

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 amendments to 5TH CIR. R.: 8.1, 8.10, 9.1, 9.5, 15.3.3(b), 15.3.4, 15.3.5, 15.5, 25.2 - 25.3, 26.1, 27.3, 28.3, 30.1.7, 31.4.1, 31.4.3.1, 32.4, .2.5, .4.3, 35.2, 35.2.7, 35.2.10, 35.6, 39.1, 40.1, 41.1, 41.2, 41.4, 42.1, 42.3.1.1, 46.1, 47.5.2, 47.5.5, 47.8.1, 47.8.2, 47.9, and 47.10.3

We must receive written comments on the proposed changes to the 5TH CIR. R. no later than August 10, 2009. 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:

Rules.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

2009 Proposed Changes to 5TH CIR. R.

We offer for public comment four categories of changes:

Amendments to time deadlines to comply with the proposed December 1, 2009 amendments to the FED. R. APP. P.

Replacing the word “shall” with “will” to be consistent with the previous linguistic preference in the FED. R. APP. P.

3. Modifications to our attorney admissions requirements, (Rule 46.1); and an updated reference to the May 2008, 5th Circuit Judicial Misconduct Rules, in Rule 47.9.

4. Addition of rules governing electronic case filing.

I. FED. R. APP. P. Required Time Changes

In December 2009, the federal rules will change the way certain time deadlines are calculated and will adopt the “days are days” approach. This means all deadlines will be measured in calendar days, rather than the current system where deadlines of less than 11 days do not count intermediate Saturdays, Sundays and holidays. As a practical matter currently a 7 day deadline provides a party at least 10 days to act. With the change in counting methodology, many deadlines have been extended in the federal rules.¹ We propose amendments to 5TH CIR. R. 8.1.1, 8.10, 9.1, 9.5, 15.3.3(b), 15.3.4, 15.3.5, 15.5, 26.1, 27.3, 31.3, 31.4.1, 32.4, 32.5 and 34.3 to be consistent with the new federal rules time schema.

II. “Shall” and “Will” Changes

The FED. R. APP. P. previously replaced the word “shall” with “will” throughout the rules. As the court is making a significant number of changes to its rules because of the time computation changes, this is an appropriate time to update our rules.

¹ See proposed amendments to FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, 41, effective December 1, 2009.

III. Changes Affecting Attorney's Obligation to Advise Court of Contact Information, and to Update a Reference

5th Cir. R. 46.1 is amended to state clearly an attorney's obligation to advise the clerk's office of initial and updated contact information.

5TH CIR. R. 47.9 is updated to reflect the publication of the Judicial Council's amended Rules for Judicial-Conduct and Judicial-Disability Proceedings.

IV. Electronic Case Filing

Current 5TH CIR. R. 25.2. and 25.3 are replaced by new Rules 25.2 through 25.2.15 and will govern the court's practice on electronic case filing.

In the text which follows, deleted language is stricken through; added text is in "redline," which may appear as shaded if you print out the proposed amendments.

2009 PROPOSED RULES CHANGES

FIFTH CIRCUIT RULE 8

Procedures in Death Penalty Cases Involving Applications for Immediate Stay of Execution and Appeals in Matters in Which the District Court Has Either Entered or Refused To Enter a Stay

8.1.1 If the state indicates that it does not oppose the stay, and the applicant states this fact in the application, these documents do not need to be filed with the application but must be filed within ~~10~~ **14** days after the application is filed.

8.10 Time Requirements for Challenges to Death Sentences and/or Execution Procedures. Inmates sentenced to death who wish to appeal an adverse judgment by the district court on a first petition for writ of habeas corpus, 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, 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 7** 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 7** 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 7 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.

If the state asks this court to vacate a district court order staying an execution, counsel for the state will file the state's appeal and application for relief from the stay as soon as practicable after the district court issues its order. Any unjustified delay by the state's counsel in seeking relief in this court will subject counsel to sanctions.

