

Summary of December 1, 2006

Changes to 5TH CIR. R.

In September 2006, the court approved amendments to 5TH CIR. R. 8.10, 32.2, 47.5.3 and 47.5.4, and added a new Rule 28.7.

1. The change to Rule 8.10 addresses belated pleadings in death penalty cases, e.g. successive habeas corpus petitions or challenges to execution procedures, under 28 U.S.C. §1983, etc. The amended rule expands the requirement to file such matters timely or to explain under oath the reasons therefor. The rule provides:

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 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. The change to Rule 32.2 corrects an oversight in our last revision and seeks to avoid confusion with the provisions of FED. R. APP. P. 28.1. The amended rule provides:

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.*

3. To make our rules consistent with FED. R. APP. P. 32.1, effective December 1, 2006, we have added a new 5TH CIR. R. 28.7 and amended Rules 47.5.3 and 47.5.4. These changes provide guidance on the limited situations in which a paper copy of an unpublished opinion cited in a document must be attached to the pleading. The rules provide:

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.

47.5.3 Unpublished Opinions Issued Before January 1, 1996. *Unpublished opinions issued before January 1, 1996, are precedent. Although every opinion believed to have precedential value is published, 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. If the disposition is not available in an electronic database, 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, notice, sanctionable conduct, entitlement to attorney's fees, or the like). 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, 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)....*