FEDERAL APPELLATE PRACTICE:
FIFTH CIRCUIT

by Sidney Powell

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APPELLATE PRACTICE IN THE FIFTH CIRCUIT[1]

_____This goal of this paper is to provide a dozen critical points that every attorney needs to know to practice in the United States Court of Appeals for the Fifth Circuit.[2] To understand Fifth Circuit practice, it is important to understand how the Court itself works, because many of the rules that counsel must follow were created to assist the Court in handling its enormous caseload. It is also imperative to read the Federal Rules of Appellate Procedure, the Fifth Circuit's Rules, and the Fifth Circuit's Internal Operating Procedures before proceeding in any appeal.

1. THE FIFTH CIRCUIT HAS A MULTI-FACETED SCREENING PROCESS.

First, each incoming case is screened by an attorney who specializes in jurisdictional issues. If the case passes jurisdictional muster, it proceeds to screening on the merits.

5th Cir. Rule 34 I.O.P. - Screening - Screening is the name given to the method used by the court to determine whether cases should be argued orally or decided on briefs only. This is done under Fed. R. App. P. and 5th Cir. R. 34. Judges are assigned to sit together as a screening panel for one year.

a. The judges of the court screen cases with assistance from the Staff Attorney. When the last brief is filed, a case is generally sent to the Staff Attorney for prescreening classification. If the staff attorney concludes that the case does not warrant oral argument, a brief memorandum may be prepared and the case returned to the clerk. The

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[2] This paper does not attempt to address the special issues or rules required for appeals from bankruptcy, tax court, or agency decisions, writs of mandamus or habeas, etc.

clerk then routes the case to 1 of the court's judges, selected in rotation. If that judge agrees that the case does not warrant oral argument, the briefs, together with a proposed opinion, are forwarded to the 2 other judges on the screening panel. If any party requests oral argument, all panel judges must concur that the case does not warrant oral argument, and also in the panel opinion as a proper disposition without any special concurrence or dissent. If no party requests oral argument, all panel judges must concur that the case does not warrant oral argument. However, absent a party's request for oral argument, summary disposition may include a concurrence or a dissent by panel members.

b. If the staff attorney concludes that oral argument is required, the case is sent to an active judge for screening. If the screening judge agrees, the case is placed on the next appropriate calendar, consistent with the court's calendaring priorities. If the screening judge disagrees with the recommendation for oral argument, that judge's screening panel disposes of the case under the summary calendar procedure.

2. APPROXIMATELY 80% OF THE COURT'S CASES ARE CASES DECIDED WITHOUT ORAL ARGUMENT.

There are three procedures pursuant to which the judges decide cases without oral argument. Counsel is usually not informed as to which of the three procedures was used in her case, but rather, simply receives a brief order or decision from the court, often indicating nothing more than the actual disposition of the case. Sometimes there is a short opinion. The three procedures are:

1. Summary calendar decisions
2. Conference calendar decisions
3. Augean Panel decisions

Cases decided on the Augean panel are usually those involving clear procedural defects that result in the appeal being dismissed. Once every few months, a panel of three judges meets as the "Augean panel," nicknamed after the exploits of Hercules in cleaning out the Augean stables. They dispose of a number of cases in a short amount of time.

The "Conference Calendar" disposes of the shorter, more routine one or two issue cases that do not even merit the full round of summary calendar attention. A panel of three judges meets in New Orleans, reviews the briefs and staff attorney memos on 20 or more cases in the morning and decides the cases that afternoon. Often, the staff attorney is present to discuss the case with the Judges if they have any questions. This procedure is often used on routine Social Security cases and habeas corpus cases.

The "Summary Calendar" is used for more significant cases, but those which still do not merit the scrutiny afforded on the oral argument calendar. A significant number of criminal cases and relatively small civil cases are decided on the Summary Calendar. Usually, the initiating Judge believes that oral argument is not necessary and drafts an opinion which is circulated to the other two members of his "Screening Panel." If they agree, the case is decided on the summary calendar without oral argument. If ANY judge thinks the case warrants argument, the case is calendared for oral argument.

When all panel members agree that oral argument of a case is not needed, they advise the clerk the case has been placed on the summary calendar. The court's decision usually accompanies the notice to the clerk.