FIFTH CIRCUIT RULE 9

9.1 Release Before Judgment of Conviction. The clerk's office will advise counsel of the requirements of this rule after receiving a copy of a notice of appeal from the district court from an order respecting release entered prior to a judgment of conviction (FED. R. APP. P. 9(a)), or on counsel's advice a notice of appeal has been or will be filed.

Four copies of a memorandum must be filed within 7 10 days of the filing of the notice of appeal, clearly setting out the nature and circumstances of the offense charged and why the order respecting release is unsupported by the district court proceedings.

9.5 Response. The opposing party must file a written response to all requests for release within 7 10 days after service of the memorandum or application.

15.3.3.(b) Nonparty. A person who is not a party Oppositions to such motions must be filed within 10 14 days of service

15.3.4 Docketing Statement. All parties filing petitions for review must file a joint docketing statement within 30 days of the filing of the initial petition for review, but not later than 10 14 days after the expiration of the period permitted for filing a petition for review. The docketing statement must:

15.3.5 Prehearing Conference. The clerk may give notice of a prehearing conference 10 days after filing of a docketing statement, or 10 14 days after entry of an order by the court deciding a venue issue, whichever is later. The prehearing conference will:

- (a) Simplify and define issues;
- (b) Agree on an appendix and record;
- (c) Assign joint briefing responsibilities and schedule briefs; and

- (d) Resolve any other matters aiding in the disposition of the proceeding.

15.5 Time for Filing Motion for Intervention. A motion to intervene under FED. R. APP. P. 15(d) should be filed promptly after the petition for review of the agency proceeding is filed, but not later than ~~10~~ 14 days prior to the due date of the brief of the party supported by the intervenor.

~~**25.2**———**Electronic Filing.** In cases or classes of cases that the court may select, the clerk may allow a moving party to file a required document electronically. (Facsimile filing is distinguished from “electronic” filing and is covered by Rule 25.1 above.) If electronic filing is permitted, the clerk shall advise the parties of acceptable formats and procedures. Adobe Acrobat PDF format is the preferred standard. Any account name and password the clerk issues to facilitate an electronic filing shall be kept confidential and used solely for electronic filings of such papers and briefs as the clerk may permit. The electronic image of the document constitutes the original document for all court purposes. Filing is complete when the document is received in the clerk’s database.~~

~~—To each electronically filed document, the filer must add a certificate verifying that the original paper document was signed by the attorney or party shown as the filer. The filer must maintain the signed original paper document at least until the appellate process is complete, including action on any petition for writ of certiorari to the United States Supreme Court. Upon request, the signed original paper document must be provided to other parties or to the court.~~

~~—The clerk may allow a district court clerk to transmit the notice of appeal and other required docketing documents electronically.~~

~~—The clerk may require paper copies of any documents filed electronically. See 5TH CIR. R. 30 and 32 for instructions regarding the procedures for electronic filing of record excerpts and briefs, if permitted.~~

25.2 Electronic Case Filing Procedures.

25.2.1 Electronic Filing. At the court’s direction, the clerk will set an implementation date for an initial period of voluntary, and a subsequent date for mandatory use of the court’s electronic filing system. Thereafter, all cases will be assigned to the court’s electronic filing system. Counsel must register as Filing Users under Rule 25.2.3 and comply with the court’s electronic filing procedures, posted separately on the court’s website, www.ca5.uscourts.gov, unless excused for good cause. Non-incarcerated pro se litigants may request the clerk’s permission to register as a Filing User, in civil cases only, under such conditions as the clerk may authorize.

Except as authorized in the electronic filing procedures, Filing Users must submit all briefs, motions, petitions for rehearing in PDF text, (not scanned), format **and** in paper format as prescribed by the

clerk, see 5th Cir. R. 30, 31, etc. Whenever possible, other documents, e.g. record excerpts, etc., should be in PDF text format, and in paper format as prescribed by the clerk. All paper filings **must** be identical to the electronic file(s). Upon the clerk's request, a Filing User must promptly provide an identical electronic version of any paper document previously filed in the same case.

