION?

As of June 30, 2024, there were 3,366 cases pending in the Fifth Circuit. Administrative Office of the U. S. Courts statistics showed the median time from filing the notice of appeal to issuance of the court's opinion was 7.8 months.

WHAT IF I FILE A MERITLESS APPEAL?

A frivolous appeal is one when the result is obvious and the arguments of error are wholly without merit. If the court finds that you filed a frivolous appeal, it may award damages and single or double costs, pursuant to FED. R. APP. P. 38. Costs may be awarded against counsel if the lawyer is at fault. Pro se litigants who file frivolous appeals may be barred from further filings unless they get prior written approval from a judge. 5TH CIR. R. 40.2.1 discusses the power of the court to impose sanctions on its own initiative under Rule 38 and 28 U.S.C. § 1927 if you file a groundless petition for rehearing en banc.

THE CLERK'S OFFICE

The clerk's office is the custodian of the court's records and papers. Unless otherwise directed, all communications with the court **must** be made through the clerk's office.

Among the clerk's duties are to: receive and account for monies paid to the court, initiate a docket for each appeal, enter all filings in appeals, issue calendars for oral argument sessions, enter orders and opinions of the court as authorized by the judges, and decide or refer to the court the procedural motions set forth in 5TH CIR. R. 27.1 and 31.4.

CONTACTING THE CLERK'S OFFICE

The Fifth Circuit Clerk's Office is located in the F. Edward Hebert Building, 600 South Maestri Place, Suite 115, New Orleans, LA 70130. Clerk's office telephone numbers are posted on our website.

The office is open for business from 8:00 a.m. until 5:00 p.m., Monday through Friday. The office is staffed on all days except Saturdays, Sundays, designated federal holidays, and Mardi Gras. A limited staff is on duty in the clerk's office for five federal holidays (Martin Luther King Jr.'s Birthday, Washington's Birthday, Juneteenth, Columbus Day, and Veterans' Day), but the office is **not staffed** on all other federal holidays.

When the clerk's office is not staffed, you can reach a deputy clerk by dialing (504) 310-7700, listening to the instructions from the automated attendant, and selecting the option that connects you to the emergency duty clerk. This service is designed for **true emergency matters only.** Assistance with filing is **NOT** an emergency. Requests for extension of time to file briefs or to pay fees and other procedural matters are **NOT** considered emergencies. If you think you will need to file documents outside normal business hours, please make advance arrangements with the clerk's office.

CASE MANAGEMENT RESPONSIBILITIES

The judicial support division processes all specific case-related matters, except for the calendaring of oral argument cases. Most case processing responsibilities are assigned to one of three teams, as follows:

- Northern and Western District Courts of Texas;
- Southern and Eastern District Courts of Texas; and
- Louisiana and Mississippi District Courts, and Agency cases.

You can tell which team your case is assigned to by the case number you receive when we docket your appeal. All case numbers consist of two-digits corresponding to the year the case was docketed (e.g., 19, 20, etc.), then a hyphen, and then a five-digit number. The first digit of the five-digit number indicates which team is handling your case:

- Northern District of Texas cases begin with 1, e.g., 20-10025;
- Southern District of Texas (Houston) cases begin with 2;
- Louisiana cases begin with 3;

- Southern District of Texas (non-Houston) and Eastern District of Texas cases begin with 4;
- Western District of Texas cases begin with 5;
- Mississippi District Court cases and most agency cases begin with 6; and
- Newly docketed death penalty cases begin with 7.

You can obtain much useful information—e.g., information about briefs, record excerpts, due dates, copies of opinions, filing fees, or the clerk's office address—24 hours a day by calling (504) 310-7700, following the prompts, and listening to prerecorded information. We encourage you to use our automated system. You may also check case statuses on PACER.[2] To access PACER, you will need to register.

If you cannot find the information you need, contact the case management team responsible for your case. Because of the large number of telephone calls we receive, we ask for your patience and suggest calling at the non-peak times of 8:30 to 9:30 a.m. and 11:30 a.m. to 1:30 p.m.

INFORMATION AVAILABLE ONLINE

Reference Materials. Our website includes the FED. R. APP. P and our implementing 5TH CIR. R. and IOPs; a checklist for Preparation of Briefs, Record Excerpts, Motions and Other papers; and links to sources, including frequently asked questions, a flow chart depicting the life of an appeal, forms and samples, and checklists.

Opinions. You can access published and unpublished opinions decided from 1992 to the present on our website. If you are unable to find an older opinion, please contact us at (504) 310-7700.

CASELOAD HIGHLIGHTS

For the 12 month period which ended June 30, 2024, we docketed 5,397 actions. We had 3,683 appeals from Texas district courts; 945 from Louisiana courts; and 329 from Mississippi courts. The remaining cases included appeals from Agency decisions, Bankruptcy and Tax court decisions, and motions to file successive habeas corpus

[2] Except for federal court opinions, which are free, PACER charges $0.10 per page with a cap of $3.00 for any single document. Fees are waived each quarterly billing cycle unless you accrue more than $30.00 in fees during the quarter. Transcripts of federal court proceedings are not subject to the $3.00 cap.

petitions, among other matters. Pro se litigants filed 40.2% of the notices of appeal, and 49.5% of the cases were proceeding pro se at the time the case terminated.

ATTORNEYS

ADMISSION TO PRACTICE

All counsel who represent litigants before the Fifth Circuit, including counsel appointed under the Criminal Justice Act (CJA), must be admitted to the bar of the court. Admission requirements are set forth in FED. R. APP. P. 46 and 5TH CIR. R. 46. In general, an attorney admitted to practice before the U.S. Supreme Court, the highest court of a state, another U.S. court of appeals or a U.S. district court, and who is of good moral and professional character is eligible for admission. Attorneys **must** provide initial contact information **and update that information when changes occur**.[3]

Attorneys must apply for admission on the court's approved form. A member of the bar of this court must move for the applicant's admission, but the applicant does not need to appear before the court to be admitted. If you file an appeal or enter an appearance in a case, we will not permit further practice until you are admitted to the court.

During the application process, attorneys will submit:

- The completed application;
- Unless exempt, a certificate of good standing from the state bar or court that qualifies the attorney for admission to the Fifth Circuit;
- An accompanying motion for admission signed by a member of this court's bar (this motion is on the application form); and
- An application fee of $249.00 payable to "Clerk, U.S. Courts."

The court waives the admission fee for any attorney appointed to represent a party in a criminal or civil appeal, federal government attorneys, **current** law clerks to Fifth Circuit Judges, and certain military attorneys. Motions to proceed pro hac vice are greatly disfavored and will be denied absent extraordinary circumstances. Federally employed

[3] 5TH CIR. R. 46.1 requires attorneys to advise us of any change of their physical addresses, e-mail addresses, or telephone numbers. Contact information must be updated via PACER. Without compliance, notices may not be delivered timely, and we may be unable to notify you promptly about any changes in a scheduled oral argument date or location.

attorneys should register for admission and e-filing through PACER with our court as a Federal Attorney; that registration process will complete admission requirements.

5TH CIR. R. 46.1 requires members of this court's bar to apply for readmission every five years. The clerk's office will notify attorneys of their requirement to renew their admission. When notified, attorneys must pay a $50.00 renewal fee payable to "Librarian, U.S. Court of Appeals" within 30 days. Renewal should be completed online. Failure to respond to the readmission notice may result in the attorney's name being removed from our attorney roll. Thereafter, if an attorney seeks readmission, he or she will need to file a new application and oath for admission and may be required to pay the full admission fee before being allowed to practice again in this court.

COUNSEL'S DUTIES

Continuation of Representation in Criminal and Post-Conviction Cases. Counsel appointed to represent a defendant at trial or in a conditional guilty plea must continue representation of the defendant unless relieved by the court. We consider your signing of a notice of appeal on behalf of a petitioner or moving party in a post-conviction proceeding under 28 U.S.C. §§ 2254 or 2255 as an entry of appearance in this court.

Withdrawal and Dismissal. An appointed attorney who has entered an appearance in a case may not withdraw without consent of the court. In most instances, a motion to withdraw will be directed to the district court. If granted, the district court should also appoint new counsel to represent the defendant on appeal. An attorney who seeks to withdraw from a criminal appeal or from an appeal involving post-conviction relief must file a motion in this court. The motion must set out the reason for withdrawing and must state that the client has been advised of the appeal process, including any deadlines for taking action prescribed by the FED. R. APP. P. and the rules of this court. The motion must contain:

- A showing that new counsel has been retained or appointed,
- A showing that appellant is proceeding in forma pauperis or is eligible for appointment of counsel under 18 U.S.C. § 3006A, or that a motion for finding appellant eligible for appointment of counsel on appeal has been filed in the district court, and
- A signed statement from the client acknowledging the right to retain new counsel or apply for appointment of counsel, and expressly electing to appear pro se; or
- A showing that exceptional circumstances prevent counsel from meeting any of the requirements stated above.

Counsel must furnish proof of service on the client and all opposing parties.

Appeals without Arguable Merit. If counsel in a direct criminal appeal files a brief characterizing the appeal as without merit and moves to withdraw under *Anders v. California*, 386 U.S. 738 (1967), or responds to a motion to dismiss by stating that any argument in opposition would be frivolous, counsel must advise us of the client's address. We will notify the client of the motion to withdraw and provide notice that a response to the motion is due within 30 days. See our Anders Guidelines for more information.

Representation after Appeal. The Fifth Circuit's Plan Under the Criminal Justice Act for Representation on Appeal provides that, following an adverse decision on appeal, appointed counsel must "promptly advise defendant in writing of the right to seek further review by the filing of a petition for writ of certiorari." If the defendant requests counsel to file for certiorari in writing, counsel shall timely file a petition for the writ. As an exception, counsel does not need to file for certiorari if this court relieves counsel of that responsibility upon counsel's motion suggesting the futility of certiorari, or upon this court's sua sponte order. Counsel must not assume that an adverse decision in this court terminates their duties under the CJA.

ELECTRONIC CASE FILING (ECF)

Electronic case filing is mandatory unless counsel files a motion and is excused for good cause shown.[4] Counsel must register as "filing users" under 5TH CIR. R. 25.2.3 and comply with the court's ECF rules and filing standards. Pro se litigants who wish to file using ECF must first file a motion. If the court grants the motion, the pro se litigant will be eligible to file via ECF in that particular case.

The court continues to require paper copies of certain pleadings. We will notify ECF filers when to submit the paper copies.

Process for Filing Motions *Ex Parte* and Under Seal. A motion for a court-approved budget and/or interim payments under the Criminal Justice Act may be filed ex parte and under seal. If counsel wishes for such motions to remain *ex parte*, counsel should

[4] Because readers of the Guide may include a few attorneys exempt from the ECF requirements, as well as pro se litigants not eligible for ECF filing, we continue to refer to documents and forms that these filers will use in paper form. However, the vast majority of readers will file electronically.

not submit them through the ECF system, but should contact the Clerk's Office for filing instructions.