3. YOU MUST FILE A TIMELY AND CORRECT NOTICE OF APPEAL TO GET THERE AT ALL.

A. Specify the order(s) appealed and the parties appealing. FRAP 3 specifies the content of the notice of appeal, and counsel must read and comply with it fully. Notice of appeal must be **filed in the district court** with sufficient copies to allow the clerk to serve it on all counsel of record.

B. File Notice of Appeal in 30 Days in a Civil Case. FRAP 4 specifies the timing requirements. In a civil case, notice of appeal must be filed within **30 days** of entry of the judgment or order appealed. If the United States is a party, the time limit is 60 days. **The timely filing of a notice of appeal is jurisdictional, and if notice of appeal is not timely filed, the appeal will be dismissed.** The timely filing of certain post-judgment motions affects the time for filing notice of appeal, so READ THE RULE.

In a criminal case, the time for filing notice of appeal is **10 days** from the entry of judgment.

C. File the Transcript Order Form. In conjunction with filing the notice of appeal, counsel should make arrangements with the court reporter and **file a transcript order form**. The district clerk's office has these readily available. FRAP 10; 5th Cir. R. 10.1. I strongly recommend ordering the entire transcript. Unlike state court, the Fifth Circuit monitors the court reporters and makes certain that transcripts are timely filed. *See* 5th Cir. R. 11.

D. Pay the Filing Fee. A filing fee of **$255** is also required. FRAP 3(e); 5th Cir. R. 3. Failure to pay the fee can result in the appeal being dismissed.

Significantly, in the Fifth Circuit, the Court still allows counsel full use of the original record in the case and will send it to counsel upon request. It is imperative to maintain this in pristine condition and to forward it to Appellee upon completion of Appellant's brief and then back to the Court.

4. YOUR BRIEF IS EXTREMELY IMPORTANT BECAUSE IN 80% OF THE CASES, THAT IS YOUR ONLY ACCESS TO THE JUDGE.

The Fifth Circuit only reverses now approximately 8% of the cases that are appealed. Writing a persuasive brief is even more important if you are the appellant.

BRIEF WRITING.

A good, clear and concise brief is key to success on appeal. In the Fifth Circuit, for example, almost 80 percent of all cases appealed are decided according to the court's "summary calendar" procedures. A case decided on the "summary calendar" is based solely upon the briefs, without the opportunity for oral argument. However, even when counsel does have the opportunity to present an oral argument, it is the brief that predisposes the judge toward a particular result and provides a basis for questions as the judge listens to oral argument. The judges on the Fifth Circuit always read the briefs before argument and rely heavily on them throughout the appeal. If the brief is well written, it will serve as an outline for the court's opinion. Briefs should be drafted with that purpose in mind.

The admonition of Antoine de Saint Exupery is important to remember and to apply when preparing a brief: "Perfection is finally attained, not when there is no longer anything to add, but when there is no longer anything to take away . . ." In other words: edit, edit, edit.

A. READ THE RULES.

The Fifth Circuit has its own Rules and Internal Operating Procedures which augment the Federal Rules of Appellate Procedure and govern every detail of brief writing, including the list of required contents, and they periodically change them. It is imperative to sit down and simply read the rules before you file your brief. Some of the basics, specified in FRAP 28 and 32, and 5th Cir. R. 28 and 32, include the following:

1. Briefs must be composed in 14 point type, preferably in Word Perfect, and spiral bound so that they will lay flat when opened. A principal brief may not exceed 14,000 words, and motions to exceed the word count are rarely granted. 5th Cir. R. 32.4. There is a new rule that requires them to be saved and served in PDF format, and there is progress toward electronic filing as well, particularly in the district court. FRAP 32; 5th Cir. R. 32. Also, the caption of the brief must read precisely as the court has it on its Rule 12 letter.

2. Record references are required for each statement of fact.

3. The Brief for the Appellant is blue, Appellee is Red, Reply Briefs are gray, and Record Excerpts are white. Amicus briefs are green. Supplemental briefs are tan. Petition for panel rehearing and a petition for hearing or rehearing en banc must be white. Fed. R. App. P. 32 (c)(2)(A). FRAP 32(a)(2); 5th Cir. R. 32.7.

4. Briefs are timely filed when mailed or Fed-Exed by their due date. FRAP 25(a)(2)(B). Most other documents must be in the clerk's hands by their due date. 5th Cir. R. 26.1. READ THE RULES for each filing.

