FEDERAL RULES OF APPELLATE PROCEDURE WITH FIFTH CIRCUIT RULES AND INTERNAL OPERATING PROCEDURES

Note: These rules generally apply to all circuits.

**Fifth Circuit Rules and Internal Operating Procedures (IOP)
Effective May 15, 1997, and Federal Rules of Appellate
Procedure Effective December 1, 1996**

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APPENDIX OF FORMS

Form

FEDERAL RULES OF APPELLATE PROCEDURE
(Effective December 1, 1996)

TITLE I. APPLICABILITY OF RULES

FRAP 1. SCOPE OF RULES AND TITLE

(a) ***Scope of Rules.*** These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

(b) ***Rules Not to Affect Jurisdiction*****.** These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

(c) ***Title*****.** These rules may be known and cited as the Federal Rules of Appellate Procedure.

FRAP 2. SUSPENSION OF RULES

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

FRAP 3. APPEAL AS OF RIGHT--HOW TAKEN

(a) ***Filing the Notice of Appeal*****.** An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) ***Joint or Consolidated Appeals*****.** If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) ***Content of the Notice of Appeal.*** A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the

notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(d) ***Serving the Notice of Appeal*****.** The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

(e) ***Payment of Fees*****.** Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

FIFTH CIRCUIT RULE 3

Filing Fee; Appeals. *When the notice of appeal is filed, counsel must pay to the district court clerk, pursuant to Fed. R. App. P. 3(e), the court of appeals docketing fee required by 28 U.S.C. § 1913. Upon receipt of a duplicate copy of a notice of appeal, the clerk of the Fifth Circuit will transmit to counsel a notice advising of other requirements of the rule. No additional fees are thereafter required. Failure to pay the docketing fee does not prevent the appeal from being docketed, but is grounds for dismissal of the appeal by the clerk under the authority of 5th Cir. R. 42.*

FRAP 3.1. APPEAL FROM A JUDGMENT ENTERED BY A MAGISTRATE JUDGE IN A CIVIL CASE

When the parties consent to a trial before a magistrate judge under 28 U.S.C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U.S.C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only, to the court of appeals, in accordance with 28 U.S.C. § 636(c)(4). An appeal under 28 U.S.C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.

FRAP 4. APPEAL AS OF RIGHT--WHEN TAKEN

a) ***Appeal in a Civil Case.***

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) ***Appeal in a Criminal Case.*** In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for arrest of judgment;

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may--before or after the time has expired, with or without motion and notice--extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) ***Appeal by an Inmate Confined in an Institution*****.** If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party

to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

FRAP 5. APPEAL BY PERMISSION UNDER 28 U.S.C. § 1292(b)

(a) ***Petition for Permission to Appeal.*** An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

(b) ***Content of Petition; Answer.*** The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

(c) ***Form of Papers; Number of Copies.*** All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

(d) ***Grant of Permission; Cost Bond; Filing of Record.*** Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.

FRAP 5.1. APPEAL BY PERMISSION UNDER 28 U.S.C. § 636(c)(5)

(a) ***Petition for Leave to Appeal; Answer or Cross Petition.*** An appeal from a district court judgment, entered after an appeal under 28 U.S.C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

(b) ***Content of Petition; Answer.*** The petition for leave to appeal shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a

copy of the order, decree or judgment complained of and any opinion or memorandum relating thereto. The petition and answer shall be submitted to a panel of judges of the court of appeals without oral argument unless otherwise ordered.

(c) ***Form of Papers; Number of Copies.*** All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

(d) ***Allowance of the Appeal; Fees; Cost Bond; Filing of Record.*** Within 10 days after the entry of an order granting the appeal, the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice, the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b).

FRAP 6. APPEAL IN A BANKRUPTCY CASE FROM A FINAL JUDGMENT, ORDER OR DECREE OF A DISTRICT COURT OR OF A BANKRUPTCY APPELLATE PANEL

(a) ***Appeal From a Judgment, Order or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.*** An appeal to a court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U.S.C. § 1334 shall be taken in identical fashion as appeals from other judgments, orders or decrees of district courts in civil actions.

(b) ***Appeal From a Judgment, Order or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.***

(1) *Applicability of Other Rules.* All provisions of these rules are applicable to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b), except that:

(i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) are not applicable;

(ii) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" shall be read as a reference to Form 5; and

(iii) when the appeal is from a bankruptcy appellate panel, the term "district court" as used in any applicable rule, means "appellate panel".

(2) *Additional Rules.* In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U.S.C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a) or (b):

(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in

compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.

(ii) The Record on Appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, the appellee shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.

(iii) Transmission of the Record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the redesignated record, subject to the right of any party to request at any time during the pendency of the appeal that the redesignated record be transmitted.