DISCIPLINE/CJA COUNSEL DISQUALIFICATION

Attorneys may be sanctioned for misconduct or failure to comply with FED. R. APP. P. 46 and 5TH CIR. R. 46. Attorneys appearing before the court may not withdraw without the court's consent. Counsel in direct criminal, habeas, and other prisoner cases must review 5TH CIR. R. 42.3.1.1 to understand their obligation to timely prosecute appeals. In relevant part, the rule provides that **if a default is not timely remedied, the clerk may enter an order dismissing the appeal and must refer to the court the matter of disciplinary action against the attorney**. *See* 5TH CIR. R. 42.3.1.

Standards of Conduct. All members of the bar must comply with the standards of professional conduct and ethical behavior in the states in which they are admitted to practice. The court imposes disciplinary sanctions for deviations from these standards.

Basis for Disciplinary Action. The court usually takes disciplinary action when notified that another court has suspended or disbarred an attorney, or when an attorney's conduct in this court falls below that required of a member of the bar. Possible sanctions include reprimand, monetary penalties, forfeiture of payments to appointed counsel, prohibition from receiving CJA appointments, suspension from practicing in the court, and removal from the roll of attorneys permitted to practice before this court.

Procedures for Disciplinary Action. The chief judge, or the chief judge's designee, handles attorney disciplinary matters (including suspensions from practice and, removals of attorneys' names from the court's roll), and issues related to the performance and billing practices of CJA attorneys. Upon learning an attorney has failed to meet the standards expected of a member of this court's bar, the clerk, at the direction of the chief judge or designee, may issue an order to the attorney to show cause why disciplinary action should not be taken, or why the attorney should not be disqualified from handling CJA cases. The order will set out the circumstances giving rise to the court's concern and specify the sanctions that may be imposed. A request for a hearing must be submitted in writing. The chief judge decides the composition of any hearing panel and the attorney may be represented by counsel. If an evidentiary hearing is allowed, the chief judge may delegate fact-finding to a special master.

If CJA counsel is relieved for misconduct or nonperformance, the clerk is responsible for appointing replacement counsel and sending a copy of the order relieving counsel to the Circuit Mediation and Judicial Support Office.

APPEARANCE FORMS

In lieu of the "representation form" required by FED. R. APP. P. 12(b), this court requires attorneys to file a Form for Appearance of Counsel within 30 days after filing the notice of appeal. After you download the form, **complete it electronically, save it, and upload the completed form when you docket your appearance electronically**. Non-ECF filers may print the form and mail it in.

Because there may be delay between when attorneys file an appearance form and when they can actually file a document electronically, we strongly advise counsel to file an appearance form **as soon as they know they will be participating in the case**.

HOW DO I GET REVIEW OF…

A DISTRICT COURT JUDGMENT?

You appeal from a final judgment or order of a district court by filing a notice of appeal with the **district court clerk** within the time prescribed in FED. R. APP. P. 3(a) and 4. The notice of appeal must name all of the parties taking the appeal; designate the judgment or order, or part thereof, you are appealing; and identify the court you are appealing to. FED. R. APP. P. 3(c). Form 1 following the FED. R. APP. P. is a suggested notice of appeal. The district court clerk notifies the other parties by mail that a notice of appeal has been filed and sends us copies of the notice of appeal and the district court docket entries. FED. R. APP. P. 3(d).

Magistrate Judges' Judgments. United States Magistrate Judge judgments entered under 28 U.S.C. § 636(c)(1) may be appealed to this court in accordance with 28 U.S.C. § 636(c)(3). These are treated the same as appeals from district court judgments.

AN INTERLOCUTORY ORDER?

This court may permit an appeal of an otherwise non-appealable interlocutory order if the district court expressly states that its order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of litigation. An order may be amended at any time to include the prescribed statement. 28 U.S.C. § 1292(b) and FED. R. APP. P. 5(a).

Requesting Permission to Appeal and Length of Petition. An interlocutory appeal is taken by filing a petition for permission to appeal with the clerk of this court, with

proof of service on all parties to the action in the district court. The petition and response are limited to 20 pages. FED. R. APP. P. 5(c).

Time for Filing. The petition must be filed within the time limits set by FED. R. APP. P. 5(a)(2) and (3).

Processing the Petition and Answer. The clerk will enter the petition on the miscellaneous docket. Adverse parties may file an answer within 10 days after service of the petition, FED. R. APP. P. 5(b)(2). When the time for filing answers expires, the clerk will submit the petition and answer, if any, to the court. There will be no oral argument on the petition unless ordered by the court, FED. R. APP. P. 5(b)(3).

Granting of Permission. If this court grants permission to appeal, the appellant has 14 days to pay the fees to the district court clerk. If payment is not made, we will dismiss the appeal. If the appellant is a criminal defendant who has appointed counsel or a **non-incarcerated** party proceeding in forma pauperis, then no fee is required, and we will enter the appeal on the docket after we enter the order granting permission to appeal.

A U.S. TAX COURT DECISION?

You appeal a United States Tax Court decision by filing a notice of appeal with the Tax Court clerk in Washington, D.C., within the prescribed time. The clerk notifies all other parties by mail that a notice of appeal has been filed. Form 2 of the FED. R. APP. P. provides an example of a notice of appeal from the Tax Court.

Time for Filing. A petitioner wishing to appeal from a decision of the Tax Court may file a notice of appeal within 90 days after entry of the decision. If a timely notice of appeal is filed, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the decision of the Tax Court. FED. R. APP. P. 13(a)(1)(A). You may file a notice of appeal by mail, addressed to the clerk. The postmark date is deemed the date of filing. FED. R. APP. P. 13(a)(2) and Internal Revenue Code § 7502 and implementing regulations.

Termination of Time for Filing a Notice of Appeal. A timely motion to vacate or revise a decision, made in conjunction with the Rules of Practice of the Tax Court, terminates the running of time for filing a notice of appeal. The full time will begin to run again for all parties from entry of the order disposing of the motion or from entry of the decision, whichever is later. FED. R. APP. P. 13(a)(1)(B).

AN AGENCY ORDER?

You can have an agency order reviewed by filing a petition for review with the Fifth Circuit clerk. The respondent is the appropriate agency, board, or officer. The United States may be a respondent if allowed by statute. When a statute provides for enforcement of an agency order by a court of appeals, you may apply for enforcement with the Fifth Circuit clerk. We serve the respondents with copies of any petition for review or application for enforcement, but the petitioner must serve a copy on all other parties to the administrative proceedings and file with the clerk a list of those parties served. No response to a petition for review is required. But if an application for enforcement is contested, an answer must be served and filed by the respondent within 21 days after the application for enforcement is filed.

Failure to answer will result in judgment by default. A cross-application for enforcement may be filed by a respondent to a petition for review, if the court has jurisdiction to enforce the order. Any cross-application will be filed in the already docketed proceeding and the matters will be briefed and submitted as a single matter, FED. R. APP. P. 15(a)–(c).

Fees. You must pay a $600.00 docketing fee to the Fifth Circuit clerk when a petition for review is filed. If you fail to pay timely, the petition will be dismissed.

Time for Filing Petition or Application. A petition for review or application for enforcement must be filed within the time prescribed by the applicable statute which varies from agency to agency.

Contents and Number of Copies. A petition for review or application for enforcement should contain a concise statement describing the proceeding in which the order sought to be reviewed or enforced was entered, any reported citation of the order, the facts upon which venue is based and the relief prayed. 5TH CIR. R. 15.1 requires that when you file a petition for review, you pay the filing fee **and attach a copy of the order or orders to be reviewed**. You must file an original and a copy for each respondent.

AN ORIGINAL PROCEEDING?

You file an application for a writ of mandamus by filing a petition with the Fifth Circuit clerk's office. It can be mailed in hard copy or submitted electronically via ECF. The associated fee must be submitted via PACER. Filers are required to comply with service in accordance with FED. R. APP. P. 25. You must provide proof of service on all parties to the proceeding in the trial court and provide a copy to the trial court judge.

Applications for other extraordinary writs are made by filing a petition with the circuit clerk with proof of service on the respondents. Pro se prisoner petitions are not submitted to the court until the $600.00 docket fee is paid or the petitioner is granted leave to proceed in forma pauperis, FED. R. APP. P. 21(a). Depending on the nature of the complaint, prisoners may be required to pay a portion of the fee and then the remainder in installments. *See* U.S.C. § 1915; *In re Stone*, 118 F.3d 1032, 1033-34 (5th Cir. 1997).

Fees. You must pay a $600.00 docket fee to the Fifth Circuit clerk at the time of filing, unless granted permission to proceed in forma pauperis.

Time for Filing a Petition. Extraordinary writs are usually matters of great urgency; no time limit is prescribed.

Contents and Length of the Petition. The petition must contain a statement of the issues, the relevant facts, the relief sought, and the reasons why the writ should issue. Copies of an opinion, order, or necessary parts of a record must be included. FED. R. APP. P. 21 sets a 30-page limit for petitions.

Further Proceedings. If the court thinks the writ should not be granted, it normally denies the petition without calling for an answer. Otherwise, it issues an order fixing a time for filing an answer. The clerk serves the order on the judge(s) named as respondents and on all parties to the action in the trial court. FED. R. APP. P. 21(b). All parties other than the petitioner are deemed respondents for all purposes. Answers filed by respondents must be served on the petitioner. Ordinarily, the court decides the petition on its merits without further briefing or hearing.

PROCEDURES FOR GETTING TO COURT

WHEN DO I FILE MY NOTICE OF APPEAL?

The prescribed times for filing a notice of appeal are jurisdictional and may not be extended by the court of appeals except in limited circumstances. *See* FED. R. APP. P. 26(b). Make sure to file your notice of appeal within the following timeframes:

Civil Cases:

- If the United States is not a party, you must file your notice of appeal within 30 days after entry of the judgment or order appealed from. FED. R. APP. P. 4(a)(1).

- If the United States (including or one of its officers or agencies) is a party, any party may file the notice of appeal within 60 days after entry of the judgment or order appealed from. *Id.*
- If a party files a timely notice of appeal, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by FED. R. APP. P. 4(a). If two or more notices of appeal are filed, the 14 days run only from the time the first notice of appeal was filed. FED. R. APP. P. 4(a)(3).

Criminal Cases:

- A defendant must file a notice of appeal within 14 days after entry of the judgment or order appealed from or after the government files a notice of appeal.
- The United States must file a notice of appeal within 30 days after entry of the judgment or order appealed from or after the defendant's notice of appeal. FED. R. APP. P. 4(b).

WHEN DOES THE TIME TO APPEAL START TO RUN?

Your time to file a notice of appeal is governed by FED. R. APP. P. 4(a)(7), and in civil cases depends on whether FED. R. CIV. P. 58(a) requires the district court to enter a separate document on the docket.