B. DETAILS OF WRITING STYLES.

1. What Judges find persuasive.

Judges are persuaded by clear, concise reasoning, accurately supported by the record and the law. Counsel must inform before he can convince.

2. What Judges dislike or disregard.

Judges dislike emotional appeals, griping, whining, and disparaging remarks about the district judge or the opposition.

3. Legal jargon and its avoidance.

Legal jargon serves no one. It creates stumbling blocks for the reader. While the use of legal terms of art are necessary at times, "legalese" is not. A well written brief should be understandable to a layman.

4. Taking the proper tone in a brief.

The tone of a brief should be very much like the tone of an appellate decision. It should reasonably explain the facts and the applicable law.

5. To footnote or not, that is the question.

Many judges say they simply do not read footnotes. Fifth Circuit Rule 32.5 addresses footnotes. Under the new rule which requires a word or line count for the entire brief, and 14-point type for text, footnotes may be single-spaced and in 12-point or larger type. Counsel should use footnotes sparingly and avoid making arguments in footnotes. The author uses them to include information that will help the law clerks.

6. Quotations; when and how much and of what.

Block quotes should be used sparingly. Long block quotes lose the reader and are generally regarded as a sign of the lawyer's laziness. Moreover, under the new word or line count rules, block quotes provide no space-saving advantage.

7. Writing directed at the court vs. a law clerk.

The author uses footnotes to include material that the law clerks will find helpful, such as extra record cites and other case citations including parenthetical statements indicating the reason for the cite.

C. SPECIFIC WRITING TIPS.

1. The do's and don'ts of effective writing.

a. Do pay particular attention to the style of the brief.

b. Do use concise, strong sentences written in active voice, which will make the brief persuasive. Judge Patrick E. Higginbotham suggests that counsel delete all adjectives and adverbs. In any event, a lay person should be able to read a well-written brief and understand the facts of the case and the thrust of the argument.

c. Do edit the brief several times and have someone who has not previously read the brief proofread it.

d. Do check all copies to make certain that each page is legible and that pages are in the right order.

e. Do cite controlling circuit court and Supreme Court authorities. The Fifth Circuit, for example, is bound by its own panel decisions unless the decision is reversed by the *en banc* court.

f. Do admit and address adverse precedent. At counsel's discretion, she may include citations to decisions in other Circuits when the Fifth Circuit has not addressed the issue or when the case is going to be heard *en banc*.

g. Do admit and address the adverse facts in his case as well as adverse precedent. The judges, staff attorneys, and law clerks are bright and thorough. Counsel cannot avoid the truth and will lose precious credibility with any attempt to do so. The problems in each case must be analyzed and explained. There is no substitute for intellectual integrity.

h. Do serve a copy of your brief, and a disk containing only the brief, in PDF, on the court and opposing counsel. See Rule 31.1.

I. Do include service of a disk in your certificate of service.

j. Do include the **precise word count** in your certificate of compliance.

k. Don't overuse footnotes and long block quotes.

l. Don't use *ad hominem* to attack the district judge or the other side.

m. Don't be repetitive.

n. Don't whine.

2. Sloppy writing = sloppy thinking; how to avoid both.

Use an outline to organize your thoughts. The author also finds it helpful to look at the structure used by the Court when writing the most closely analogous decision.

D. SPECIFICS ON APPELLATE BRIEFING.

1. Setting forth an effective and persuasive Statement of the Case and Statement of the Facts.

a. Statement of the Case--Course of proceedings and disposition in the court below.

Counsel should briefly outline the key facts of the procedural history of the case in the section subtitled "Course of Proceedings and Disposition in the Court Below." Counsel should include a record reference at the end of each sentence and should omit all unnecessary dates. In most cases, it can be done in one-half page.

b. Statement of the Facts.

The statement of facts is often the most critical section of the brief. An effective statement of facts can tilt the scale in favor of one's client. The judges know or can easily learn the law, but the facts of each case are unique and determine its outcome. Therefore, the practitioner should use the statement of facts to tell the story of the case in chronological or some other logical order. Counsel must not simply summarize the testimony of each witness; nor should counsel slant the testimony in

the client's favor. To write anything less than an accurate statement of facts can cost an attorney credibility with the court. Counsel can, however, identify points with which the appellant disagrees and on which there was conflicting testimony. There must be a correct record reference for each statement of fact, and the citations should be to the original record as numbered by the court. If counsel has his own copy of the trial transcripts, he should number the volumes to correspond to the court's numbering of the official record.

