

## Summary of November 1, 2004

### Changes to 5<sup>TH</sup> CIR. R. and

### Internal Operating Procedures

On September 13, 2004, the court approved the amendments shown below to the 5<sup>TH</sup> CIR. R. and Internal Operating Procedures, effective November 1, 2004. The complete file of 5<sup>TH</sup> CIR. R. and IOPs posted on the internet, already reflect these changes.

The major changes are as follows:

1. 5<sup>TH</sup> CIR. R. 30.1 and 30.2, are amended **to authorize the clerk to require counsel to pay reasonable shipping fees to send the record on appeal for preparation of briefs.** The federal judiciary is facing a significant budgetary crisis, and the court can no longer absorb the cost of shipping these records to counsel. At an appropriate time in the processing of the case, the clerk will request that counsel provide us with a UPS, or similar commercial delivery service, account number to which we can charge the shipping costs. If you cannot obtain a delivery service account number, we will request other delivery arrangements, or ask you to provide us with a pre-paid postage label. The shipping cost for an average record generally is less than \$10.00.

2. 5<sup>TH</sup> CIR. R. 31.1 is rewritten to be clearer and to set certain standards for the electronic copy of the brief.

- A. The court currently requires counsel to submit an electronic copy of the brief on a 3.5 inch diskette, but the clerk's office may elect to accept the copy on a CD, some other physical media, or by electronic transmission.
- B. We now require that the entire electronic version of the brief be in a single PDF file.
- C. We make clear that the electronic copy of the brief **may not** be scanned into a PDF file.
- D. The electronic copy of the brief must have an electronic "cover" page as required by FED. R. APP. P. 32(a)(2).

E. To ease the burden on counsel, the certificate of service no longer needs to indicate service in both electronic and written form.

3. 5<sup>TH</sup> CIR. R. 47.10.3(e) is modified to permit the clerk to allow counsel to request access to sealed presentence reports by other than a “writing, setting forth the reasons why access is necessary to the appeal.”

4. The Internal Operating Procedures (IOPs) following 5<sup>TH</sup> CIR. R. 35.6 and 40.4 are amended to reflect the court’s long established principle and practice that the filing of a petition for hearing or rehearing en banc does not constitute or operate as a stay of execution in capital cases, nor does such a petition preclude carrying out an execution. Additional procedures for voting on en banc matters in capital cases also are set forth in the IOP following rule 35.6.

#### Text of Amended Rules and IOPs

#### **I.O.P. following Fifth Circuit Rule 27.5**

**MOTIONS AFTER ASSIGNMENT TO CALENDAR** - AFTER CASES ARE ASSIGNED TO THE ORAL ARGUMENT CALENDAR, MOTIONS ARE CIRCULATED TO THE HEARING PANEL RATHER THAN TO THE STANDARD MOTIONS PANELS. THE SENIOR ACTIVE JUDGE ON THE PANEL IS CONSIDERED THE INITIATING JUDGE. THE CLERK ENTERS ORDERS RESPONDING TO THE MOTIONS ON BEHALF OF THE PANEL UNTIL ENTRY OF THE OPINION.

#### ***FIFTH CIRCUIT RULE 30***

**30.1 *Records on Appeal/Record Excerpts/Appendix - Appeals from District Courts, the Tax Court, and Agencies.*** Appeals from district courts and the Tax Court are decided on the original record on appeal (ROA). The clerk is authorized to require the party receiving the ROA to pay reasonable shipping costs as a condition of receiving the record. Moreover, counsel and unrepresented parties must review the ROA within 20 days of dispatch from the clerk’s office and advise electronically or in writing both the appropriate District Court (or the Tax Court, if appropriate) and Fifth Circuit clerk’s offices of any errors in, or omissions from, the ROA. Failure to comply may result in a denial of any requested extension of time to file a brief due to an alleged error in, or incomplete ROA. Record excerpts are filed in lieu of the appendix prescribed by FED. R. APP. P. 30. Petitions for review or enforcement of agency orders are governed by 5<sup>TH</sup> CIR. R. 30.2, but parties may be required to pay reasonable shipping costs, and are responsible for timely review of the record and the notification requirements set out above.

**30.2 *Appendix - Agency Review Proceedings.*** Petitions for review or enforcement of orders of an administrative agency, board, commission or officer must proceed on the original record on review, without a FED. R. APP. P. 30 required appendix. If a party requests use of the original record, the clerk may require payment of reasonable shipping costs, and the party is

responsible for timely review and notification to the agency and the Fifth Circuit clerk's office of any record deficiencies, see 5TH CIR. R. 30.1.

### **FIFTH CIRCUIT RULE 31**

**31.1 Briefs - Number of Copies; Computer Generated Briefs.** Only 7 paper copies of briefs need be filed. Where a party is represented by counsel and generates his or her brief by computer, the party also must submit an electronic version of the brief to the court. The filing party must serve unrepresented parties and counsel for separately represented parties in accordance with FED. R. APP. P. 31(b), and also must serve an electronic version of the brief on each party separately represented. However, the parties may agree in writing to waive service of paper copies of the brief and to be served with an electronic copy only. Electronic service may be in a form agreed to in writing by the parties, or by the same means as submitted to the court. The presently accepted form for submitting the court's electronic version is on a 3.5 inch diskette, but the clerk's office later may elect to allow submission on other physical media, e.g. CD, etc., or by electronic transmission, under criteria to be developed.