Final Judgments and Interlocutory Orders. Generally, you may only appeal a final judgment. *See* 9 MOORE'S FEDERAL PRACTICE §§ 110.06–110.15. However, statutes allow appeals from certain interlocutory orders, and the time for appealing is the same as the time prescribed for other civil appeals. Further, under FED. R. CIV. P. 54(b), a district court may permit an immediate appeal from an otherwise non-appealable interlocutory order by directing that it be entered as a final judgment as to fewer than all the claims or parties. In such cases, the time for filing a notice of appeal begins on the date that the district court clerk enters the order as final. A notice of appeal filed before entry of the final order is premature and subject to dismissal by the court of appeals, but it may be sufficient for a valid appeal if the district court enters a final judgment prior to this court's dismissal of the appeal. *See St. Paul Mercury Ins. Co. v. FGC*, 123 F.3d 336, 338 (5th Cir. 1997).

Effect of Post-judgment Motions in Civil Cases. If a party timely files in the district court any of the following motions in a civil case, then the time for filing a notice of appeal is suspended:

- For judgment under FED. R. CIV. P. 50(b);
- To amend or make additional findings of fact under FED. R. CIV. P. 52(b), whether or not granting the motion would alter the judgment;
- For attorney fees under FED. R. CIV. P. 54 if the district court extends the time to appeal under FED. R. CIV. P. 58;
- To alter or amend the judgment under FED. R. CIV. P. 59;
- For a new trial under FED. R. CIV. P. 59; or
- For relief under FED. R. CIV. P. 60, if filed within 28 days of entry of judgment.

The full time for filing a notice of appeal begins to run again from the entry of the order disposing of any of the above motions. FED. R. APP. P. 4(a)(4).

WHAT DOES IT COST TO APPEAL?

Appellants must pay a $5.00 filing fee and a $600.00 docketing fee to the district court clerk when the notice of appeal is filed. Those exempt from paying are: the United States (or its officer or agency), defendants filing a direct criminal appeal who are represented by CJA-appointed attorneys, and non-incarcerated appellants granted leave to appeal in forma pauperis or seeking to appeal in forma pauperis. Failure to timely pay may result in dismissal of the appeal. Appellants who abuse the privilege of proceeding in forma pauperis may have restrictions placed on filing further appeals.

Absent approval of in forma pauperis status, the filing fee is payable in full when the notice of appeal is filed. Prisoners may be able to pay in installments as set forth in the Prison Litigation Reform Act, 28 U.S.C. § 1915(b)(1). Among other requirements, prisoners seeking to proceed in forma pauperis must:

- File a motion to proceed on appeal in forma pauperis with the district court clerk;
- Provide a certified statement of their prison accounts for the six months prior to filing the notice of appeal (statements must be obtained from every institution in which the prisoner was in custody during the six-month period); and
- Sign consent forms allowing prison officials to access the inmate's account to withdraw funds, if the prisons require consent forms.

Prisoners must send any consent forms required by the prisons to the district court clerk with the motion to proceed on appeal in forma pauperis and the certified statement of their prison account.

The court will assess an initial partial filing fee (IPFF) if a prisoner applying to proceed on appeal in forma pauperis does not have enough money to pay the full fee. Prisoners **must** pay the IPFF from their inmate accounts, and all available funds in the account will be put toward the IPFF until the full IPFF has been paid.[5] Once the IPFF has been paid, the remaining fees will be collected periodically, but only when the prisoner has more than $10.00 in the account.

Prisoners in civil cases may have to pay costs of the appeal if they lose. Also, under the PLRA's "three strikes" rule, inmates who have had three actions or appeals dismissed because they were frivolous, malicious, or failed to state a claim are prohibited from proceeding in forma pauperis in a civil action or appeal unless they are under imminent danger of grievous bodily harm. Prisoners with three "strikes" must pay the full amount of their filing fees before their appeal can be considered.

WHAT HAPPENS AFTER THIS COURT GETS MY NOTICE OF APPEAL?

Once we receive your notice of appeal and district court docket entries, or we receive your petition for review or your petition for extraordinary relief, the clerk's office reviews the information and dockets the case.

After we docket the case, **we issue a notice of docketing activity and enclosures in ECF. To those not required to use ECF, we send a paper docketing packet**. An attorney in our office conducts an initial jurisdictional review. Cases with obvious jurisdictional deficiencies are sent to a jurisdictional review panel for review and possible dismissal. Some civil cases where both parties are represented by counsel may be identified as possible candidates for our mediation program and referred to that office. We will direct you to pay any fees if you have not already done so and to send in an appearance form as required by 5TH CIR. R. 46, and we will inform you how to obtain access to the Record on Appeal.

Read the letter immediately. Comply with the instructions as soon as possible. Also, this is the time to resolve questions about the case caption or what actions you need to take. If we can address these matters early, we can avoid last-minute problems.

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[5] For example, if the IPFF is $4.30, and the prisoner has only $1.25 in the inmate account, the $1.25 will be withdrawn immediately from the account, or the prison may place a hold on the money to keep the prisoner from spending it. In either event, the prisoner will effectively have a $0.00 account balance. If the prisoner receives $0.75 the next month, that will be collected or held, keeping the balance at $0.00 until the IPFF is fully paid.

DISMISSAL OF AN APPEAL

Voluntary Dismissal. Civil appeals not involving post-conviction relief may be dismissed by agreement of the parties or on appellant's motion. The terms of dismissal may be agreed upon by the parties or fixed by the court. FED. R. APP. P. 42(b). Pro se appellants may voluntarily dismiss criminal appeals and appeals involving post-conviction relief. However, if counsel moves to voluntarily dismiss a criminal appeal or one involving post-conviction relief, counsel must submit a signed statement from the appellant acknowledging his right to appeal and expressly electing to withdraw the appeal. Alternatively, counsel must show exceptional circumstances preventing such a statement.

Dismissal by the court. On its own motion, the court may dismiss an appeal if a pro se appellant or retained counsel fails to comply with 5TH CIR. R. 42. Dismissal does not relieve counsel from possible disciplinary action. *See* 5TH CIR. R. 42.3.

TRANSCRIPTS

NECESSARY TRANSCRIPTS

An appellant who argues that a ruling is unsupported by or contrary to the evidence must include in the record a transcript of all evidence relevant to the challenged findings or conclusions. FED. R. APP. P. 10(b)(2). Further, if the appeal challenges the trial court's admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other evidentiary ruling, the record must include a transcript of those portions of the proceedings at which the evidence, offer of proof, instruction, or ruling and any necessary objections are recorded. Exercise discretion in deciding whether to order transcripts because they significantly increase the time and expense of an appeal.

To order necessary transcripts, you must:

- Complete Part I of the Transcript Order Form,
- Serve copies on the court reporter, the clerk of the district court, and all other parties to the appeal; and file a copy with the court of appeals; and
- Arrange to pay for the transcript when you order it. An order is not complete until you make financial arrangements with the court reporter. If the United States is paying under the CJA, your order must say so and you must submit an authorization request.

ECF filers should fill out the transcript order form electronically and upload it when docketing the event in CM/ECF.

The appellant must order necessary transcripts not already on file **within 14 days** after the notice of appeal. Because time required for the production of transcripts is a major cause of delay, we urge you to order and pay for necessary transcripts as soon as possible after filing the notice of appeal. In a criminal appeal where the appellant requests expediting the appeal because his sentence is one year or less, you must order and pay for necessary transcripts when the notice of appeal is filed. The court does not favor motions for extensions of time to file briefs if you did not timely order the transcripts.

Unavailability of Transcripts. If transcripts are unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection, and serve the statement on the appellee, who may serve objections or proposed amendments within 14 days. The **district court** settles and approves the statement or objections, and the resulting statement is included in the record on appeal. FED. R. APP. P. 10(c).

Extensions of Time. If a court reporter seeks an extension of time to file the transcript, he or she must comply with the provisions of 5TH CIR. R. 11.2. The court reporter must notify you if this court grants an extension.

WHAT IF I DO NOT NEED A TRANSCRIPT?

If you do not need a transcript to pursue your appeal, e.g., there was no hearing or trial at the district court, notify us by filing a Transcript Order Form with an "x" in the box in Part I, A stating "Transcript is unnecessary for appeal purposes" and serve the other parties to the appeal, 5TH CIR. R. 10.1.

MEDIATION PROGRAM

Since 1996, the Circuit Mediation Program (formerly the Fifth Circuit's Appellate Conference Program) has offered a confidential forum in which counsel can discuss their cases with both opposing counsel and the court's mediators. *See* The Circuit Mediation Program Order .

The discussions are off the record and without prejudice to the parties. Your communications with a circuit mediator are kept in strict confidence and are not divulged to the judges, court personnel, or anyone else. If you need more information than that provided below, you may contact the Circuit Mediation Program, U.S. Court of Appeals, 600 Camp Street, New Orleans, LA 70130, or call (504) 310-7799.

The office currently is staffed by three attorney-mediators who conduct telephonic, video and in-person conferences with counsel. These conferences are intended primarily to explore the possibilities of settlement and secondarily to resolve procedural problems. Follow-up conferences directed toward settlement can include parties as well as counsel.

The Circuit Mediation Program is limited to civil cases in which all parties are represented by counsel. Conferences are not scheduled in criminal, pro se, or habeas corpus appeals. Most cases in the program are selected by the chief circuit mediator after the initial jurisdictional review process. In addition, either party can request that a case be assigned to the program at any time. The court itself occasionally refers specific cases to the program, even after oral argument.

HOW DOES THE PROGRAM WORK?

Most cases assigned to the program are scheduled for an initial conference, usually by telephone. Such conferences ordinarily last less than an hour and generally occur early in the case's history—before a briefing schedule is set. The appellant's counsel summarizes what the case is about, why the appellant should win, and the relief sought. The appellee's counsel may respond. This discussion begins the process of focusing on which issues may control and provides background for possible settlement.

Counsel and the mediator then map out steps to attempt to resolve the case. Any settlement must be voluntary. A substantial percentage of the cases selected for the program are settled. However, in some cases, it is clear that no settlement can occur, and conference proceedings do not continue. Even if a case does not settle, the program may benefit the parties, since issues on appeal can be identified, explored, and refined. Discussing the issues at the outset should make writing briefs easier, and the better briefs that result will aid the court in its consideration of the case.

Assignment to the mediation program does not affect deadlines already set by the court. But if settlement discussions are making progress, extensions of briefing schedules can be arranged within the guidelines of 5TH CIR. R. 31.4.

WRITING YOUR BRIEF

THE BRIEFING NOTICE

The first thing you should do when you receive the briefing notice is to **read it carefully and completely**. We will tell you:

- The brief's due date,
- How to cite to the record on appeal in writing your brief, and
- The case caption to use on the cover of your brief.