(iv) Filing of the Record. Upon receipt of the record, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed. Upon receipt of a certified copy of the docket entries transmitted in lieu of the redesignated record pursuant to rule or order, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

FRAP 7. BOND FOR COSTS ON APPEAL IN CIVIL CASES

The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

FRAP 8. STAY OR INJUNCTION PENDING APPEAL

(a) ***Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.*** Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its

action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

(b) ***Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties.*** Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. A surety's liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

(c) ***Stay in a Criminal Case.*** A stay in a criminal case shall be had in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure.

FIFTH CIRCUIT RULE 8

Applications for Immediate Stay of Execution of a State Court Judgment and Appeals in Matters in Which the District Court Has Either Entered or Refused To Enter a Stay

8.1 Documents Required. *The appellant shall file 4 copies of the motion for stay and attach, to each, legible copies of the documents listed in a-h below. If the appellant asserts that time does not permit the filing of a written motion, appellant shall deliver to the clerk 4 legible copies of each of the listed documents as soon as possible. If any listed document cannot be attached or delivered, a statement of the reason for the omission shall be substituted. The documents required are:*

(a) The complaint or petition to the district court;

(b) Each brief or memorandum of authorities filed by both parties in the district court;

(c) The opinion giving the reasons advanced by the district court for denying relief;

(d) The district court judgment denying relief;

(e) The application to the district court for a stay;

(f) The district court order granting or denying a stay, and the statement of reasons for its action;

(g) The certificate of appealability or, if there is none, the order denying a certificate of appealability;

(h) A copy of each state or federal court opinion or judgment involving any issue presented to this court or, if the ruling was not made in a written opinion or judgment, a copy of the relevant portions of the transcript.

8.1.1 If the state has indicated to the petitioner that it does not seek to oppose the stay immediately, and the petitioner states this fact in the petition, these documents need not be filed with the application but shall be filed within 10 days after the application is filed.

8.1.2 If an issue is raised that either was not raised before the district court or has not been exhausted in state court, the applicant shall state the reasons why such prior action was not taken and why a stay should nonetheless be granted.

***8.2 Special Docket** A special docket shall be maintained in accordance with the procedure stated in this rule, for all appeals in matters in which the district court has either entered or been requested to enter a stay and for all applications for a stay of the execution of a state court judgment.*

***8.3 Motions To Vacate Stays.** If a stay of execution of a state court judgment or order has been entered by the district court, the party who seeks to have the stay vacated will attach to the motion 4 copies of each of the documents required by 5th Cir. R. 8.1.*

***8.4 Emergency Motions.** Counsel having emergency motions or applications, whether addressed to the court or to an individual judge, shall ordinarily file such petitions with the clerk rather than with an individual judge. If time does not permit the filing of a motion or application in person, by mail, or by fax, counsel may communicate with the clerk by telephone and thereafter shall file the motion with the clerk in writing as promptly as possible. The motion, application, or oral communication shall contain a brief account of the prior actions of this or any other court or judge to which the motion or application, or a substantially similar or related petition for relief, has been submitted.*

***8.5 Merits.** The parties shall address the merits of each issue presented by an application. The panel may allow such additional time, if any, as may be necessary to afford the parties adequate opportunity to do so.*

***8.6 Consideration of Merits.** If a certificate of appealability has been granted, the panel to which a motion for a stay of a state court judgment is assigned shall, before denying a stay, consider and expressly rule on the merits of the appeal, unless the panel rules that the appeal is frivolous and entirely without merit.*

***8.7 Vacating Stays.** The panel to which an appeal has been assigned shall consider the merits before vacating a stay of execution, unless the panel rules that the appeal is frivolous and entirely without merit.*

***8.8 Mandate.** The panel may order that the mandate of the court issue instantly or after such time as it may fix.*

***8.9 Stays of Execution Following Decision.** A stay to permit the filing and consideration of a petition for a writ of certiorari will not ordinarily be granted. The court shall determine whether there is a reasonable probability that 4 members of the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari and whether there is a substantial possibility of reversal of its decision, in addition to a likelihood that irreparable harm will result if its decision is not stayed.*

***8.10 Habeas Petitions in Death Penalty Cases.** Counsel for a habeas petitioner under a sentence of death who wish to appeal an adverse judgment rendered by the district court on a first application for writ of habeas corpus, or who seek permission to file a successive petition, shall exercise reasonable diligence in moving for a certificate of appealability or for permission to file a second or successive habeas petition, and a stay of execution with the clerk of this court at least 5 days (exclusive of Saturdays, Sundays and holidays) before the*

scheduled execution. Counsel who seek a certificate of appealability or permission to file a successive petition less than 5 days before the scheduled execution shall 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.

If the state intends to ask this court to vacate an order of the district court 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 counsel for the state in seeking such relief in this court will subject counsel to sanctions.