D. HONING THE ISSUES ON APPEAL.

Issues to be raised on appeal are called "issues"--not "points of error." Each issue statement should be succinct, accurate, and sufficiently self-explanatory to enable the judge to understand the nature of the issues by reading only the statement of them. The following is an example of a concise statement of the issue:

Whether the district court abused its discretion in instructing the jury that oil on the walkway was a violation of the Boiler Inspection Act?

Whether the district court correctly granted summary judgment in favor of KIII, finding that KIII is the exclusive owner of the concert videotape and thus did not commit copyright infringement?

E. PRESENTING THE ARGUMENTS AND AUTHORITIES.

1. Arguments and authorities.

The brief of the appellant must contain, under an appropriate heading, an argument. Any issue posed for appellate review but not argued in the opening brief is waived. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statues, and the record. If research reveals conflicting panel decisions, the first decision's rule of law is to be followed. Furthermore, unpublished opinions issued prior to January 1, 1996, bind subsequent panels unless a contrary decision from the United States Supreme Court or the Fifth Circuit Court of Appeals *en banc* exists. Unpublished decisions issued on or after January 1, 1996 are not precedent except as res judicata, collateral

estoppel or law of the case. An unpublished opinion may be cited, in which case a copy must be attached. The argument must also include a concise statement of the applicable standard of review; this statement should appear under a separate subheading placed before the discussion of each issue.

In appeals to the Fifth Circuit, arguments and authority are called "arguments and authorities"--not "points of error" or "points or error restated." Counsel should carefully select the arguments and authorities. Few cases present more than three real issues that warrant appellate scrutiny. Arguing a myriad of issues will detract from the real issue. Logically, whenever possible, counsel should make the strongest argument first.

2. Headings and subheadings.

The use of concise headings and subheadings is helpful to the court, but to be effective, they should not be overused. Although the appellee usually should respond as directly as possible to the appellant's issues, the appellee is not bound by the appellant's characterization of the issues or arguments or to the appellant's order of the arguments. The appellee should indicate beneath his caption, however, which of the appellant's arguments he is answering and the corresponding page numbers. If there is an issue that is dispositive of the appellant's case, it should be addressed first.

3. A suggested format for writing each argument.

The structure of the argument must be designed to facilitate a logical presentation and a clear understanding of the party's position. In the course of writing several hundred briefs, the author developed the following format. If one employs this format, the brief helps write itself.

a. The appellant, in his first paragraph for each argument, should explain how the trial court erred. The appellee, in his first paragraph for each argument, should explain the appellant's contention.

b. Next, counsel should address whether the issue was preserved, explain how it was preserved, and put in context the appropriate standard of review. Federal Rule of Appellate Procedure 28(a)(9)(B) requires a "*concise statement of the applicable standard of review*" for each issue. 5th Cir. R. 28.2.6. Sometimes I have thought that judges apply "the gut reaction standard of review," forming an opinion of how the

case should be decided after reading the facts and listening to their experience, knowledge of the law, and instincts.

c. Counsel should then explain the applicable law, the legal test, the essential elements of the offense, or the legal principles relevant to the issue raised.

d. Counsel should explain the applicable facts. Many issues require an explanation of procedural facts or other portions of the record that would not be included appropriately in the statement of facts, which is reserved in most cases for the "story" of the case. Issue-specific facts are most efficiently detailed in the argument to which they are relevant. Counsel should provide record references for each statement.

e. Next, counsel should apply the law to the facts, a step which many brief writers overlook. Counsel must explain to the court how the law cited applies to the facts of the case and how the court should resolve the issue.

f. It is also important to cite and detail the most similar cases and to distinguish any close, adverse cases. If there is a case that is clearly dispositive of the issue raised, it may be appropriate to skip step (3) in favor of step (6).

g. The last step is to discuss any equitable or policy considerations, if necessary and appropriate, and briefly to conclude.

If counsel will follow this structure, adapting it as necessary to suit the peculiarities of each case, counsel's arguments will be more fully developed and more helpful to the court.