We may remind you to send an appearance form if you have not done so.

MAKING A PDF FILE

Almost all attorneys will be ECF filers and need to follow 5TH CIR. R. 25.2 and ECF Standards in filing their briefs and record excerpts. Counsel exempt from ECF filing must send an electronic copy of their brief to the clerk's office on a CD or by other means as the clerk allows. *See* 5TH CIR. R. 31.1. The brief must be **a single Portable Document Format (PDF) file**. You may not submit separate files for the Statement of Issues, Statement of Facts, etc. Counsel exempt from the ECF rules must also submit an electronic PDF of the record excerpts. A guide for converting Word and WordPerfect documents to a PDF file is available here.

THE RECORD ON APPEAL

Counsel who has entered an appearance in a case may access the electronic record from the district court or the administrative record from the agency whose decision is being appealed. The court relies on the record to decide your case. You are responsible for ensuring that it is complete and that you have ordered all necessary transcripts and documents. Except for those trial exhibits being part of the ROA, trial exhibits are not sent unless you specifically request them.

As with the briefing notice, please act promptly. Within 14 days of receipt, you need to review the ROA and advise us and the district court of any omissions, if you need to order additional transcripts, etc. This court will not be sympathetic to requests for extensions of time to file briefs if you have waited until the last moment to see if the ROA is complete and a delay then results because of a deficiency.

CITING TO THE RECORD

You must cite to the page number in the record to support factual assertions, etc. The Fifth Circuit has adopted the Electronic Record on Appeal (ROA) as the official record in cases in which the district court created the appellate record. In single record cases, you should use the format of "ROA," followed by a period, then the page number (e.g., ROA.123). For multiple record cases, you will use "ROA," followed by a period, the Fifth Circuit case number of the relevant record, another period, and the page number

(e.g., ROA.13-12345.123). Guidance for attorneys regarding citation issues can be found in Fifth Circuit Form 1, at the appendix to the Fifth Circuit's Local Rules.

FORMAL REQUIREMENTS FOR BRIEFS

Before filing a brief, you may wish to review our Checklist of Rule Requirements for Briefs and Record Excerpts. You may also review our website's page providing assistance for preparing rule-compliant briefs. The site contains a link to brief templates available on CM/ECF. Brief templates in MS Word are available to assist in preparing briefs; counsel may access the templates through CM/ECF in the Attorney Toolbox. Pro se parties can request a brief template via email to ca05_cmecf@ca5.uscourts.gov.

Principal Briefs. FED. R. APP. P. 28 and 5TH CIR. R. 28 set out the requirements for briefs. The principal brief must contain the following, in the order indicated, a(n):

- *Cover* meeting the requirements of FED. R. APP. P. 32 and 28.1 (for cross appeals),
    - Briefs filed in ECF **must** have an electronic cover page identical in format (but not color) to the paper copy; the paper copy must have the correct color cover;
- *Certificate of interested persons*, 5TH CIR. R. 28.2.1;
- *Statement regarding oral argument*, 5TH CIR. R. 28.2.3;
- *Table of contents with page references*, FED. R. APP. P. 28(a)(2);
- *Table of authorities*, FED. R. APP. P. 28(a)(3),
- *Brief statement of jurisdiction*, FED. R. APP. P. 28(a)(4)(A)–(D);
    - An appellee's brief does not need a jurisdictional statement unless dissatisfied with the appellant's statement, FED. R. APP. P. 28(b)(1);
- *Statement of the issues presented for review*, FED. R. APP. P. 28(a)(5),
    - This is not required in an appellee's brief if the appellee is satisfied with the appellant's statement, but an appellee who does not agree should correct errors or omissions in the appellant's statement;
- *Statement of the case*, setting out the facts relevant to the issues presented, describing the relevant procedural history, and identifying rulings presented for review with appropriate references to the record, FED. R. APP. P. 28(a)(6),
    - The appellee's brief does not need such a statement if the appellee is satisfied with the appellant's statement;
- *Summary of the argument*, FED. R. APP. P. 28(a)(7);
- *Argument*, FED. R. APP. P. 28(a)(8). This must contain the party's contentions with respect to the issues presented, and the reasons therefor, and

must include citations to relevant authorities, statutes, and page numbers in the record on appeal,
    - Although FED. R. APP. P. 28(a)(8)(B) allows discretion on where to place the standard of review, this court greatly prefers that it be clearly identified in a separate heading before discussion of the issues. If the issue is a ruling for which a party must record an objection to preserve the right of appeal (e.g., failure to admit or exclude evidence, refusal to give a jury instruction), your brief should identify where in the record counsel made the objection and where it was ruled upon,
    - Note that an appellee does not need to state the standard of review unless he or she disagrees with the appellant's standard;
- *Short conclusion* setting forth the precise relief sought, FED. R. APP. P. 28(a)(9);
- *Signature of counsel or a party*, FED. R. APP. P. 32(d) and 5TH CIR. R. 25.2.10 for ECF filing;
- *Proper certificate (proof) of service*, FED. R. APP. P. 25.
    - If you are exempt from ECF and prepare your brief on a computer, your certificate of service must state that you served an electronic copy on opposing counsel;
    - Not required if opposing side is served electronically.
- *Certificate of compliance*, if required by FED. R. APP. P. 32(g) and 5TH CIR. R. 32.3.

Supplemental Briefs. The only additional brief that may be filed without express leave of court is the reply brief, if the appellant chooses to respond to the appellee's brief, or if a cross-appellant responds to the answer brief filed by the cross-appellee. Any other supplemental briefing requires leave of the court.

Rule 28(j) Letters. The court prefers that FED. R. APP. P. 28(j) letters be used only to cite cases decided after a brief has been filed. You are limited to 350 words.

Cross-Appeals. Under FED. R. APP. P. 28.1(b), the party who first files a notice of appeal is generally the appellant, but if notices are filed the same day, the plaintiff below is the appellant. The appellee must file a principal brief in the cross-appeal **and** respond to the principal brief in the appeal. The appellant then must respond to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal.

Designation of Parties. Designations as "appellant" and "appellee" should be used as little as possible. In the interest of clarity, the briefs should, as much as possible,

use the designations used in the court or agency below, the actual names of the parties, or terms descriptive of the parties.

Joint Briefing. Joint briefing is encouraged, but not required, in criminal appeals involving more than one appellant or appellee. The United States is encouraged to file a consolidated brief whenever possible. On motion, leave to file a consolidated brief may be granted by the court even if the appeals are not consolidated. Every effort is made to set co-defendants' appeals before the same panel.

PAPER COPIES

The court requires paper copies of briefs only on request. FED. R. APP. P. 32 sets the standards for briefs. Use opaque, unglazed paper. Print on only one side of the paper. We will notify ECF filers when to submit their paper copies.

Cover. Except for filings by pro se parties, paper copies of briefs must have a durable cover and be in the colors prescribed by the federal rules. Your cover must include the:

- Case number at the top of the cover;
- Name of the court;
- Title of the case (use the title in the briefing notice, unless you and this office have agreed that a different title is correct);
- Nature of the proceeding and the name of the court, agency, or board below;
- Title of the brief, identifying the party or parties on whose behalf the brief is filed, e.g., "Appellant's Brief" or "Brief of Appellant"; and
- Name, office address, and telephone number of counsel representing the party filing the brief.

The brief must be securely bound. The binding may not obscure the text and must allow the brief to lie reasonably flat when open. The court strongly prefers spiral binding.

Paper Size, Line Spacing, and Margins. The brief must be on 8½ x 11-inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides.

Typeface. You may use either monospaced or proportionally spaced typeface. Text written in proportionally spaced typeface must include serifs, and the typeface must

be at least 14 points. As an exception to the federal rule, footnotes may be in 12-point or larger proportional typeface. Monospaced typeface may not have more than 10½ characters per inch.

PAGE AND VOLUME LIMITS

The court requires **typed** briefs; however, the court accepts handwritten briefs from incarcerated pro se litigants. Briefs from non-incarcerated pro se litigants must conform to FED. R. APP. P. 32.

Page Limits. Principal briefs with 30 or fewer pages, and reply briefs with 15 or fewer pages, automatically meet the length standards of FED. R. APP. P. 32(a)(7)(A). Principal briefs can be longer than 30 pages and reply briefs more than 15 pages if you comply with the "type-volume" limits and provide a certificate of compliance.

Type-volume Limits. A principal brief may contain up to 13,000 words in either proportional or monospaced typeface. Alternatively, if your brief uses monospaced typeface, it may contain up to 1,300 lines of text. A reply brief may not contain more than one-half the type-volume limits for a principal brief.

In counting pages, words, or text lines, you do not count the certificate of interested persons; any corporate disclosure statement; the tables of contents and citations; the statement regarding oral argument; any addendum containing statutes, rules, or regulations; or any certificates of counsel.

The court "looks . . . with great disfavor" on motions to exceed the type volume limits, 5TH CIR. R. 32(a)(7). Any motion to exceed the limits **must** be filed at least 10 days before the brief is due **and** contain sufficient reasons to warrant the request.

The type-volume limits are designed to be applied mechanically and objectively. As a matter of court policy, you must **use your word processor's word count feature**. Do not manually count the words. A manual count is often inaccurate, and we cannot readily verify the count. Please note that least one version of Microsoft Word will not automatically count words in footnotes and will produce an inaccurate word count unless special care is taken. *See DeSilva v. DiLeonardi*, 185 F.3d 815, 816 (7th Cir. 1999). Be aware of the attributes of your word-processing software to ensure that all words in your brief are reflected in your certificate of compliance.

Because the type-volume limits are designed to work only in a mechanical fashion, we do not permit handwritten briefs to use the type-volume limits to measure length.

Because handwriting size and spacing are inconsistent, the text line convention of 26 lines per page is not reliable. Thus, handwritten principal briefs are limited to 30 pages, and reply briefs are limited to 15 pages, exclusive of the statements regarding oral argument or interested persons, tables of contents and authorities, etc.

CERTIFICATES OF COMPLIANCE

You MUST complete a certificate of compliance and place it as the last document in your brief and other papers in accordance with FED. R. APP. P. 32(g)(1).

FED. R. APP. P. 32(g)(2) provides a "Form 6" Certificate of Compliance, which counsel should use. Note that to meet the requirements of FED. R. APP. P. 32(g), the certificate must state the number of words in the document. A statement that the document has "fewer than 13,000" words is not sufficient. Further, to assist us in checking the accuracy of your certificate, we ask you to identify the name and version of the word-processing software you used, e.g., Microsoft Office Professional Word 13.

WHY DO I HAVE TO SIGN MY BRIEF?

FED. R. APP. P. 32(d) requires a signature because this constitutes a certificate that you have read the brief and that it complies with the rules. We look at this as a personal professional responsibility and a means to help ensure that counsel is involved fully in the preparation of the briefs.