FRAP 9. RELEASE IN A CRIMINAL CASE

(a) ***Appeal from an Order Regarding Release Before Judgment of Conviction*****.** The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(b) ***Review of an Order Regarding Release After Judgment of Conviction*****.** A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.

(c) ***Criteria for Release*****.** The decision regarding release must be made in accordance with applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

FIFTH CIRCUIT RULE 9

9.1 Release Pending Trial. *Upon receipt of 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 advice of counsel that a notice of appeal has been or will be filed, the clerk's office will advise counsel by telephone of the requirements of this rule.*

A memorandum in 4 copies must be filed within 7 days of the filing of the notice of appeal, setting forth with particularity the nature and circumstances of the offense charged and why the order respecting release is not supported by the proceedings in the district court.

9.2 Release Pending Appeal. *The original and 3 copies of an application for release pending appeal from a judgment of conviction (Fed. R. App. P. 9(b)) shall be filed with the clerk of this court.*

(a) The application for release shall contain:

(1) The name of the appellant;

(2) The district court docket number of the case;

(3) The offense of which appellant was convicted; and,

(4) The date and terms of sentence.

(b) The application shall also contain, appropriate to the district court's reasons for denying release or imposing conditions of release pending appeal:

(1) The legal basis for the contention that appellant is not likely to flee or pose a danger to the safety of any other person or the community;

(2) An explanation why the district court's findings with respect to release pending appeal are clearly erroneous;

(3) Issues to be raised on appeal that contain substantial questions of law or fact likely to result in reversal or an order for a new trial on all counts of the indictment on which incarceration has been imposed, with pertinent legal argument establishing that the questions are substantial.

9.3 Documents To Be Appended. *A copy of the district court's order respecting release pending trial or appeal, containing the written reasons for its ruling, shall be appended to the memorandum to be filed under 9.1 or the application under 9.2 of this rule.*

(a) If the appellant questions the factual basis of the order, a transcript of the proceedings had on the motion for release made in the district court shall be lodged with this court. If the transcript is not lodged with the memorandum or application, the appellant shall attach thereto a certificate of the court reporter verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the estimated date of completion of the transcript.

(b) If the appellant is unable to obtain a transcript of the proceedings, the appellant shall state in an affidavit the reasons why a transcript has not been obtained.

9.4 Service. *A copy of the memorandum under 9.1 or application under 9.2 of this rule shall be hand-delivered to government counsel or served by other expeditious method.*

9.5 Response. *Within 7 days after service thereof, the government shall file a written response to all requests for release.*

FRAP 10. THE RECORD ON APPEAL

(a) ***Composition of the Record on Appeal.*** The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.

(b) ***The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.***

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) ***Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript Is Unavailable.*** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) ***Agreed Statement as the Record on Appeal.*** In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

(e) ***Correction or Modification of the Record.*** If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified

and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

FIFTH CIRCUIT RULE 10

10.1 Ordering the Transcript - Duty of Appellant. *Appellant's order for the transcript of proceedings, or parts thereof, contemplated by Fed. R. App. P. 10(b), shall be on a form prescribed by the clerk, and a copy of such order form shall be furnished by counsel to the clerk and to the other parties set out in Fed. R. App. P. 10(b). If no transcript is to be ordered, appellant shall file with the clerk a copy of the certificate to that effect that counsel served on the parties under Fed. R. App. P. 10(b).*

10.2 Form of Record. *The record on appeal shall be bound in a manner that will facilitate reading, with pages numbered consecutively by the clerk of the district court.*

I.O.P. - The district court will furnish a purchase order form, as required by this court, when the notice of appeal is filed. Once the purchase order has been completed and forwarded to the reporter, with adequate financial arrangements made, counsel's responsibility under Fed. R. App. P. 10 and 11 will have been fulfilled.

FRAP 11. TRANSMISSION OF THE RECORD

(a) ***Duty of Appellant.*** After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(b) ***Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record.*** Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that the reporter has received it and the date on which the reporter expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that the reporter has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(c) ***Temporary Retention of Record in District Court for Use in Preparing Appellate Papers*****.** Notwithstanding the provisions of (a) and (b) of this Rule 11, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in

preparing appellate papers. In that event the clerk of the district court shall certify to the clerk of the court of appeals that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(d) ***Extension of Time for Transmission of the Record; Reduction of Time [Abrogated].***

(e) ***Retention of the Record in the District Court by Order of Court.*** The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

(f) ***Stipulation of Parties That Parts of the Record Be Retained in the District Court.*** The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) ***Record for Preliminary Hearing in the Court of Appeals.*** If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

FIFTH CIRCUIT RULE 11

11.1 Duties of Court Reporters - Extensions of Time. *The court reporter shall, in all cases in which transcripts are ordered, furnish the following information, on a form to be prescribed by the clerk of this court:*

(a) Acknowledge receipt of the order for the transcript,

(b) The date of receipt of the order for the transcript,

(c) Whether adequate financial arrangements under CJA, or otherwise, have been made,

(d) The number of trial or hearing days involved in the transcript, and an estimate of the number of pages,

(e) The estimated date on which the transcript is to be completed, and

(f) A certificate that he or she expects to file the trial transcript with the district court clerk within the time estimated.