25.2.2 Filings in Original Proceedings. Filing Users may be required to file case-initiating documents in original proceedings, e.g. mandamus, petitions for second and successive habeas corpus relief, petitions for review, etc., in paper format. Subsequent documents may be filed electronically and in paper format as prescribed by the clerk.

25.2.3 Filing Users: Eligibility, Registration, Passwords. All counsel not excused from filing electronically must register themselves, or any additional approved designee, as Filing Users of the court's electronic filing system. The clerk will define the registration requirements and continuing duty of counsel to keep their contact information current, see 5TH CIR. R. 46.1, and will determine necessary training to receive Filing User registration.

Non-incarcerated pro se litigants granted Filing User status under Rule 25.2.1 will have Filing User status terminated as prescribed by the clerk, generally at the termination of the case. If a pro se party, permitted to register as a Filing User, retains an attorney, that counsel must advise the clerk.

A Filing User's registration constitutes consent to electronic service of all documents as provided in the FED. R. APP. P. and the 5TH CIR. R.

Filing Users agree to protect the security of their passwords and immediately notify the PACER Service Center and the clerk if their password is compromised. Filing Users may be sanctioned for failure to comply with this provision.

Subject to a single judge's review, the clerk may terminate a Filing User's electronic filing privileges for abusing the system by an inordinate number of filings, filings of excessive size, or other failures to comply with the electronic filing procedures.

A Filing User may move to withdraw from participation in the electronic filing system for good cause shown.

25.2.4 Consequences of Electronic Filing. A Filing User's electronic transmission of a document to the electronic filing system consistent with these rules and the court's electronic filing procedures, together with the court's transmission of a Notice of Docket Activity, constitutes filing of the document under the FED. R. APP. P. and 5TH CIR. R., and constitutes entry of the document on the docket under FED. R. APP. P. 36 and 45(b). If a party must file a motion for leave to file, both the motion and document at issue must be submitted electronically and in identical paper form; the underlying document will be filed if the court so directs.

A Filing User must verify a document's legibility and completeness before filing it with the court. Except as authorized by the court's electronic filing procedures, documents the Filing User creates and files electronically must be in PDF text format. When a Filing User's document has been filed

electronically, the official record is the electronic document stored by the court, and the filing party is bound by the document as filed. Except for documents first filed in paper form and subsequently submitted electronically under 5TH CIR. R. 25.2.2, an electronically filed document is deemed filed at the date and time stated on the court's Notice of Docket Activity.

Filing must be completed by 11:59 p.m. Central Time to be considered timely filed that day.

25.2.5 Service of Documents by Electronic Means. The court's electronic Notice of Docket Activity constitutes service of the filed document on all Filing Users. Parties who are not Filing Users must be served with a copy of any document filed electronically in accordance with the FED. R. APP. P. and 5TH CIR. R. If the document is not available electronically, the filer must use an alternative method of service.

The court's electronic Notice of Docket Activity does not replace the certificate of service required by FED. R. APP. P. 25.

25.2.6 Entry of Court-Issued Documents. Except as otherwise provided by rule or order, all of the court's orders, opinions, judgments, and proceedings relating to cases electronically filed will be filed in accordance with these rules, and will constitute entry on the docket under FED. R. APP. P. 36 and 45(b).

Any order or other court-issued document filed electronically does not require a signature of a judge or other court employee. An electronic order has the same force and effect as a paper copy of the order. Orders also may be entered as "text-only" entries on the docket, without an attached document. Such orders are official and binding.

25.2.7 Attachments and Exhibits to Motions and Original Proceedings. Filing Users must submit all documents referenced as exhibits or attachments, in electronic form within any file size limits the clerk may prescribe, as well as any paper copies the clerk specifies. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. The clerk may require parties to file additional excerpts or the complete document.