*The electronic version must:*

*be prepared in a single Portable Document Format (PDF) file. (Briefs scanned into PDF are not acceptable);*

*contain nothing other than the brief;*

*have as the first page of the electronic file a brief cover page as required by FED. R. APP. P. 32(a)(2).*

*If submitted on a diskette, or other later authorized physical media, the electronic version must have a label containing the case name and docket number, and identifying the brief as the appellant's, appellee's, etc.*

*The proof of service must comply with FED. R. APP. P. 25(d)(1)(B) & (2).*

#### **I.O.P. following Fifth Circuit Rule 31.4.4**

**I.O.P.** - FOR THE 12 MONTH PERIOD ENDED JUNE 30, 2004, THE COURT RECEIVED 3,819 MOTIONS REQUESTING EXTENSIONS OF TIME TO FILE BRIEFS, OR TO FILE BRIEFS OUT OF TIME, WHICH ARE CONSIDERED EXTENSION REQUESTS. THE MAJORITY OF THESE MOTIONS WERE BY COUNSEL, AND FREQUENTLY WERE MADE IN DIRECT CRIMINAL APPEALS WHICH HAVE THE LONGEST AVERAGE PROCESSING TIME FROM FILING THE NOTICE OF APPEAL TO FILING THE LAST BRIEF. TO ASSURE THAT THIS COURT DECIDES CASES MORE EXPEDITIOUSLY, THE COURT'S GOALS ARE TO: 1) REDUCE THE NUMBER OF MOTIONS TO EXTEND TIME TO FILE BRIEFS; AND 2) TO SHORTEN THE AMOUNT OF TIME GRANTED. IN GENERAL AND ABSENT THE MOST COMPELLING OF REASONS, NO MORE THAN 30 DAYS EXTENSION OF TIME WILL BE GRANTED IN CRIMINAL CASES AND NO MORE THAN 40 DAYS EXTENSION OF TIME WILL BE GRANTED IN CIVIL CASES.

### **I.O.P. following Fifth Circuit Rule 35.6**

**CAPITAL CASES** - CONSISTENT WITH LONG ESTABLISHED LEGAL PRINCIPLE AND UNIFORMLY FOLLOWED PRACTICE, THE FILING OF A PETITION FOR REHEARING (OR HEARING) EN BANC DOES NOT CONSTITUTE OR OPERATE AS A STAY OF EXECUTION AND DOES NOT PRECLUDE CARRYING OUT AN EXECUTION.

TIMELY PETITIONS FOR REHEARING (OR HEARING) EN BANC WHICH ARE FILED IN A CAPITAL CASE WHILE A SCHEDULED EXECUTION DATE IS PENDING AND LESS THAN 22 CALENDAR DAYS BEFORE THE SCHEDULED DATE WILL BE PROCESSED AND DISTRIBUTED IN THE MANNER PRESCRIBED BY THE CHIEF JUDGE OR DELEGEE. THE CHIEF JUDGE OR DELEGEE MAY ORDER EXPEDITED CONSIDERATION THEREOF AND SET A TIME LIMIT FOR EACH JUDGE ELIGIBLE TO VOTE THEREON TO ADVISE THE CHIEF JUDGE OR DELEGEE WHETHER TO CALL FOR A POLL AND WHETHER (IF A POLL IS OR WERE TO BE TIMELY REQUESTED BY ANY JUDGE) THE JUDGE WOULD VOTE FOR OR AGAINST REHEARING (OR HEARING) EN BANC, AND THE PETITION FOR REHEARING (OR HEARING) EN BANC WILL BE DISPOSED OF ACCORDINGLY. IF NO POLL IS TIMELY REQUESTED, OR IF A POLL RESULTS IN NO REHEARING (OR HEARING) EN BANC, THE PANEL MAY ENTER AN ORDER DENYING REHEARING (OR HEARING) EN BANC. IF A POLL RESULTS IN A GRANT OF REHEARING (OR HEARING) EN BANC, THE CHIEF JUDGE, OR DELEGEE, WILL ENTER AN ORDER STAYING THE EXECUTION PENDING FURTHER ORDER OF THE COURT.

### **I.O.P. following Fifth Circuit Rule 40.4**

**CAPITAL CASES** - CONSISTENT WITH LONG ESTABLISHED LEGAL PRINCIPLE AND UNIFORMLY FOLLOWED PRACTICE, THE FILING OF A PETITION FOR REHEARING DOES NOT CONSTITUTE OR OPERATE AS A STAY OF EXECUTION AND DOES NOT PRECLUDE CARRYING OUT AN EXECUTION.

## ***FIFTH CIRCUIT RULE 47***

### **47.10.3     *The Appellate Record.***

- (e)     *Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, may request them from the clerk's office by such means as the clerk permits. Counsel must return the copy of the presentence report, without duplicating it. Counsel should avoid disclosure of confidential matters in their public filings.*