A request by a court reporter for enlargement of the time for filing the transcript beyond the 30 day period fixed by Fed. R. App. P. 11(b) shall be filed with the clerk and shall specify in detail:

(a) The amount of work that has been accomplished on the transcript;

(b) A list of all outstanding transcripts due to this and other courts, including the due dates of filing; and,

(c) Verification that the request has been brought to the attention of, and approved by, the district judge who tried the case.

11.2 Duty of the Clerk. *It is the responsibility of the clerk of the district court to determine when the record on appeal is complete for purposes of the appeal. Unless the record on appeal can be transmitted to this court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of trial proceedings if one has been ordered, whichever is later, the clerk of the district court shall advise the clerk of this court of the reasons for delay and request an enlarged date for the filing thereof. The clerk of this court may grant an enlargement for the filing of the record for a period not to exceed 45 days. Enlargements beyond 45 days will be referred to a single judge for decision.*

I.O.P. - The monitoring of all outstanding transcripts, and the problems of delay in filing, will be done by the clerk. Counsel will be kept informed when extensions of time are allowed on requests made by the court reporters.

On October 11, 1982, the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the district court. The plan is to provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions, and delivery schedules. The plan must also provide that supervision be exercised by a judge of the court, the clerk of court, or some other person designated by the court.

FRAP 12. DOCKETING THE APPEAL; FILING A EPRESENTATION STATEMENT; FILING THE RECORD

(a) ***Docketing the Appeal.*** Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

(b) ***Filing a Representation Statement.*** Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney.

(c) ***Filing the Record, Partial Record, or Certificate.*** Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

FIFTH CIRCUIT RULE 12

Representation Statement. *The "representation statement" required by Fed. R. App. P. 12(b) is satisfied by counsel completing this court's "Notice of Appearance Form" and returning it to the clerk within 30 days of filing the notice of appeal.*

TITLE III. REVIEW OF DECISIONS OF THE UNITED STATES TAX COURT

FRAP 13. REVIEW OF A DECISION OF THE TAX COURT

(a) ***How Obtained; Time for Filing Notice of Appeal.*** Review of a decision of the United States Tax Court must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the Tax Court's decision.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later.

(b) ***Notice of Appeal--How Filed.*** The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.

(c) ***Content of the Notice of Appeal; Service of the Notice; Effect of Filing and Service of the Notice.*** The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.

(d) ***The Record on Appeal; Transmission of the Record; Filing of the Record.*** The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.

FRAP 14. APPLICABILITY OF OTHER RULES TO REVIEW OF DECISIONS OF THE TAX COURT

All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

FRAP 15. REVIEW OR ENFORCEMENT OF AN AGENCY ORDER--HOW OBTAINED; INTERVENTION

(a) ***Petition for Review of Order; Joint Petition.*** Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" will include agency, board, commission, or officer) must be obtained by filing with the clerk of a court of appeals that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency must be named respondent. The United States will also be a respondent if required by statute, even though not designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) ***Application for Enforcement of Order; Answer; Default; Cross-Application for Enforcement.*** An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(c) ***Service of Petition or Application.*** A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(d) ***Intervention.*** Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene

or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

(e) ***Payment of Fees.*** When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.

FIFTH CIRCUIT RULE 15

15.1 Docketing Fee - Agency Review Proceedings. *Parties proceeding under Fed. R. App. P. 15 shall pay to the clerk the filing fee at the time of filing the petition for review.*

15.2 Proceedings for Enforcement of Orders of the National Labor Relations Board. *In enforcement proceedings by the National Labor Relations Board under Fed. R. App. P. 15(b), the respondent shall be considered the petitioner, and the board considered the respondent, for the purposes of briefing and oral argument, unless otherwise ordered by the court.*

15.3 Proceedings for Review of Orders of the Federal Energy Regulatory Commission.

15.3.1 Petition for Review. Every petition for review shall specify as a part of its caption the number, date, and identification of the order to be reviewed and append the service list required by Fed. R. App. P. 15(c). Counsel filing the petition shall append thereto a certificate that the order sought to be reviewed has been posted, filed, or entered by the commission.

15.3.2 Docketing. All petitions for review and other documents concerning commission orders in the same number series (i.e., 699, 699A, 699B) shall be assigned to the same docket in this court.

15.3.3 Intervention.

(a) Party. A party to a commission proceeding may intervene in a review of the same proceeding in this court by filing a notice of intervention in the docket assigned to the petition for review of any order entered in such proceeding. The notice shall state whether the intervenor is a petitioner who objects to the order or a respondent who supports the order. A notice of intervention shall confer petitioner or respondent status on the intervening party as to all proceedings in the docket.

