

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOTICE OF PROPOSED AMENDMENTS TO FIFTH CIRCUIT RULES

Pursuant to 28 U.S.C. § 2071, we give notice the court is considering adoption of the following amendments to the 5TH CIR. R. Proposed language changes in the rules are shown in shaded background if viewed in paper copy, or with a colored background if viewed in electronic format. Deleted language is stricken through.

We must receive written comments on the proposed changes to the 5TH CIR. R. no later than August 15, 2006. The address to use is:

Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 S. Maestri Place
New Orleans, LA 70130

You may also offer comments in electronic form to:

Rule_Changes@ca5.uscourts.gov

The proposed amendments are at the enclosure, with explanatory comments where deemed necessary.

Charles R. Fulbruge III
Clerk of Court

ENCLOSURE

1. To prevent certain untimely filings in death penalty cases, we propose the following change:

8.10 Time Requirements for Habeas Petitions Challenges to Death Sentences and/or Execution Procedures. *Habeas petitioners Inmates sentenced to death who wish to appeal an adverse judgment by the district court on a first petition for writ of habeas corpus, or who seek permission to file a successive petition, or who seek to challenge their convictions, sentences, or the execution procedures (including but not limited to a suit filed pursuant to 42 U.S.C. § 1983), must exercise reasonable diligence in moving for a certificate of appealability, or for permission to file a second or successive habeas petition, or in filing a notice of appeal from an adverse judgment of the district court in any other type of proceeding, and a stay of execution with the clerk of this court at least 5 days before the scheduled execution. Counsel who seek a certificate of appealability, permission to file a successive petition, or an appeal from a district court judgment less than 5 days before the scheduled execution must attach to the proposed filing a detailed explanation stating under oath the reason for the delay. If the motions are filed less than 5 days before the scheduled execution, the court may direct counsel to show good cause for the late filing. If counsel cannot do so, counsel will be subject to sanctions.*

2. Last December, a new FED. R. APP. P. 28.1 was added. This rule concerns cross-appeals and makes our 5TH CIR. R. 32.2 discussion of type-volume limits in cross-appeals unnecessary. We propose the following change:

32.2 Type-Volume Limitations. *See FED. R. APP. P. 32(a)(7)(B)(iii), and for cross-appeals, FED. R. APP. P. 28.1(e). The certificate of interested parties does not count toward the limitation. A "Brief for Appellee/Cross-Appellant" and a "Brief for Cross-Appellee and Reply Brief for Appellant" are considered principal briefs for purposes of the page length and word-volume length limitations.*

3. FED. R. APP. P. 32.1 will be amended December 1, 2006 to permit citation to "unpublished" federal judicial opinions. Subparagraph (b) provides that:

If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief

To make our rules consistent with the federal rule, we propose the following changes:

Add a new rule as follows:

28.7 Citation to Unpublished Opinions, Orders, etc. FED. R. APP. P. 32.1(a) permits citation to unpublished judicial dispositions. Parties citing to such dispositions must comply with FED. R. APP. P. 32.1(b). If a party does not need to submit a copy of an unpublished disposition, the party must provide a citation to the disposition in a publicly accessible electronic database.

Amend the following rules as shown:

47.5.3 Unpublished Opinions Issued Before January 1, 1996.* Unpublished opinions issued before January 1, 1996,* are precedent. ~~However, because~~ **Although** every opinion believed to have precedential value is published, ~~such an unpublished opinion~~ **may be cited pursuant to FED. R. APP. P. 32.1(a).** The party citing to an unpublished judicial disposition **must provide a citation to the disposition in a publicly accessible electronic database.** ~~should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).~~ **If the disposition is not available in an electronic database, A a** copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document, **as required by FED. R. APP. P. 32.1(b).**

47.5.4 Unpublished Opinions Issued on or After January 1, 1996.* Unpublished opinions issued on or after January 1, 1996,* are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, ~~abuse of the writ,~~ notice, sanctionable conduct, entitlement to attorney's fees, or the like). ~~An unpublished opinion may, however, be persuasive. An unpublished opinion~~ **may be cited pursuant to FED. R. APP. P. 32.1(a).** The party citing to an unpublished judicial disposition **should provide a citation to the disposition in a publicly accessible electronic database.** ~~If the disposition is not available in an electronic database, but if cited in any document being submitted to the court,~~ **a copy of the any unpublished opinion cited in any document being submitted to the court** must be attached to each **copy of the** document, **as required by FED. R. APP. P. 32.1(b)...**