F. "CONCLUSIONS" OF BRIEFS.

Counsel should conclude the brief by stating the precise relief sought and by providing a brief summary of the reasons why she should prevail. The conclusion usually should not exceed one-half page. A more lengthy conclusion may be appropriate in longer briefs, but most often it can be accomplished in one or two sentences. An example of an appropriate conclusion follows:

> For these reasons, the district court's determination that it lacked subject matter jurisdiction was correct, and it properly dismissed Plaintiffs' complaint. Plaintiffs cannot create jurisdiction and must be estopped by their own misconduct. In addition, Plaintiffs were not the purchasers of the stock and did not have standing to file this suit. Accordingly, this Court should affirm the judgment of the district court.

5. COUNSEL MUST FILE RECORD EXCERPTS.

The Fifth Circuit has access to the entire original record, but the Court does not usually see it before oral argument. Whatever counsel includes in the Record Excerpts is what the Court will see prior to argument. FRAP 10; 5th Cir. R. 30.1.1.

The Appellant must file with his brief **4 copies** of Record Excerpts which must include the following:

Mandatory Record Excerpts: the docket sheet, the notice of appeal, the judgment and any orders being appealed, the jury's verdict, any relevant magistrate's report and recommendation, the indictment in a criminal case, any supporting opinion or transcript of findings made orally, and a certificate of service of the excerpts to all counsel of record. 5th Cir. R. 30.1.4.

Optional Record Excerpts: Counsel may include up to 40 pages of optional record excerpts. 5th Cir. R. 30.1.5 and 30.1.6. These may include any relevant jury instruction given or refused or anything else from the record that is especially relevant. I use these to place in the Court's hands any critical exhibits, excerpts of testimony or jury answers I want to make sure they see. With permission in specific cases, an electronic version may be filed and served.

The form of the excerpts is governed by 5th Cir. R. 30.1.7. They must be spiral bound with white covers, tabbed and properly cited to the Record.

6. CASES ARE CALENDARED AND JUDGES ASSIGNED IN COMPLETELY SEPARATE PROCEDURES. *See* IOP to FRAP 34.

Court -Year Schedule - The clerk prepares a proposed court schedule for an entire year which is approved by the scheduling proctor and chief judge of the court. The court schedule does not consider what specific cases are to be heard, but only sets the weeks of court in relation to the probable volume of cases and judge power availability for the year.

Panel Selection Procedure - Based on the number of weeks each active judge sits and the number of sittings available from the court's senior judges, and visiting circuit or district judges, the scheduling proctor and clerk create panels of judges for the

sessions of the court for the entire court year. The judges are scheduled to avoid repetitive scheduling of panels composed of the same members.

Separation of Assignment of Judges and Calendaring of Cases - The judge assignments are made available only to the judges for their advance planning of their workload for the forthcoming court year. To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignments to panels and (2) calendaring of cases are carefully separated.

7. ORAL ARGUMENT IS GRANTED IN ONLY ABOUT 20% OF THE COURT'S CASES.

A. Counsel Should Request Oral Argument in Her Brief.

The Recommendation on Oral Argument is a brief should be complete and inform the Court of the real reasons why oral argument should be granted. Factors to consider include the size of the record, the number of parties involved, the complexity of the facts and/or issues, the novelty of the issues, the number of parties. The Fifth Circuit grants oral argument in only about 20% of the cases it decides. Even more challenging, especially to the Appellant, is the fact that it reverses only 8% of its appeals now.

If any party requests oral argument, the request will be granted unless the three-judge Screening Panel unanimously decides that the case does not warrant oral argument. Once either party requests oral argument, the screening panel must also be unanimous as to the outcome of the case and the exact wording of the opinion. In other words, there can be no special concurrence or dissent.[3] If no party requests oral argument, the panel must agree only that the case does not warrant oral argument; in which case, the opinion may include a concurrence or dissent.[4]

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[3] FED. R. APP. P. 34, Internal Operating Procedures; 5TH CIR. R. 34, "The Rule of Triple Unanimity."

[4] Id.

If the parties indicate that oral argument is not necessary, the case is governed by Federal Rule of Appellate Procedure 34(f)[5] pursuant to which the parties may agree that a case is to be submitted on the briefs and will be decided by a screening panel. However, the court may direct that the case be argued.[6] *See* 5th Cir. R. 34.

8. HOW JUDGES PREPARE FOR ORAL ARGUMENT INFORMS COUNSEL'S PREPARATION.

When preparing for oral argument, the judges read the briefs and apply their substantial knowledge of the law to the issues before them. However, the judges do not read the record and therefore will ask a lot of questions. Thus, in preparing for argument, counsel should anticipate and prepare to answer these questions.