(b) Nonparty. A person who is not a party to a commission proceeding who desires to intervene in a review of that proceeding in this court shall file with the clerk, and serve upon all parties to the proceeding, a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party, the grounds upon which intervention is sought, and a statement why the interest asserted is not adequately protected by existing parties. Any opposition to a motion shall be filed within 10 days of service.

15.3.4 Docketing Statement. Within 30 days of the filing of the initial petition for review, but not later than 10 days after the expiration of the period permitted for filing a petition for review, all parties filing petitions for review shall file a joint docketing statement which shall:

(a) List each issue to be raised in the review,

(b) List any other review proceeding pending as to the same order in any other court, and

(c) Append copies of the order to be reviewed.

Every petitioner who files for review after a docketing statement has been filed shall specify in the petition for review any exceptions taken or additions to the issues listed in the docketing statement. Every party who intervenes after a docketing statement has been filed shall specify in the notice of intervention any exceptions taken to the issues listed in the docketing statement.

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

(a) Simplify and define issues,

(b) Agree on an appendix and record,

(c) Assign joint briefing responsibilities and schedule briefs, and

(d) Resolve such other matters as may aid in the disposition of the proceeding.

Except for good cause shown, any party who petitions for review or intervenes in a docket after prehearing conference has been held will be bound by the result of the prehearing conference.

15.3.6 Severance. Any petitioner or respondent may move to sever parties or issues on a showing of prejudice.

I.O.P. - Because these proceedings often involve multiple parties before the commission and on appeal, the court has adopted special procedures for the purpose of (a) simplifying and defining issues, (b) agreeing on an appendix and record, (c) assigning joint briefing responsibilities and scheduling briefs, and (d) determining such other matters as may aid in the disposition of the proceeding.

15.4 Proceedings for Review of Orders of the Benefits Review Board. *In petitions filed by either the claimant or the employer under 33 U.S.C. § 921 to review orders of the Benefits Review Board, the Office of Workers Compensation of the United States Department of Labor, the nominal respondent shall be aligned with the claimant for the purposes of briefing and oral argument, unless otherwise ordered by the court. Within 30 days of the filing of the petition for review of the board's decision, the petitioner shall file a statement of the issues to e presented on appeal and serve same on the director and counsel for all parties so that the appropriate alignment can be made.*

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 days prior to the due date of the brief of the party supported by the intervenor.*

FRAP 15.1. BRIEFS AND ORAL ARGUMENT IN NATIONAL LABOR RELATIONS BOARD PROCEEDINGS

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

FRAP 16. THE RECORD ON REVIEW OR ENFORCEMENT

(a) ***Composition of the Record.*** The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

(b) ***Omissions From or Misstatements in the Record.*** If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

FRAP 17. FILING OF THE RECORD

(a) ***Agency to File; Time for Filing; Notice of Filing.*** The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

(b) ***Filing--What Constitutes.*** The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

FIFTH CIRCUIT RULE 17

Filing of the Record. *If the agency fails to file the record within 40 days, it must request an enlargement of time and provide specific reasons justifying the delay. The clerk may grant such a request for a time not to exceed 30 days. Thereafter, the court may order production of the record.*

FRAP 18. STAY PENDING REVIEW

Application for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial,

or that the action of the agency did not afford the relief which the applicant had requested. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

FRAP 19. SETTLEMENT OF JUDGMENTS ENFORCING ORDERS

When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of any agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

FRAP 20. APPLICABILITY OF OTHER RULES TO REVIEW OR ENFORCEMENT OF AGENCY ORDERS

All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3-14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

TITLE V. EXTRAORDINARY WRITS

FRAP 21. WRITS OF MANDAMUS AND PROHIBITION, AND OTHER EXTRAORDINARY WRITS

(a) ***Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing*****.**

(1) A party petitioning for a writ of mandamus or prohibition directed to a court shall file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party shall also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2) (A) The petition shall be titled "In re [name of petitioner]."

(B) The petition shall state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issues presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition shall include copies of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) ***Denial; Order Directing Answer; Briefs; Precedence.***

(1) The court may deny the petition without an answer. Otherwise, it shall order the respondent, if any, to answer within a fixed time.

(2) The clerk shall serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may request permission to respond but may not respond unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk shall advise the parties, and when appropriate, the trial court judge or amicus curiae.

(6) The proceeding shall be given preference over ordinary civil cases.

(7) The circuit clerk shall send a copy of the final disposition to the trial court judge.