25.2.8 Sealed Documents. A Filing User may move to file documents under seal in electronic form if permitted by law, and as authorized in the court's electronic filing procedures. The court's order authorizing or denying the electronic filing of documents under seal may be filed electronically. Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk.

25.2.9 Retention Requirements. The Filing User must maintain in paper form documents filed electronically and requiring original signatures, other than that of the Filing User, for 3 years after the mandate or order closing the case issues. On request of the court, the Filing User must provide original documents for review.

25.2.10 Signatures. The user log-in and password required to submit documents in electronic form serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of the FED. R. APP. P. and 5TH CIR. R., and any other purpose for which a signature is required in connection with proceedings before the court.

The Filing User's name under whose log-in and password the document is submitted must be preceded by an "s/" and be typed in the space where the signature otherwise would appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's log-in and password to be used by anyone other than an authorized agent of the Filing User.

Documents which require more than one party's signature must be filed electronically by:

submitting a scanned document containing all necessary signatures;

showing the consent of the other parties on the document; or

any other manner approved by the court.

Electronically represented signatures of all parties and Filing Users described above are presumed valid. If any party, counsel of record, or Filing User objects to the representation of his or her signature on an electronic document as described above, he or she must file a notice within 10 days setting forth the basis of the objection.

25.2.11 Notice of Court Orders and Judgment. The clerk will transmit electronically a Notice of Docket Activity to Filing Users in the case when entering an order or judgment. This electronic transmission constitutes the notice and service of the opinion required by FED. R. APP. P. 36(b) and 45(c). The clerk must give notice in paper form to a person who has not consented to electronic service in accordance with the FED. R. APP. P.

25.2.12 Technical Failures. A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

25.2.13 Public Access/Redaction of Personal Identifiers. Parties must refrain from including, or must partially redact where inclusion is necessary, certain personal data identifiers whether filed electronically or in paper form as prescribed in Fed. R. App. P. 25, FED. R. CIV. P. 5.2(a), and FED. R. CRIM. P. 49.1. Responsibility for complying with the rules and redacting personal identifiers rests solely with counsel. The parties or their counsel may be required to certify compliance with these rules. The clerk will not review pleadings, and is not responsible for data redaction.

Parties wishing to file a document containing the personal data identifiers referenced above may:

file an un-redacted version of the document under seal, or

file a reference list under seal. The list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right.

The court will retain the un-redacted version of the document or the reference list as part of the record. The court may require the party to file a redacted copy for the public file.

25.2.14 Hyperlinks. Electronically filed documents may contain the following types of hyperlinks:

Hyperlinks to other portions of the same document;

Hyperlinks to PACER that contains a source document for a citation;

Hyperlinks to documents already filed in any CM/ECF database;

Hyperlinks between documents that will be filed together at the same time;

Hyperlinks that the clerk may approve in the future as technology advances.

Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document. The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked. The court accepts no responsibility for the availability or functionality of any hyperlink.

25.2.15 Changes. The clerk may make changes to the procedures for electronic filing to adapt to changes in technology or to facilitate electronic filing. Changes to the court's electronic filing procedures will be posted on the court's internet website.

~~25.3 **Electronic Noticing.** In cases or classes of cases that the court may select, the clerk is authorized to serve all papers, including opinions, electronically on any party who consents to such manner of service. Parties who agree to accept electronic notice must agree the electronic notice will be the only notice provided by the clerk.~~

FIFTH CIRCUIT RULE 26

26.1 Computing Time. Except for briefs and record excerpts, all other papers, including petitions for rehearing, are not timely unless the clerk actually receives them within the time fixed for filing. Briefs and record excerpts are deemed filed on the day sent to the clerk electronically

where permitted by 5TH CIR. R. 30 and 32, by a third-party commercial carrier for delivery within 3 ~~calendar~~ days, or on the day of mailing if the most expeditious form of delivery by mail is used. The additional 3 days after service by mail, by electronic means, or after delivery to a commercial carrier for delivery within 3 ~~calendar~~ days referred to in FED. R. APP. P. 26(c), applies only to matters served by a party and not to filings with the clerk of such matters as petitions for rehearing under FED. R. APP. P. 40, petitions for rehearing en banc under FED. R. APP. P. 35, and bills of costs under FED. R. APP. P. 39.