WHAT DOES AN APPELLEE NEED TO DO?

An appellee's brief must be written under the standards of FED. R. APP. P. 28 and 32 and 5TH CIR. R. 28 and 32. Under FED. R. APP. P. 28(b), an appellee's brief **does not need** to contain any of the following, unless the appellee is dissatisfied with the appellant's statement:

- Jurisdictional statement,
- Statement of the issues,
- Statement of the case, and
- Statement of the standard of review.

An appellee's brief **must:**

- contain a certificate of interested persons and a statement regarding oral argument;

- be signed (see 5TH CIR. R.25.2.10 for ECF filing); and
- if prepared on a computer, be served on the appellant's counsel electronically, in addition to paper copies.

REPLY BRIEFS

Under FED. R. APP. P. 28(c), an appellant may file a reply brief to address arguments raised in the appellee's brief. Reply briefs should be filed only if necessary, to rebut an important argument in the appellee's brief. A reply brief that merely reiterates your opening brief serves little purpose and delays consideration of your appeal.

If you do file a reply brief, it must contain a table of contents with page references and a table of authorities. FED. R. APP. P. 28(c). Reply briefs are due within 21 days after service of the appellee's brief. FED. R. APP. P. 31(a)(1). Extensions of time to file reply briefs are greatly disfavored. 5TH CIR. R. 31.4.4. An appellant in a civil case who is not going to file a reply brief should notify us immediately so we can forward the case for decision.

Length. A reply brief may contain up to 15 pages, 6,500 words, or (if prepared in monospace type) 650 lines of text. FED. R. APP. P. 32(a)(7).

DEFICIENCIES IN BRIEFS

We check briefs us to ensure, among other things, that: the case caption is correct; there are certificates of service and, compliance, if required; and the brief is signed. If there are errors (over 30% of the briefs we receive have deficiencies), we will notify ECF filers via a "notice of docket activity." For non-ECF filers, we will call or write to explain what corrective action you must take. Under FED. R. APP. P. 25, we must file your brief (even with errors) and notify you of the deficiencies. If you do not timely correct the errors, we may send your brief to the court for review, which may lead to it being stricken and, if you are the appellant, dismissal of the appeal. 5TH CIR. R. 32.5. Carefully check your briefs before you file them. If there is a problem, promptly correct the errors and return the brief to us.

AMICUS BRIEFS

Amicus briefs may be filed only with the consent of all parties and such consent must be noted in the brief, FED. R. APP. P. 29(a), or by leave of court granted on motion. The United States (including its agencies or officers), or a state, territory, or commonwealth, or the District of Columbia, do not need

consent or leave of court to file an amicus brief during initial consideration of a case on the merits, FED. R. APP. P. 29(a)(2), or during consideration of whether to grant rehearing, FED. R. APP. P. 29(b)(2). However, if any other person or entity wishes to file an amicus brief in support of a petition for rehearing or rehearing en banc, they must file a motion. If a motion for leave is required, your motion must accompany your brief and state your interest and the reason an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case, FED. R. APP. P. 29(a)(3).

Amicus briefs must comply with FED. R. APP. P. 29 and must be filed no later than 7 days after the principal brief of the party being supported is filed. Amicus briefs must include a certificate of interested parties, if necessary to fully disclose all those with an interest in the amicus brief, 5TH CIR. R. 29.2. A brief filed pursuant to Rule 29(a) is limited to one half the maximum length allowed by the rules for a party's principal brief, FED. R. APP. P. 29(a)(5). A brief filed pursuant to Rule 29(b) is limited to 2600 words, FED. R. APP. P. 29(b)(4).

FILING AND SERVING YOUR BRIEF

Number of Copies Required. We have suspended the requirement under 5TH CIR. R. 31.1 for all counsel to file 7 paper copies of their briefs. Counsel will be notified to provide copies if the appeal is placed on the oral argument calendar. For non-ECF attorney filers, send us the paper copies on the due date along with one copy of the brief in a single PDF file or other authorized electronic format; send another electronic copy to each party separately represented by counsel. We use the electronic copy to check the word count and provide staff attorneys and judges a text-searchable brief.

An appellant must file its brief to this court no later than 40 days after the date the briefing notice was sent. The appellee has 33 days from the date on the appellant's certificate of service to file its brief.

Proof of Service. FED. R. APP. P. 25(d) requires that the proof or "certificate" of service certify:

- The date and manner of service;
- The names of the persons served; and
- The mailing addresses or the addresses of the place of delivery.

ECF filers must agree to receive service electronically. Certificate of Service is not required if opposing side is served electronically. If the opposing party is not an ECF filer,

you must complete service in accordance with the federal rule. Please remember that when you identify an address for service, you must give a full address.

EXTENSIONS OF TIME

5TH CIR. R. 31.4 governs requests for extensions of time to file briefs. The court expects briefs to be filed timely, without extensions. No extension, even if unopposed, is automatic. Extensions should only be requested when absolutely necessary—not just when convenient. Unopposed requests for extension for less than 30 days normally should be made by via ECF and must include a letter advising why the extension is needed. The clerk should receive all motions requesting an extension at **least 7 days** before the due date. Absent extraordinary circumstances, the MAXIMUM extension in criminal cases is 30 days, and 40 days in civil cases. *See* 5TH CIR. R. 31.4.1 and the Internal Operating Procedures following 5TH CIR. R. 27 & 31.

OTHER SUGGESTIONS

The court is duty-bound to do substantial justice in deciding the appeals before it. Judges rely upon the advocates to point out the facts of record, the applicable rules of law, and the equities of the case. You will have greater success persuading the court if you have an effective and carefully prepared brief. Because fewer than 25% of briefed cases are given oral argument, the brief may be your only chance to argue your position. Briefs should be written so that you get your important contentions before the court.

The court strongly recommends that the parties cite statutes, cases, etc. according to a uniform system, such as that set out in *The Bluebook: A Uniform System of Citation*.

Make an effort to present only a few questions or issues for review. The questions you select should be stated clearly and simply. A brief that assigns a dozen errors and treats each as being of equal importance when some are clear losers may suggest that none are very good. As Justice Frankfurter once said, "a bad argument is like the clock striking thirteen, it puts in doubt the others."

The statement of facts should set forth a brief and objective account of the pertinent facts, with references to the record to support and verify each statement. Use a narrative chronological summary, rather than a digest of what each witness said. Do not omit relevant unfavorable facts. If you marshal the facts well, the relevant points of law often develop naturally. An effective statement summarizes the facts and persuades the reader that both justice and precedent require a decision for your client. Appellees should give

their own statement of facts if they believe that the facts have not been fairly presented by the appellant; however, they should not needlessly repeat the appellant's statement.

Factual statements should be suitably divided by appropriate headings. Short paragraphs with topic sentences and frequent headings help the court follow and understand the points you are making. If the case turns on the facts, the brief should make clear factual arguments bolstered by record references. If the important record reference is short enough, quote the record, but not for pages and pages. Record citations also help the court find the important facts in a voluminous record.

Emphasize reason, not merely precedent, unless a particular decision is controlling. A few good cases, with sufficient discussion to show that they are relevant, are preferred over string citations. If a case is worth citing, it usually has a quote which will drive the point home, and one or two good cases are ordinarily sufficient. If the cited case lacks a good quote, a terse summary will establish it as a case the court should read. A long discussion of the facts of the cited cases is usually unnecessary.

If an opponent cites cases that obviously do not apply, your brief need not distinguish those cases. Consider whether the judge could reasonably think the opponent's cited case was important. If not, do not waste space on the case.

Clarity, simplicity, and accuracy are paramount. Use italics and footnotes sparingly. Statements, citations, and quotations must be accurate. Counsel should carefully proofread briefs for errors.

Finally, put yourselves in the judges' position. Write the briefs almost as your client would like to see the opinion written. Think about what the judges must do to affirm or reverse, and structure the briefs accordingly.

RECORD EXCERPTS

5TH CIR. R. 30 requires parties to file record excerpts in appeals from decisions of district courts, the U.S. Tax Court, and in agency cases, except for Immigration and Naturalization Service appeals and Federal Energy Regulatory Commission cases, which are covered by 5TH CIR. R. 15.3.

Record excerpts are intended to give our judges a brief document that they can read along with the briefs in deciding whether a case needs oral argument. Judges also refer to record excerpts in preparing for oral argument. When preparing record excerpts, include **only** those portions of the record on appeal that are required or that will assist the judges.

Records are available online to attorneys who have filed an appearance-of-counsel form in the case. Pro se parties must contact the district court to obtain a copy of the record. For more information, see Accessing District Court Electronic Record.

WHO MUST FILE RECORD EXCERPTS AND HOW DO YOU FILE?

Appellants represented by counsel must file record excerpts. Pro se parties do not need to file record excerpts. An appellee who believes essential material has been excluded may file separate record excerpts with the brief.

Appellant counsel may use the "Create Record Excerpts" feature in the Attorney Toolbox (within CM/ECF) to create record excerpts for filing. Non-ECF filing attorneys will file record excerpts in paper and provide an electronic copy in PDF format.

Form. Record excerpts must:

- Have a numbered table of contents, with citations to the record, starting with the lower-court docket sheet;
- Be on 8½ x 11-inch light paper with clear black images;
- Be tabbed to correspond to the table of contents;
- Be securely bound (spiral binding is preferred) in a way that allows the excerpts to lie reasonably flat when opened; and
- Have a durable white cover conforming to FED. R. APP. P. 32(a)(2), except titled "RECORD EXCERPTS."

Nonconforming Record Excerpts. If deficiencies are not timely corrected, the excerpts may be struck, sanctions may be imposed, and the appeal may be dismissed.

CONTENTS

Mandatory Contents. Record excerpts **must** contain the matters identified in 5TH CIR. R. 30, including copies of the following portions of the district court record.

- The docket sheet;
- The notice of appeal;
- The indictment in criminal cases;
- Any jury verdict;
- The judgment or interlocutory order appealed;
- Any other orders or rulings being reviewed;
- Any relevant magistrate judge's report and recommendation;

- Supporting opinion or findings of fact and conclusions of law filed, or transcript pages of orally delivered opinions or findings of fact;
- A certificate of service complying with FED. R. APP. P. 25.

In agency cases, except for Federal Energy Regulatory Commission actions, the petitioner must file record excerpts that include: any order being reviewed and any supporting opinion, findings of fact, or conclusions of law. 5TH CIR. R. 30.2(b). This filing must be completed immediately following the petitioner's brief.

If later required to produce paper, we ask that you take particular care in binding the record excerpts to ensure that the binding does not obscure any documents.

Optional Contents. Optional contents are **limited to 40 pages** and may include parts of the record referred to in the briefs, including:

- Essential pleadings or portions thereof;
- Relevant parts of a FED. R. CIV. P. 16(e) pretrial order;
- Jury instructions given or refused, together with any objection and the court's ruling, and any other relevant part of the jury charge;
- The administrative law judge's findings and conclusions, if the appeal seeks review of a court order reviewing an agency determination;
- Relevant transcript pages challenging admission or exclusion of evidence, or other interlocutory ruling or order; and
- Relevant parts of written exhibits.