(c) ***Other Extraordinary Writs.*** Application for an extraordinary writ other than one of those provided for in subdivisions (a) and (b) of this rule shall be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) ***Form of Papers; Number of Copies.*** All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

FIFTH CIRCUIT RULE 21

Petition for Writ. *The petition shall contain a certificate of interested persons as described in 5th Cir. R. 28.2.1.*

In addition to the items required by Fed. R. App. P. 21, the application shall be accompanied by a copy of any memorandum or brief filed in the district court in support of the application to that court for relief and any

memoranda or briefs filed in opposition thereto as well as a statement by petitioner of any oral reasons assigned by the district judge for the action complained of.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

FRAP 22. HABEAS CORPUS AND SECTION 2255 PROCEEDINGS

(a) ***Application for the Original Writ.*** An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

(b) ***Certificate of Appealability*****.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of appealability is not required. (Effective 4/96)

FIFTH CIRCUIT RULE 22

Applications for Certificates of Appealability. *Applications for certificates of appealability and responses thereto shall conform to the length limitations of 5th Cir. R. 32.*

I.O.P. - See 5th Cir. R. 27.4.

FRAP 23. CUSTODY OF PRISONERS IN HABEAS CORPUS PROCEEDINGS

(a) ***Transfer of Custody Pending Review.*** Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge

rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) ***Detention or Release of Prisoner Pending Review of Decision Failing to Release.*** Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon the prisoner's recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) ***Release of Prisoner Pending Review of Decision Ordering Release.*** Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(d) ***Modification of Initial Order Respecting Custody.*** An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

I.O.P. - See 5th Cir. R. 9.2 for procedures governing application for bail.

FRAP 24. PROCEEDINGS IN FORMA PAUPERIS

(a) ***Leave to Proceed on Appeal In Forma Pauperis From District Court to Court of Appeals.*** A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

(b) ***Leave to Proceed on Appeal or Review In Forma Pauperis in Administrative Agency Proceedings.*** A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.

(c) ***Form of Briefs, Appendices and Other Papers.*** Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

TITLE VII. GENERAL PROVISIONS

FRAP 25. FILING, PROOF OF FILING, SERVICE, AND PROOF OF SERVICE

(a) ***Filing.***

(1) *Filing with the Clerk*. A paper required or permitted to be filed in a court of appeals shall be filed with the clerk.

(2) *Filing: Method and Timeliness*.

(A) *In General*. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) *A Brief or Appendix*. A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier.

(C) *Inmate Filing*. A paper filed by an inmate confined in an institution is timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of a paper by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

(D) *Electronic Filing*. A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) *Filing a Motion with a Judge*. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge shall note the filing date on the motion and give it to the clerk.

(4) *Clerk's Refusal of Documents*. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

(b) ***Service of All Papers Required.*** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) ***Manner of Service.*** Service may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party shall be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

(d) ***Proof of Service; Filing*.** A paper presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the name of the person served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service shall also state the date and manner by which the document was mailed or dispatched to the clerk.

(e) ***Number of Copies*.** Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

FIFTH CIRCUIT RULE 25

Facsimile Filing. *The clerk of court is authorized to accept, for filing, papers transmitted by facsimile equipment in situations the clerk determines are of an emergency nature or that present other compelling circumstances.*

I.O.P. - Limits on recovery of mailing or commercial carrier delivery costs. See 5th Cir. R. 39.2.

FRAP 26. COMPUTATION AND EXTENSION OF TIME

(a) ***Computation of Time*.** In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

(b) ***Enlargement of Time.*** The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

(c) ***Additional Time after Service*****.** When a party is required or permitted to act within a prescribed period after service of a paper upon that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

FIFTH CIRCUIT RULE 26

26.1 ***Computing Time****. Except for briefs and appendices, all other papers, including petitions for rehearing, shall not be timely unless they are actually received by the clerk within the time fixed for filing. Briefs and appendices shall be deemed filed on the day dispatched to the clerk 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, or after delivery to a commercial carrier for delivery within 3 calendar days as 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, suggestions for rehearing en banc under Fed. R. App. P. 35, and bills of costs under Fed. R. App. P. 39.*

26.2 Extensions of Time. *The court's policy requires the timely filing of all papers within the period of time allowed by the rules, without granting extensions of time, except for good cause shown. Failure to process appeals timely will cause their dismissal for want of prosecution, without further notice, under the provisions of 5th Cir. R. 42. If the right to file a reply brief is waived, parties or counsel should immediately notify the clerk to expedite submission of the case to the court.*

FRAP 26.1. CORPORATE DISCLOSURE STATEMENT

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

FRAP 27. MOTIONS

(a) ***Content of Motions; Response*****.** Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served

and filed with the motion. Any party may file a response in opposition to a motion other than one for procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) ***Determination of Motions for Procedural Orders.*** Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.