FIFTH CIRCUIT RULE 27.3

27.3 Emergency Motions in Cases Other Than Capital Cases. Parties should not file motions seeking emergency relief unless there is an emergency sufficient to justify disruption of the normal appellate process. In cases not governed by 5th Cir. R. 8.10, motions seeking relief before the expiration of ~~14~~ 14 days after filing must, subject to the penalties of Fed. R. App. P. 46(c), be supported by good cause and must:

Be preceded by a telephone call to the clerk's office and to the offices of opposing counsel advising of the intent to file the emergency motion. If time does not permit the filing of the motion by hand delivery or by mail, the clerk may permit filing by facsimile or by other electronic means. In an extraordinary case, the clerk may permit the submission of an oral motion by telephone. If the motion is filed by means other than hand delivery or mail, counsel should also later file the motion by hand delivery or by mail.

Be labeled "Emergency Motion."

State the nature of the emergency and the irreparable harm the movant will suffer if the motion is not granted.

Certify that the facts supporting emergency consideration of the motion are true and complete. Provide the date by which action is believed to be necessary.

Attach any relevant order or other ruling of the district court as well as copies of all relevant pleadings, briefs, memoranda, or other papers filed by all parties in the district court. If this cannot be done, counsel must state the reason that it cannot be done.

Be served on opposing counsel at the same time and, absent agreement to the contrary with

opposing counsel, in the same manner as the emergency motion is filed with the court.

Be filed in the clerk's office by 2:00 p.m. on the day of filing.

28.3 Brief - Order of Contents. The order of contents of the brief is governed by FED. R. APP. P. 28 and this rule and ~~shall~~ **will** be as follows:

FIFTH CIRCUIT RULE 30

30.1.7 Form. The record excerpts must:

(d) Be bound to expose fully the filing date columns and allow the document to lie reasonably flat when opened. The record excerpts must have a durable white cover conforming to FED. R. APP. P. 32(a)(2), except that it ~~shall~~ **will** be denominated “RECORD EXCERPTS.”

31.3 Briefs - Time for Mailing or Delivery to a Commercial Carrier. The appellant must send his or her brief to the clerk not later than 40 days after the date of the briefing notice. Pursuant to FED. R. APP. P. 26(c), the appellee has 33 days from the appellant’s date of the certificate of service to place the appellee’s brief in the mail, file it with the clerk electronically where permitted, or to give it to a third-party commercial carrier for delivery within 3 ~~calendar~~ days. This rule may not be combined with the additional time provisions of FED. R. APP. P. 26(c) to give the appellee 36 days to file a brief. The certificate of service required by FED. R. APP. P. 25(d) is placed in the brief as specified in 5TH CIR. R. 28.3, and must be dated. See 5TH CIR. R. 39.2 for limitations on recovery of certain mailing and commercial delivery costs.

31.4.1

- (a) A request for extension should be made as soon as it is reasonably possible to foresee the need for the extension. The clerk must receive a request for extension at least 7 ~~calendar~~ days before the due date, unless the movant demonstrates, in detail, that the facts that form the basis of the motion either did not exist earlier or were not and with due diligence could not have been known earlier.

31.4.3.1 Level 1 Extensions. The clerk is authorized to act on or refer to the court Level 1 extensions. The court prefers that an unopposed request be made by telephone, but it may be by written motion or letter. When making the request, the movant must explain what good cause exists for the extension. If the extension is granted by telephone, the movant ~~shall~~ **will** immediately send a confirming letter to the clerk, with copies to all parties.