MOTIONS PROCESSING

Applications for an order or other relief from operation of the rules must be made by filing a motion unless the federal rules prescribe another form. FED. R. APP. P. 27(a)(1).

5TH CIR. R. 27.1 and 27.2 set forth which motions the clerk and single judges can decide. If you are dissatisfied with a ruling, you may file a motion for reconsideration. Reconsideration of a clerk's order is by a single judge; review of a single-judge order is by a three-judge panel. 5TH CIR. R. 27 gives the clerk's office authority to act on opposed and unopposed procedural motions. Centralizing the authority to act on these motions—e.g., motions for extension of time—gives greater consistency to the court's actions.

Contents of Motions. Motions must state the particular grounds for the motion, the relief sought, and any legal argument necessary to support the motion. The motion also

must contain and be accompanied by the documents required by FED. R. APP. P. 27(a)(2)(B) and 5TH CIR. R. 27.4, which requires a certificate of interested persons (except for purely procedural motions). If motions are supported by memoranda, affidavits, or other papers, these must be served and filed with the motions, FED. R. APP. P. 27. **All motions must indicate whether they are opposed.** All motions must contain a certificate of compliance, in accordance with FED. R. APP. P. 32(g).

Responses. Any party may file a response in opposition to a motion within 10 days after service of the motion unless the court shortens or extends the time. The court may act on motions authorized by FED. R. APP. P. 8, 9, 18, and 41 in fewer than 10 days by giving reasonable notice before ruling. The court may decide **procedural** motions at any time, without waiting for a response. Any party adversely affected by such action may file a motion for reconsideration, vacatur, or modification. FED. R. APP. P. 27(a)–(b).

Reply to Responses. Although FED. R. APP. P. 27(a)(4) permits a reply within 7 days after service of the response, the court looks upon replies with great disfavor. Further, as a general rule, the court does not grant extensions of time to file a reply to a response.

Form. Motions must be filed electronically. Text must be double spaced, except for quotations more than two lines long. There must be one-inch margins on all sides. Motions should be in 14-point proportional typeface (or not more than 10½ characters per inch in monospaced typeface) and use a plain roman typeface.

A motion or response does not need a cover but must contain a caption setting forth the name of the court, the title of the case, the case number, and a brief descriptive title indicating its purpose. FED. R. APP. P. 27(d) and 32(a)(3).

Number of Copies. ECF filers need to send paper copies of motions **only when we request them**. Non-ECF filers must provide paper copies. Where the motion can be acted on by the clerk or a single judge, *see* 5TH CIR. R. 27.1 and 27.2, you need only file an original and one copy. Motions which require panel action (e.g., to dismiss an appeal) require an original and three copies.

Service. You must serve copies of all motions and responses on all other parties and must file proof of service with the court. FED. R. APP. P. 25(b)–(d).

HOW ARE MOTIONS PROCESSED?

Motions decided by the clerk under 5TH CIR. R. 27.1 will normally be ruled on within 5 days after we receive an unopposed motion or within 5 days after the time for filing

an opposition expires. In prisoner cases, if the federal or state government moves for an extension of time to file a brief, the clerk's office can grant a 15-day extension without knowing whether the prisoner objects. If the prisoner objects after the motion has been granted, then any further governmental extension requests are considered opposed.

If a single judge can decide a motion, the judge is selected randomly.

Most non-emergency motions requiring initial decision by a three-judge panel are sent to the staff attorney's office for review and recommendation. A motion for permission to file a successive habeas corpus application in the district court is sent to the staff attorney's office as soon as possible because a three-judge panel has only 30 days to decide the matter. 28 U.S.C. § 2244(b)(3)(D).

Emergency Motions. 5TH CIR. R. 27.3 discusses how to file an emergency motion and the requirements you must meet for the court to consider your motion on an expedited basis. If your motion is a true emergency, we immediately assign it to the next initiating judge on our log and simultaneously send copies to the other panel members. Unless directed by the clerk, all communication must be made to the clerk's office. The court may take action on a motion before receiving a response. Therefore, respondents should notify the clerk immediately if they intend to respond and file their response as soon as possible.

Fax or Electronic Filing. 5TH CIR. R. 25 permits fax filing only in emergency situations and only after the clerk specifically allows a party to send documents by fax. ECF filers will file motions electronically. Non-ECF filers may send an electronic motion via e-mail only when the clerk's office grants permission to do so.

CASE SCREENING & PANEL ASSIGNMENTS

CASE SCREENING

Cases with obvious jurisdictional deficiencies are not briefed, and we do not request the full record. Instead, they are prepared for decision by a jurisdictional review panel. Briefed cases are either screened through the staff attorney's office or sent directly to an "initiating" screening judge. When we receive the briefs and record on appeal, we send the case on for screening. A discussion of the court's screening practices and procedures is found in the Internal Operating Procedures following 5TH CIR. R. 34.

The staff attorney generally designates cases as Class I through IV:

- Class I cases are so lacking in merit they are deemed frivolous and subject to affirmance or dismissal under FED. R. APP. P. 34(a)(2)(A) AND 5TH CIR. R. 42.2 and 47.6;
- Class II cases constitute the court's summary calendar. This includes cases where counsel has waived argument. In general, Class II cases have a limited number of issues that have recently been decided, or the facts and arguments are presented adequately in the briefs and record.
- Class III and IV cases represent the oral argument calendars and present difficult or new issues. Class III cases are given 20 minutes per side for argument; Class IV cases receive 30 minutes per side and represent the most complex cases.

After review, the staff attorney may designate cases with few issues, easy facts, and a limited record for decision on the summary calendar without further screening. Otherwise, cases submitted to the court are sent in rotation to the next screening panel selected from our log. Screening panel assignments are made effective July 1st of each year, and the three judges assigned to a panel sit together for one year. Within each panel, we rotate initiating judge assignments. When the initiating judge receives the appeal, his or her first task is to determine whether the case is properly classified. If the initiating judge agrees with a Class I or II recommendation, the case will be decided on the summary calendar. The judge then normally has 45 days in civil cases and 31 days in criminal cases to draft an opinion and send it to the other judges on the panel. Those judges can agree both with the proposed disposition and the opinion or send the case to the oral argument calendar. It takes all three judges' agreement to decide the case on the summary calendar.

Cases that the staff attorney classifies as Class III or IV and recommends for oral argument are sent to an initiating judge for approval of the recommendation, except for direct criminal appeals, which are sent to the oral argument calendar on the staff attorney's recommendation alone. If the judge concurs that argument is needed, the case is assigned to the next available oral argument calendar. If the initiating judge disagrees with the recommendation, the judge's screening panel will decide the case without oral argument, as long as all three panel members agree.

A small number of cases (e.g., NLRB, private civil diversity, tax, bankruptcy) are sent directly to an initiating judge. Cases sent directly to the judges' chambers for screening are handled in a similar manner to cases sent via the staff attorney.

PANEL ASSIGNMENTS

At the beginning of each court year, the clerk's office sets various panels of judges to decide cases. As discussed above, screening panels determine whether oral argument is needed. We also set panels for hearing oral argument.

Summary Calendar Panels. Class I and II cases not decided on the conference calendar are submitted to the court along with all briefs, record excerpts, and the record on appeal. The panel then decides the cases (typically within a month). If any party has requested oral argument in their briefs, all judges must concur in the result and in opinion; there can be no special concurrences or dissents.

Oral Argument Panels. Before argument, each panel member receives a copy of the briefs and the record excerpts, and the record on appeal is available for review. The judges confer promptly after completion of a day's calendar of oral arguments. Although the panel may reach a tentative decision at this conference, additional exchanges among the judges are often necessary. The presiding judge of the panel assigns the case to a panel member to prepare an opinion. The writing judge circulates a copy of the proposed opinion to the other panel members. By court policy, the court does not pre-circulate opinions to the entire court except in the very rare instance where the panel opinion results in a split of authority among the circuits. After panel members have concurred or had an opportunity to prepare separate opinions, the disposition is sent electronically to the clerk with instructions as to how to assess costs and how to release the opinion. The median time from oral argument until decision for all cases is about 2 months.

ORAL ARGUMENT

Fewer than 20% of briefed cases receive oral argument. Some cases initially selected for argument are later removed from the calendar shortly before the scheduled argument. Criminal cases have the least, and private civil cases the greatest, likelihood of being selected for argument.

The length of time between the filing of briefs and oral argument varies depending upon the type of case and the court's caseload. Criminal and other special cases receive priority. The court presently has little backlog of cases for oral argument, so once designated for argument, a case should be heard within about 3 months.

PANEL ARGUMENTS

Generally, the court hears oral argument during the first week of each month, and each panel hears five cases per day, Monday through Thursday. Additional sessions can be scheduled at any time to handle certain matters (e.g., death penalty appeals, cases requiring emergency relief). Except for en banc cases, the panel consists of three judges. Cases are randomly assigned to panels. We send the briefs and record excerpts to panel members soon after cases are selected for argument. The judges read the briefs and record excerpts before argument, but they usually will not have examined the entire record.

About 30 days before the beginning of oral argument sessions, we post the case names and numbers and the locations of the arguments on our website. However, the court does not release the identity of the panel members until seven days before the beginning of the oral argument session. At that time, this information will be posted on our website.

EN BANC ARGUMENTS

If a majority of the judges in active service agree, the en banc court can hear an appeal initially or rehear it after panel decision. FED. R. APP. P. 40(g) and 40(c). If the court votes to take a case en banc, the parties must file 22 copies of all previously filed and any supplemental briefs. All non-recused active judges participate. Generally, each side is allowed thirty minutes for argument. Counsel for the appellant and appellee may each reserve no more than the first 5 minutes of an en banc argument as uninterrupted time. Uninterrupted time cannot be shared or divided between advocates for a side, nor can any part of the rebuttal be reserved as interrupted time. The court normally holds en banc sessions in January, May, and September.

THE DAY OF ORAL ARGUMENT

Attorneys who will argue must check in with the clerk. Once you arrive at the John Minor Wisdom U.S. Court of Appeals Building (directions are available here), proceed to Room 105. Counsel must check in 30 minutes before court convenes. 5TH CIR. R. 34.9. Counsel in the fourth and fifth cases on the docket may check in by telephone, except on the panel's last day of argument. The number to call is at the end of "Note 1" to the oral argument calendar posted on the court's website. If you check in by phone, you still must physically check in at the courtroom no later than one hour after the court session convenes. Because changes are frequently made to the calendar after issuance, we recommend you check the calendar on the court's website on the Friday preceding oral argument.