(c) ***Power of a Single Judge to Entertain Motions.*** In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) ***Form of Papers; Number of Copies.*** All papers relating to a motion may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

FIFTH CIRCUIT RULE 27

27.1 Clerk May Rule on Certain Motions. *The clerk is vested with discretion in accordance with the standards set forth in the applicable rules, and subject to review by the court, to grant, deny, or take other appropriate action for the court on the following unopposed procedural motions:*

27.1.1 To extend the time for filing designations as to printing under Fed. R. App. P. 30; and to extend the time for filing briefs, answers, objections, or replies to pending motions, in any cases not yet assigned or under submission, for no more than 60 days. Any further enlargements must be granted by the court;

27.1.2 To transmit records to the Supreme Court for use in connection with petitions for writs of certiorari;

27.1.3 To withdraw appearances;

27.1.4 To make corrections in briefs or pleadings filed in this court at the request of counsel;

27.1.5 To grant leave to file briefs in preliminary typewritten form with privilege of later substitution of printed copies;

27.1.6 To extend time for filing petitions for rehearing and suggestions for rehearing en banc for not longer than 7 days;

27.1.7 To stay further proceedings in appeals, upon notice to the chief judge or such member of the court as may be designated;

27.1.8 To supplement or correct records;

27.1.9 To consolidate appeals;

27.1.10 To incorporate records or briefs on former appeals;

27.1.11 To grant leave to file further reply or supplemental briefs in addition to the single reply brief permitted by Fed. R. App. P. 28(c), either in typewritten or printed form, prior to submission to the court;

27.1.12 To stay the issuance of mandates pending certiorari in civil cases only not to exceed a period of 30 days and provided the court has not specially ordered the mandate issued earlier;

27.1.13 For leave to file an amicus curiae brief under Fed. R. App. P. 29 (see 5th Cir. R. 29.4);

27.1.14 To reinstate appeals dismissed by the clerk;

27.1.15 To enter and issue without special submission consent decrees in labor board and other government agency review cases;

27.1.16 To enter CJA Form 20 orders continuing trial court appointment of counsel on appeal for purposes of compensation;

27.1.17 To enlarge the time for filing applications under the Equal Access to Justice Act;

27.1.18 To enlarge the number of pages of optional contents in record excerpts;

27.1.19 To act on requests to extend the time for filing briefs as permitted by 5th Cir. R. 31.4;

27.1.20 To extend the time for filing bills of costs.

27.2 Single Judge May Rule on Certain Motions. *Pursuant to Fed. R. App. P. 27(c), any single judge of this court is authorized, in the judge's discretion and subject to review by the court, to take appropriate action for the court regarding the following procedural motions:*

27.2.1 Where opposed, the motions that are subject to action by the clerk under paragraph 27.1, supra;

27.2.2 To permit interventions in agency proceedings pursuant to Fed. R. App. P. 15(d);

27.2.3 For certificates of appealability under Fed. R. App. P. 22(b) and 28 U.S.C. § 2253;

27.2.4 To appeal in forma pauperis, see Fed. R. App. P. 24 and 28 U.S.C. § 1915;

27.2.5 To appoint counsel for indigent persons appealing from judgments of conviction or from the denial of writs of habeas corpus or petitions filed under 28 U.S.C. § 2255; or to permit court-appointed counsel to withdraw;

27.2.6 For leave to extend the length of briefs under 5th Cir. R. 32, of petitions for rehearing under 5th Cir. R. 40.3, and of suggestions for rehearing en banc under 5th Cir. R. 35.5;

27.2.7 To enlarge for good cause shown the times prescribed by the Federal Rules of Appellate Procedure or by the rules of this court supplementing those rules except as to the limitation on the power of the court to enlarge the time for initiating an appeal, see Fed. R. App. P. 26(b);

27.2.8 To substitute parties under Fed. R. App. P. 43;

27.2.9 To exercise the power granted in Fed. R. App. P. 8 and 9, with respect to stays or injunctions or releases in criminal cases pending appeal, and subject to the restrictions set out therein; and under Fed. R. App. P. 18, respecting stays pending review of decisions or orders or agencies, subject also to the restrictions on the power of a single judge contained therein;

27.2.10 To stay the issuance of mandates or to recall same pending certiorari;

27.2.11 To expedite appeals;

27.2.12 To extend the time for filing briefs as provided in 5th Cir. R. 31.4.

27.3 Motions Shall Not Be Argued. *Unless otherwise ordered by the court, no motion shall be orally argued.*

27.4 Emergency Motions. *Counsel having emergency motions or applications, whether addressed to the court or to an individual judge, ordinarily shall file such petitions with the clerk rather than with an individual judge. In matters where time does not permit the filing of a motion or application in person, by mail, or by fax, contact with the clerk may be made by telephone, and thereafter counsel shall file the motion in writing with the clerk as promptly as possible. The motion, application, or contact shall contain a brief account of the prior actions of this or any other court or judge to which the motion or application, or a substantially similar or related petition for relief, has been submitted.*