All the briefs and record excerpts of the cases scheduled for oral argument are sent to the judges' chambers several weeks prior to argument. The official record is not sent unless a judge requests it. Each active judge has three law clerks. Most judges have one of their clerks prepare a bench memorandum summarizing the facts of the case, and the issues, arguments, and applicable law. The clerks frequently append copies of controlling cases. The judges make notes–including questions–and compile a bench notebook which they again review the night before the argument. Some judges also engage in extensive exchanges with their clerks. Sometimes chambers share bench memos with other chambers.

The judges usually do not talk with each other about pending cases before argument. Each judge comes to the bench independently prepared, often with a tentative opinion about how the case should be decided. The decision to affirm or reverse however, is not made–nor is the writer of the opinion assigned–until the judges' conference immediately following oral argument. The writing judge then has the entire record and the tape of the oral argument shipped to his chambers. This level of preparation should make it obvious that counsel need not waste oral argument time on background information.

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[5] 5TH CIR. R. 34.2.

[6] FED. R. APP. P. 34(f).

9. CASES ARE DECIDED ACCORDING TO SEVERAL DIFFERENT PROCEDURES.

A. After Oral Argument: **Case Conferences and Designation of Writing Judge** - The panel hearing the arguments usually confers on the cases at the conclusion of each day's arguments. A tentative decision is reached and the presiding judge assigns responsibility for opinion writing. There is no pre-argument assignment of opinion writing. Judges do not specialize. Assignments are made to equalize the workload of the entire session.

B. Without oral Argument-Cases are decided according to the procedures outlined for the Augean, Conference and Summary Calendar. Occasionally, however, a case is decided on the oral argument calendar, but the court decides it does not need to hear argument.

10. EXTENSIONS OF TIME ARE NOT AUTOMATIC–EVEN IF AGREED.

Appellant's brief must be filed within 40 days of receipt of the Rule 12 letter from the Court; Appellee's brief is due 33 days after the date of Appellant's certificate of service (but check the date the court shows!), and a reply brief is due 14 days thereafter. FRAP 31; 5th Cir. R. 31.3 and 31.4. 5th Cir. R.31.1 required that 7 copies of the brief be filed along with a disk containing the brief in WordPerfect.

THE RULE IS QUOTED IN FULL:

5th Cir. R. 31.4.1 General Provisions. The court expects briefs to be filed timely and without extensions in the vast majority of cases. No extensions are automatic, even where the request is unopposed. Any requests for extensions should be made sparingly. No extension can be granted without good cause shown as required by Fed. R. App. P. 26(b), or without meeting the additional requirements contained in the 5th Cir. R.

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.

b. As specified in 5th Cir. R. 27.1, the movant must indicate that all other parties have been contacted and whether the motion is opposed. Movants should request only as much time as is absolutely needed. The pendency of a motion for extension does not toll the time for compliance.

31.4.2 Grounds for Extensions. As justification for extensions, generalities, such as that the purpose of the motion is not for delay or that counsel is too busy, are not sufficient. Grounds that may merit consideration for extensions are, without limitation, the following, which must be set forth if claimed as a reason in any motion for an extension beyond 30 days:

a. Engagement of counsel in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth:

1. A description of any effort taken to defer the other litigation and of any ruling thereon;

2. An explanation of why other litigation should receive priority over the case at hand; and

3. Other relevant circumstances, including why other associated counsel cannot prepare the brief or relieve the movant's counsel of the other litigation.

b. The matter is so complex that an adequate brief cannot reasonably be prepared when due.

c. Extreme hardship will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

31.4.3 Levels of Extensions. There are two levels of extensions: a Level 1 extension of 1-30 days from the original due date; and a Level 2 extension of more than 30 days from the original due date.

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 immediately send a confirming letter to the clerk, with copies to all parties.

An opposed request for a Level 1 extension must be made by written motion setting forth why there is good cause. The motion must state the initial due date, whether any other extension has been granted, the length of the requested extension, and which parties have expressed opposition.

31.4.3.2 Level 2 Extensions. The clerk is authorized to act on or refer to the court Level 2 extensions. The request must be made by written motion, with copies to all parties, stating the initial due date, whether any other extension has been granted, the length of the requested extension, and whether the motion is opposed.