FIFTH CIRCUIT RULE 32

32.4 Motions for Extra-Length Briefs. A motion to file a brief in excess of the page length or word-volume limitations must be filed at least ~~7~~ **10** days in advance of the brief's due date. The court looks upon such motions with great disfavor and will grant them only for extraordinary and compelling reasons. If a motion to file an extra-length brief is submitted, a draft copy of the brief must be submitted with the motion.

32.5 Rejection of Briefs and Record Excerpts. If all copies of briefs and record excerpts do not conform to 5TH CIR. R. 28 and 30 and all provisions of FED. R. APP. P. 32, the clerk will file the briefs and record excerpts, but is authorized to return all nonconforming copies. An extension of 10 days is allowed for resubmission in a conforming format. The court may strike briefs and record excerpts if the party fails to submit conforming briefs or record excerpts within ~~10~~ **14** days. If at any time the clerk believes the non-conformance is egregious or in bad faith, the clerk, in the alternative to filing the nonconforming matters, may submit them to a single judge, who can reject them and direct that they be returned unfiled. Failure to submit conforming briefs or record excerpts may result in imposition of sanctions.

34.3 Submission Without Argument. A party desiring to waive oral argument in a case set for oral argument must file a motion to waive argument at least ~~7~~ **7** calendar days before the date set for hearing.

35.2 Form of Petition. Twenty copies of every petition for en banc consideration, whether upon initial hearing or rehearing, must be filed. The petition must not be incorporated in the petition for rehearing before the panel, if one is filed, but must be complete in itself. In no case ~~shall~~ **will** a petition for en banc consideration adopt by reference any matter from the petition for panel rehearing or from any other briefs or motions in the case. A petition for en banc consideration must contain the following items, in order:

35.2.7 Argument and authorities. These ~~shall~~ **will** concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.10 A copy of the opinion or order sought to be reviewed. The opinion or order ~~shall~~ **will** be bound with the petition and shall not be marked or annotated.

35.6 Determination of Causes En Banc and Composition of En Banc Court. A cause ~~shall~~ **will** be heard or reheard en banc when it meets the criteria for en banc set out in FED. R. APP. P. 35(a).

The en banc court ~~shall~~ **will** be composed of all active judges of the court plus any senior judge of the court who participated in the panel decision who elects to participate in the en banc consideration. This election is to be communicated timely to the chief judge and clerk. Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case.

39.1 Taxable Rates. The cost of reproducing necessary copies of the briefs, appendices, or record excerpts shall be taxed at a rate of actual cost, or \$.15 per page, whichever is less, including cover, index, and internal pages, for any form of reproduction costs. The cost of the binding required by 5TH CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk ~~shall~~ **will**, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.

40.1 Copies. Four copies of all petitions for rehearing ~~shall~~ **will** be filed. A party seeking panel rehearing must attach to the petition an unmarked copy of the opinion or order sought to be reviewed. If the party contemporaneously files a petition for rehearing en banc and attaches a copy of the opinion or order required by 5TH CIR. R. 35.2.10, the party does not have to attach a copy to the petition for panel rehearing.

41.1 Stay of Mandate - Criminal Appeals. A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under FED. R. APP. P. 41 ~~shall~~ **will** not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.

41.2 Recall of Mandate. Once issued a mandate ~~shall~~ **will** not be recalled except to prevent injustice.

41.4 Issuance of Mandate in Expedited Appeals or Mandamus Actions. The clerk ~~shall~~ **will** issue the mandate forthwith in any expedited appeal of a criminal sentence and in actions denying mandamus relief, unless instructed otherwise by the court.

FIFTH CIRCUIT RULE 42

42.1 Dismissal by Appellant. In all cases where the appellant or petitioner files an unopposed motion to withdraw the appeal or agency review proceeding, the clerk ~~shall~~ **will** enter an order of dismissal and issue a copy of the order as the mandate.