There are three courtrooms on the second floor of the John Minor Wisdom Building. If more than three oral argument panels are scheduled in New Orleans, some calendars will start at 9:00 a.m. and others at 1:00 p.m. Periodically, the court hears oral argument outside of New Orleans. At least 30 days before oral argument, we will notify you where and when the session will be held.

Once argument begins, cases are heard without interruption until the entire calendar has been heard. Thus, counsel in the second case normally sit in the courtroom during the first argument so that they can move to counsel's table immediately after the first case is argued. Counsel in the third and later cases may wait in the attorney's lounges adjacent to our three courtrooms. Each lounge contains a monitor to indicate which case is being argued. When the case before yours is being heard, you should be present in the courtroom so there is minimal delay when the preceding argument concludes.

You should know the names of the judges on the panel. At the beginning of your argument, we ask you to identify yourselves to the court. This allows the judges to know who is arguing so they can address counsel by name.

Time for Argument. Each side normally receives 20 minutes; a few cases permit 30 minutes per side. Most appellants reserve 5 minutes of their time for rebuttal. The court disfavors requests to extend the time for argument and normally denies them. The time permitted has no relationship to the attention the court gives a case; time limits represent the estimate of the time needed to present the issues and answer questions.

If more than one counsel will argue, or if an amicus is permitted to argue, counsel must agree among themselves how to allocate their 20- or 30-minute time allowance. Cases consolidated for briefing are treated as one case for oral argument unless the court orders otherwise. Counsel may divide the argument time as they agree. Generally, not more than two counsel will be heard for each party. 5TH CIR. R. 34.4.

Attendance of Counsel. Counsel for each party must be present unless excused by the court for good cause. 5TH CIR. R. 34.2. Parties desiring to waive oral argument and to submit the case on the briefs, must file a motion to waive argument at least **7 days** before the date set for hearing. 5TH CIR. R. 34.3. Please note, however, that when a case is placed on the oral argument calendar, a judge has determined argument will be helpful in resolving the case. Requests to waive argument are not looked upon with favor. 5TH CIR. R. 34.10.

Continuance of Hearing. After a hearing has been set, only the court may delay argument for good cause. 5TH CIR. R. 34.6. The court ordinarily does not consider engagement of counsel in other proceedings as good cause.

PREPARING FOR ARGUMENT

Counsel should thoroughly prepare to argue their case. You should have read the record on appeal while writing your brief, and you should reread the record excerpts. Be certain about what the record contains (and where those contents are located therein). Review all the briefs. Be aware of discrepancies between your statement of facts and your opponent's. Make sure you are fully conversant on the legal arguments.

Imagine yourself in the court's position: consider what the judges will want to know and how they will want to hear it. Although your oral argument and brief complement each other, each serves a different purpose. The oral argument should emphasize the critical points to convince the judges that fair play and precedent support your position. In contrast, the strength of the brief lies in its lucid, precise, and documented statement of the facts, with fully explained reasoning and law supporting your position.

SUGGESTIONS FOR PRESENTING ARGUMENT

The Opening Statement. The panel has read the briefs before argument and is familiar with the case. Individual judges, however, will have prepared to hear about twenty cases during oral argument week. Thus, counsel should say enough about the facts and posture of the case to bring it into focus. While counsel must obviously capture the judges' attention in the first few minutes, an effective presentation can take many forms.

The Statement of Facts. Attune yourselves to the court's level of comprehension. If the facts are simple, do not spend much time on them. A common mistake lawyers make is spending half of their time talking about background facts—and not focusing on the key issues on which the decision turns. If the case is factually complex, even though the court has read the briefs, counsel may need to give a clear factual exposition.

Discussion of Cases. Avoid a minute dissection of case law except when one or a few cases clearly should control the outcome or when cases must be distinguished for you to prevail. Avoid quotations, and generally do not provide citations of cases in your brief (for example, "Your Honor, *Johnson v. Jones*, from this Circuit, cited in the brief, is controlling."). If you plan to discuss cases not in the briefs, refer to them by name and court, and provide citations in writing to the court and counsel before argument.

Visual Aids. Visual aids are a two-edged sword. Many judges do not find them helpful. Some judges will not allow you to make visual aids of anything not already in the record on appeal. Further, when counsel refer to a chart or diagram, they might walk toward the aid or turn away from the microphone, so the judges then have difficulty

hearing. Nonetheless, if counsel believe visual aids are necessary, in lieu of large poster-sized aids, it is more helpful to furnish four small (8 x 14 inches or less) copies to the courtroom deputy, who will give one to each judge. For en banc cases, counsel should provide 20 copies. If counsel must use large aids, they should also furnish smaller copies.

Emphasis. You do not have a lot of time to argue, particularly if the court asks many questions. Emphasize the most important points. You should have an instinct for your strongest point and the opponent's weaknesses. Stress those in oral argument.

Avoid Reading. You need to know the argument so well that you can watch the court, respond to its uncertainties, ascertain its concerns, and answer its questions. Answer questions when asked; do not postpone until later in the argument. Yet, of course, try not to let the court keep you from reaching your major points.

Talk Policy Sense. Perhaps there is no room for policy in the case, but if there is, counsel should be able to tell the court why his or her client should prevail and what social ends a favorable decision would promote. One benefit of oral argument may be the opportunity to address the breadth of the issue before the court. For example, it is sometimes critical to a regulated industry that a decision be confined to the facts of the case. Or, if a conviction might be set aside, the prosecutor might hope to create as little precedent as possible. A good advocate looking to the future may try to persuade the court to resist expressing dicta or, conversely, may seek the enunciation of a broad rule.

Avoid Personal Attacks. Although counsel may, of course, criticize the reasoning of opposing counsel or the court below, be careful not to make personal attacks. Disparaging words only detract from your argument.

The Special Position of Appellee's Counsel. Appellee's counsel has the advantage of listening to appellant's argument. Appellee's counsel should correct important misstatements of the facts. Appellee's counsel may want to give fresh answers to questions which were posed to appellant's lawyer; this can be done by noting the question and saying that you would also like to respond. Of course, having won below is an advantage, especially if the issues turn on credibility determinations.

Rebuttal. Most appellants' counsel reserve a few minutes for rebuttal. The last word may be important. However, remember that rebuttal is not used to raise new arguments. If you try to make a new argument on rebuttal, the court may deny consideration or give appellee a chance at sur-rebuttal. Make your rebuttal short and use it to correct important errors and mischaracterizations by appellee's counsel.

Be Succinct. Too often, lawyers make their points, note that argument time has not been used up, and go over the points again. The court is grateful when counsel make their arguments and then stop. That an amount of time has been allocated for argument does not require you to fill it. Be aware of the court's reaction to your argument: if your case is an obvious winner, do not prolong argument just to use up time. As one judge has noted: "Often the mark of a good appellate advocate is knowing when to sit down."

OPINIONS

The court does not issue decisions from the bench. All opinions are typewritten. A copy is sent to the trial court or agency and the parties on the day the court enters the decision on the docket sheet. FED. R. APP. P. 36. ECF filers will receive a notice of docket activity when the opinion issues. Generally, we do not fax copies of the opinion to the parties, but we will call to let you know an opinion has issued, if you request this service in advance. All opinions also are posted on our website the day issued.

The court may, in its discretion, use a terse judgment such as "affirmed." 5TH CIR. R. 47.6. Judges do not have to sign the opinion, as district court judges do.

PUBLICATION OF OPINIONS

5TH CIR. R. 47.5 sets out the criteria for publishing an opinion. Opinions are published unless each panel member decides the case does not meet the criteria for publication. If any judge of the court or a party requests that a panel reconsider its publication decision, all panel members must agree to publish the opinion.

All unpublished opinions contain a legend on the first page stating that pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published. Unpublished opinions issued before January 1, 1996, are precedent and binding on the court. But unpublished opinions issued on or after January 1, 1996, have no precedential value and do not bind other panels of the court. 5TH CIR. R. 47.5.4. However, they may be cited if they have persuasive value with respect to a material issue that has not been addressed in a published opinion.

Note that if any document you file with the court cites to an unpublished opinion not in a publicly available electronic database (e.g., WestLaw or Lexis), you must attach a copy of the opinion.

POST-DECISION MATTERS

REHEARING

Counsel may file a petition for panel or en banc rehearing. Filing a petition for rehearing is not a prerequisite to filing a petition for writ of certiorari in the Supreme Court. Rehearing is rarely granted, and you should only ask for it when truly warranted. The historical average of successful petitions for panel rehearing is less than 5%. Even fewer petitions for en banc rehearing are granted, generally less than 3%. Petitions for rehearing should never assume an adversarial posture with the panel. Even though the court has ruled against a particular party, the panel has not become an adversary.

Rehearing must be filed within 14 days after entry of judgment, except in civil cases where the United States is a party—then, any party has 45 days. FED. R. APP. P. 40(d)(1). We must **receive** the petition within the time set. 5TH CIR. R. 40.1.4. If you are filing both a petition for panel and en banc rehearing, **both** must be filed within the time limits in FED. R. APP. P. 40(d)(1). You do not get to wait until your petition for panel rehearing is denied to file a petition for en banc rehearing. Pro se litigants often make this mistake. Except by permission of the court, petitions for rehearing should have no attachments other than a copy of the panel opinion.

Petition for Panel Rehearing. A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended. FED. R. APP. P. 40(b)(1)(A). Generally, the court does not request an answer to the petition.

The petition must not exceed 3900 words. The form is prescribed by FED. R. APP. P. 32 and the petition must be served as FED. R. APP. P. 31 requires. Please attach a copy of the stamped opinion we sent you, rather than one printed out from the internet.

Petition for Rehearing En Banc. A petition for rehearing en banc is to be used only for cases involving questions of exceptional importance or to secure or maintain uniformity of the court's decisions. FED. R. APP. P. 40(b)(2). Rehearing en banc is an extraordinary procedure intended to correct errors of exceptional public importance or opinions that directly conflict with prior Supreme Court, Fifth Circuit, or state law precedent. Rehearing en banc petitions take an inordinate amount of the judges' scarce resources. Because of the extraordinary nature of en banc rehearing, the court is fully justified **in imposing sanctions on its own initiative** for petitions which have little merit. 5TH CIR. R. 40.2.1.

The petition must not exceed 3900 words and must comply with the format requirements of FED. R. APP. P. 32. Any petition must also include a statement of interested parties, 5TH CIR. R. 40.2.2.1, and if the party is represented by counsel, there must be a statement by counsel that complies with FED. R. APP. P. 40(b)(2). No response is necessary unless the court orders one.

The petition must not be incorporated in a petition for panel rehearing, if one is filed. Further, the petition for en banc rehearing may not adopt by reference any matter from the petition for panel rehearing or from any other brief or motions in the case. 5TH CIR. R. 40.2.2. You must attach unmarked copies of the panel opinion or order as an appendix to the petition. 5TH CIR. R. 40.2.2.10. Please attach a copy of the stamped opinion we sent you.