More than ordinary good cause is required for a Level 2 extension, and Level 2 extensions will be granted only under the most extraordinary of circumstances. The movant must demonstrate diligence and substantial need and must show in detail what special circumstances exist that make a Level 1 extension insufficient.

31.4.4 Extensions for Reply Briefs. The court greatly disfavors all extensions of time for filing reply briefs. The court assumes that the parties have had ample opportunity to present their arguments in their initial briefs and that extensions for reply briefs only delay submission of the case to the court.

I.O.P. -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.

11. THE CONFERENCE ATTORNEY PROGRAM.

The Court now has five conference attorneys to assist counsel in settling cases or narrowing issues on appeal. FRAP 33; 5th Cir. R. 15.3.5. Cases are selected by the Court, and now, virtually every case is steered into the Conference Attorney program at least for initial contact with counsel. The program has proved extremely helpful, and my personal experience with the program and each of the attorneys has been excellent. Counsel receives information on how the program works upon notice that his case has been referred to it. It is similar to most other court-ordered or approved mediations. The Conference Attorneys do not communicate anything about the case or the discussions to the Court. Counsel can also speak to a conference attorney confidentially and have a case placed in the program if it is not there already.

12. SUMMARY OF IMPORTANT RULE CHANGES EFFECTIVE IN 2003.

A. New Rule 4(a)(5), Fed. R. App. P., allows a showing of either good cause *or* excusable neglect when a motion for extension of time to file a notice of appeal is filed–regardless of whether it is within the original time for filing the notice or within 30 days thereafter. You don't want to be in either position!

B. Rule 4(a)(7) Fed. R. App. P., and Rule 58, Fed. R. Civ. P. have been amended to eliminate the requirement of a separate document for orders denying Rule 50(b), Rule 52(b), Rule 54, Rule 59, Rule 60 motions. Judgment is entered and time for appeal begins to run simply when the judgment or order is entered on the civil docket pursuant to Fed. R. Civ. P. 79(a).

If a separate document is required but the district court does not prepare one, judgment is deemed entered 150 days after the judgment or order was entered on the civil docket.

The appellant also has an absolute right to proceed or appeal without awaiting the formal entry of judgment on a separate document.

WATCH THE DOCKET SHEETS!

C. Fed. R. App. P. 25 Filing and Service. Counsel may now consent in writing to electronic service. The certificate of service in such cases must contain the electronic or facsimile address.

D. Fed. R. App. P. 26 Computing Time and Extending Time.

26(a) Computing Time. The Appellate Rules now correspond to the Civil and Criminal Rules: Intermediate Saturdays, Sundays and legal holidays will not be

counted if the time permitted for acting is less than 11 days, unless the time is stated in "calendar days."

26(a) Additional Time after Service.

Ordinarily, if a paper is delivered on other than the date contained in the certificate of service, the receiving party gets an extra 3 days to respond. If delivery is ON the date of the certificate (such as by hand), no additional time is allowed. When service is by electronic means (even though this is instant), the receiving party always will be entitled to an extra 3 days to respond.

E. Fed. R. App. P. 27 Motions.

A response must be filed within 8 days after service. A reply to a response much be filed within 5 days. All motions require a certificate of conference.

F. Rule 28(j) letters of supplemental authority are limited to 350 words.

G. 5th Cir. Rule 31 Briefs

Briefs must now be filed on a disk in **Adobe PDF** format. Use new Form 6 for the certificate of compliance with the type–volume limits for briefs.

H. Fed. R. App. P. 41 Mandate

Mandate will issue on the 8th calendar day after the time for filing a petition for rehearing expires or after entry of a order denying the petition.

13. OTHER HANDY SOURCES FOR HELP.

There are several other resources that you should know about where you can obtain information helpful in handling a Fifth Circuit appeal. First, the Court's own website is invaluable. It includes everything from contact information to all the Rules, and even sample briefs. See www.ca5.uscourts.gov. (Addenda A-1). Also, my friend Eric Magnuson has posted on his website a **Fifth Circuit Internet Toolbox** which contains links to virtually any site you would need to practice in the

Fifth Circuit. The link is www.riderlaw.com/fifth_circuit.html (Addenda A-2). Lastly, my firm's website at www.federalappeals.com contains some articles and links which we hope you would find helpful.

CONCLUSION

Armed with this information, the author hopes that your next appeal to the Fifth Circuit will be successful.

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