42.3.1.1 Appeals with Counsel. If appellant is represented by appointed or retained counsel, the clerk ~~shall~~ **will** issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge.

5TH CIR. R. 46 ATTORNEYS

46.1 Admission and Fees. Attorneys must have and maintain a valid underlying license to practice law issued by a governmental licensing authority listed in FED. R. APP. P.46(a)(1) to be admitted and continue to practice before this court. Admission is governed by FED. R. APP. P. 46 and this rule. **Attorneys admitted to this court must provide the clerk a valid e-mail and mailing address, as well as a working telephone number, and must provide updated information to the clerk when changes occur.** Attorneys are admitted for a period of five years and must, after notice from the clerk, timely apply for readmission ~~at the end of five years~~. To be admitted or readmitted, an attorney must pay the fee fixed by court order. No fee will be required of an attorney who otherwise has all qualifications for admission and is: appointed to represent an appellant in forma pauperis; appearing on behalf of the United States; or newly graduated from law school, licensed to practice in Louisiana, Mississippi, or Texas, and on orders for extended active duty in the Judge Advocate General' s Corps.

47.5.2 Publication Decision. An opinion ~~shall~~ **will** be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel ~~shall~~ **will** reconsider its decision not to publish an opinion. The opinion will be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason, and the panel issues an order to publish the opinion.

47.5.5 Definition of “Published.” An opinion is considered as “published” for purposes of this rule when the panel deciding the case determines, in accordance with 5TH CIR. R. 47.5.2, that the opinion ~~shall~~ **will** be published and the opinion is issued.

47.8.1 Supporting Requirements. Petitions or motions for the award of attorney's fees should always be supported by contemporaneous time records recording all work for which a fee is claimed and reflecting the hours or fractional hours of work done and the specific professional level of services performed by each lawyer seeking compensation. In the absence of such records, time expended will not be considered in setting the fee beyond the minimum amount necessary in the court's judgment for any lawyer to produce the work seen in court. Exceptions may be made only to avoid an unconscionable result.

The clerk ~~shall~~ **will** make reasonable efforts to advise counsel about this rule, but whether or not counsel has been advised, ignorance of this rule is not, standing alone, grounds for an exception. If the reasonableness of the hours claimed on the basis of time records becomes an issue, the applicant must make time records available for inspection by opposing counsel and, if a dispute is not resolved between them, by the court.

47.8.2 Attorney's Fees and Expenses Under the Equal Access to Justice Act. This rule implements the provisions of the Equal Access to Justice Act, Public Law No. 96-481, 94 Stat. 2325 (1980).

- (c) The petition must contain a copy of the order to be reviewed and any findings of fact, conclusions of law, and opinion relating thereto, a statement of the facts necessary to an understanding of the petition, and a memorandum showing why the petition for permission to appeal should be granted. An answer may be filed within 30 days after service of the petition, unless otherwise directed by the court. The application and any answer ~~shall~~ **will** be submitted without further briefing and oral argument unless otherwise ordered.

- (e) Within 10 days after the entry of an order granting permission to appeal, the applicant must pay the clerk of this court the docket fee prescribed by the Judicial Conference of the United States. Upon receipt of the payment, the clerk

~~shall~~ **will** enter the appeal upon the docket. The record shall be transmitted and filed in accordance with FED. R. APP. P. 17. A notice of appeal need not be filed.

47.9 Rules for Judicial -Conduct and Judicial Disability Proceedings.

See separately published Judicial Council of the Fifth Circuit Rules for Judicial-Conduct or Judicial Disability effective ~~April 15, 1993 as amended through July 15, 2003~~ **May 4, 2008.**

47.10.3 The Appellate Record.

- (c) Presentence Report. If a notice of appeal is filed as authorized by 18 U.S.C. § 3742(a) and (b) for review of a sentence, the clerk ~~shall~~ **will** transmit to this court the presentence report. The report is transmitted separately from other parts of the record on appeal and is labeled as a sealed record if sealed by the district court.