If the court grants a petition for en banc rehearing, the panel opinion is vacated and the mandate is stayed. 5TH CIR. R. 41.3.

RECONSIDERATION

When the clerk or a single judge rules on an administrative motion, there is no "rehearing"; instead, the court uses the term "reconsideration." 5TH CIR. R. 27.1 and .2 lay out the types of motions that the clerk and single judges may rule on. Any request for review of their decisions should be made by a "motion for reconsideration." You generally must file the motion within **14 days** after the date the order you want reviewed is filed, but if the United States is a party in a civil case, any party has 45 days to file the motion. Requests for reconsideration may not exceed 5200 words. FED. R. APP. P. 27(d)(2)(B).

Reconsideration of denials of relief in administrative motions is by a three-judge panel only. Procedural and interim matters—e.g., appointment of counsel, leave to appeal in forma pauperis, denial of permission for an abusive litigant to file pleadings, etc.—are not subject to en banc consideration.

Further, 28 U.S.C. § 2244(b)(3)(E) is clear that the denial of permission to file a successive habeas corpus petition is not appealable. There is no right of reconsideration or rehearing and no right to file a writ of certiorari to the Supreme Court.

THE MANDATE

Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the court's judgment, a copy of the opinion, and direction as to costs.

The court's judgment takes effect when the mandate issues. We issue the mandate on the eighth calendar day after the time for filing a petition for rehearing has passed, unless a timely petition for rehearing is filed or an explicit court order shortens or lengthens the time for issuing the mandate. If a petition for rehearing is denied, we issue the mandate on the eighth calendar day after the order denying rehearing is filed, unless the court shortens or extends the time. On occasion, the court will issue the mandate forthwith, in which case the mandate is issued at the same time as the judgment, e.g., in expedited appeals of criminal sentences and actions denying mandamus relief. 5TH CIR. R. 41.4. When we issue the mandate, we send a certified copy of the final judgment, the opinion, any directions as to costs, and any non-electronic portions of the record on appeal that were filed with this court to the district court. We notify the parties of the issuance of the mandate, but we **do not send another copy of the opinion or a copy of the judgment to the parties.**

STAY OF THE MANDATE

Stay Pending Application for Certiorari. You may file a motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari, with reasonable notice to all parties. Fed. R. App. P. 41(d)(2). The stay must not exceed 90 days unless extended by the court for good cause shown. To prevent a stay from being used for purposes of delay, we will not grant a stay pending certiorari in criminal cases unless we conclude there is a substantial question for the Supreme Court. 5TH CIR. R.41.1. The fact we have issued the mandate does not affect your right to apply for a writ of certiorari nor does it affect the power of the Supreme Court to grant the writ.

Petition for Writ of Certiorari. You have 90 days from the date of entry of judgment, or the date of the denial of a timely petition for rehearing, to file a petition for writ of certiorari in the U.S. Supreme Court. Any requests for additional time must be filed by motion with the clerk of the U.S. Supreme Court.

Petition for Rehearing. The timely filing of a petition for panel or en banc rehearing, or motion for stay of the mandate, stays the mandate until the petition or motion is ruled upon, unless the court directs otherwise.

COURT'S MANDATE PROCEDURES

We now notify parties when a mandate is held or released. A public entry is made on the docket and a public order is issued without releasing the name of the judge.

COSTS

The prevailing party can request payment of the costs set out in FED. R. APP. P. 39 and 5TH CIR. R. 39. A party seeking to recover costs must file an itemized and verified bill of costs, along with proof of service on opposing counsel, within 14 days after entry of the judgment. Any objections must be filed within 14 days of service on the party against whom the costs are taxed, unless the time is extended by the court. Objections to the bill of costs are usually filed when unreasonable charges or improper items are listed. We permit copying costs for up to 15 copies of briefs and 10 copies of record excerpts; copying costs are limited to the lesser of actual cost or $0.15 per page. We do not permit recovery of mailing or commercial delivery fees for transmitting briefs. 5TH CIR. R. 39.1 and .2.

Although "taxable" in the court of appeals, the money involved as "costs" never physically changes hands at the court-of-appeals level. We prepare an itemized statement of costs for insertion in the mandate. The costs can then be recovered in the district court after the mandate issues. In some instances, we may send a supplemental statement of costs to the district court after the mandate has issued. No time limit is specified for the court of appeals to send the statement of costs, and district courts are not authorized to impose such a time limit.

MISCELLANEOUS

STAY OR INJUNCTION PENDING APPEAL

The mere filing of a notice of appeal does not stay the district court's judgment. If you want to stay a district court judgment or if you seek an injunction pending appeal, you must follow FED. R. APP. P. 8 and generally make application in the district court. In a motion for stay of judgment or for injunction made to this court, you must show that the district court has denied the relief you requested, with the reasons given therefor, or that application to the district court would not be practicable. FED. R. APP. P. 8(a)(2). Stays in death penalty cases are governed by the separate requirements of 5TH CIR. R. 8.

An application for stay of a decision or order of an agency is made in a similar manner to an application for stay of a district court judgment. FED. R. APP. P. 18.

Jurisdiction. A motion for stay or injunction does not transfer jurisdiction to the court of appeals. For the court to consider such a motion, there must be a pending appeal, petition for review, or application for a writ.

Fees. No separate fee is required to file a motion for stay or injunction, but all required fees must have been paid in the underlying action or leave to proceed in forma pauperis must have been granted, before the court will act on the motion.

Content of Motion and Supporting Papers. You must show prior application to the district court or agency, where practicable, and the action of the district court or agency, with reasons given for such action. You must also show the reason for the relief requested and the facts relied upon. Disputed facts should be supported by affidavits or other sworn statements. The motion should be accompanied by copies of the relevant parts of the record. FED. R. APP. P. 8(a)(2) and 18(a)(2)(B).

Filing and Service. You must file an original copy of the motion and supporting papers, together with a certificate of service on all parties to the appeal. You must also give reasonable notice of every application for stay or injunction to all parties, including when, where and to whom the application is to be presented.

Responses. The court may grant a stay or injunction pending appeal without first giving opposing parties time to respond to the motion. It may also grant temporary relief ex parte in appropriate cases. If you intend to respond, you should notify the clerk's office immediately. All responses received by the clerk before action on the motion are presented to the court for consideration.

RELEASE IN CRIMINAL CASES

This court may review district court orders respecting release, entered before or after a judgment of conviction. Review of a district court order entered before judgment or conviction must be by appeal, 18 U.S.C. § 3145(c), and should be initiated like any other criminal appeal. After reasonable notice to the appellee, the appeal must be heard upon such papers, affidavits, and portions of the record as the parties may present or the court requires. FED. R. APP. P. 9(a). A government-requested review of a district court order respecting release pending a defendant's direct criminal appeal must also be by appeal. 18 U.S.C. §§ 3145(c) and 3731. A defendant may seek review of a district court order respecting release pending appeal by initiating a separate appeal, 18 U.S.C. § 3145(c), or by filing a new motion for release. FED. R. APP. P. 9(b).

Fifth Circuit Requirements. Our requirements for filing an application for release after judgment of conviction are set forth in 5TH CIR. R. 9.2. The documents required for an application for release before or after judgment of conviction are set forth in 5TH CIR. R. 9.3.

HABEAS CORPUS

Antiterrorism and Effective Death Penalty Act. There is a one-year statute of limitations on filing a petition for writ of habeas corpus. 28 U.S.C. §§ 2244(d)(1) and 2255. Generally, a prisoner may file only one federal habeas corpus application. A second or successive application may not be filed unless a three-judge panel of this court grants permission. 28 U.S.C. § 2244(b)(3). There are also limits on the standards of review that the court may apply.

Prisoners convicted by state courts must exhaust available state court remedies before filing a federal habeas corpus application. 28 U.S.C. § 2254(b)(1)(A). After exhaustion of those remedies, state prisoners may file an application for federal habeas corpus relief in the federal district court which has jurisdiction over the location of their prison or over the court where they were convicted. Prisoners convicted in a federal district court may file an application for a writ of habeas corpus to the federal district court where they were convicted. Applications improperly sent to this court will be transferred to the appropriate district court. FED. R. APP. P. 22(a).

Certificate of Appealability. If the district court denies habeas corpus relief, the prisoner may appeal, but only if granted a "certificate of appealability" by a district or circuit court judge. FED. R. APP. P. 22(b). A habeas petitioner who is unsuccessful in the district court must apply first to the district judge for a certificate of appealability. If the district judge denies a certificate of appealability, a notice of appeal from the denial of a writ of habeas corpus constitutes a request to this court for a certificate of appealability. FED. R. APP. P. 22(b). This court generally requires the prisoner to file: 1) a motion for a certificate of appealability and 2) a separate brief in support of the motion. If the prisoner fails to file these documents within the prescribed time, we will dismiss the appeal. If the district judge grants a certificate of appealability on only some of the issues, the petitioner must expressly ask for an expanded certificate from this court to raise additional issues.

Applications for certificates of appealability must meet the format and length requirements of FED. R. APP. P. 32(a), and 5TH CIR. R. 32, as applicable.

Successive Habeas Corpus Applications. Applications for second or successive habeas corpus petitions are limited to 30 pages for a handwritten application, or 13,000 words or 1,300 lines of text for typed or computer-generated applications.

A second or successive § 2254 petition must make a prima facie showing that you satisfy either of the two conditions found in 28 U.S.C. § 2244(b):

(a) your claim relies on a new rule of constitutional law, made retro-active by the Supreme Court, that was previously unavailable; **or**,
(b) the factual predicate for your claim could not have been discovered previously through the exercise of due diligence, **and** the facts underlying your claim, if proven by clear and convincing evidence, would be sufficient to establish that a reasonable trier of fact would not have found you guilty of the underlying offense.

You must attach the following documentation:

- a copy of the proposed § 2254 petition you are requesting permission to file in the district court;
- copies of all previous § 2254 petitions challenging the judgment or sentence received in any conviction for which you are currently incarcerated and any previous § 2241 petitions challenging the terms and conditions of your imprisonment;
- any complaint, regardless of title, that was subsequently treated by the district court as a § 2254 motion or § 2241 petition;
- all court opinions, orders, and reports and recommendations disposing of the claims advanced above.

If, after due diligence and through no fault of your own, you cannot obtain the documents described above, you should submit an affidavit describing the steps you took to obtain them and explaining why you were unsuccessful. If possible, identify by court, case name, and case number any proceeding for which you cannot obtain documents.

SPECIAL PROCEDURES IN DEATH PENALTY CASES

Because of the extraordinary nature of the interests in cases involving the death penalty and because appeals in cases in which an execution date is set may require an expedited decision or a stay of execution to prevent the appeal from becoming moot, the court has adopted special procedures governing appeals in such cases. These procedures are set out in detail in 5TH CIR. R. 8.