27.5 Form of Motions. *In addition to the requirements of Fed. R. App. P. 27, all motions except purely procedural motions shall include a certificate of interested persons as described in 5th Cir. R. 28.2.1. Motions shall be on 8½ x 11 inch paper. On motions considered by a single judge or by the clerk, only an original and 1 copy need be filed. All motions requiring panel action require an original and 3 copies.*

27.6 Acknowledgment. *Except for procedural motions, the clerk will notify counsel that a motion has been received and filed. This notice will fix the time period for filing any response and inform counsel of the approximate date when the motion must be submitted to the court. Requests for extensions of time are handled ex parte by the clerk.*

27.7 Motion To Expedite Appeal. *Motions for this relief should be presented in the same manner as other motions. An appeal may be expedited only by the court and for good cause shown. If an appeal is ordered expedited, the clerk will fix a briefing schedule that will permit the appeal to be set for oral argument at an early date, unless an earlier hearing date is directed by a judge. The clerk will usually have some idea of the approximate date of the hearing and will so advise counsel when the order is issued.*

I.O.P. - Motions Panels - Motions panels are drawn by lot from the active judges. These motions panels also operate as screening panels hereafter discussed under 5th Cir. R. 34. Composition of motions panels is changed at the beginning of each court year in July to permit the judges to sit with other judges in screening and handling administrative motions.

Distribution

To Judges - Motions requiring consideration by the judges are assigned in rotation to all active judges on a routing log.

The clerk assembles a complete set of the motion papers, including the record and any briefs on file, and submits them with a routing form to the initiating judge. In single judge matters the initiating judge acts on the motion and returns it to the clerk with an appropriate order. For those motions requiring panel action, a single

set of papers is still prepared, but the initiating judge transmits the file to the next judge with a recommendation. The second judge in turn sends it on to the third judge. The latter judge returns the file and an appropriate order to the clerk.

Emergency Motions - The clerk will immediately assign the matter to the next judge in rotation on the administrative-interim routing log and to the panel members. If the matter requires that counsel contact the initiating judge or panel members personally, the clerk will advise the name of the initiating judge and the panel members to whom the case is assigned, after first getting approval from the initiating judge.

The motion papers are distributed as described above, except that a complete set of the papers is forwarded to all members of the panel.

Motions After Assignment to Calendar - After cases are assigned to the oral argument calendar, motions in these cases are circulated to the hearing panel rather than to the standard motions panels. The senior active judge on the panel is considered to be the initiating judge. Until the identity of the panel is made public (see I.O.P. following 5th Cir. R. 34), the clerk will enter an order responding to the motion on behalf of the panel.

Post-Decision Motions

Extension of Time To File Petition for Rehearing or Leave To File Out of Time - The clerk may grant a timely motion for an extension of time to file a petition for rehearing or suggestion for rehearing en banc for a period not longer than 7 days. Any motions for additional time beyond 7 days, or to file out of time, are referred to the judge who authored the opinion, unless the writing judge is a visiting judge, in which event the matter is referred to the senior active judge on the panel. If the senior active judge dissented, the matter is referred to the other active judge on the panel.

Stay or Recall of Mandate - A motion for stay or recall of mandate pending action on a petition for writ of certiorari is decided by a single judge or the clerk, as appropriate, and is routed and disposed of in the same manner as in the preceding paragraph. (See 5th Cir. R. 27.1.12, 27.2.10, and 41).

Motion To Amend, Correct, or Settle the Judgment - These motions are referred to the writing judge with copies to the panel members.

Remand from Supreme Court of the United States - Remands from the Supreme Court of the United States are referred to the original panel for disposition when the Supreme Court's judgment is received, without the necessity of counsel filing a formal motion.

FRAP 28. BRIEFS

(a) ***Appellant's Brief.*** The brief of the appellant must contain, under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for

jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis.

(3) A statement of the issues presented for review.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

(6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

(7) A short conclusion stating the precise relief sought.

(b) ***Appellee's Brief.*** The brief of the appellee must conform to the requirements of paragraphs (a)(1)-(6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the standard of review.

(c) ***Reply Brief.*** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the reply brief where they are cited.

(d) ***References in Briefs to Parties.*** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(e) ***References in Briefs to the Record.*** References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the

references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) ***Reproduction of Statutes, Rules, Regulations, etc.*** If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) ***Length of Briefs*****.** Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

(h) ***Briefs in Cases Involving Cross Appeals*****.** If a cross appeal is filed, the party who first files a notice of appeal, or in the event that the notices are filed on the same day, the plaintiff in the proceeding below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(6) of this rule with respect to the appellee's cross appeal as well as respond to the brief of the appellant except that a statement of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(i) ***Briefs in Cases Involving Multiple Appellants or Appellees*****.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) ***Citation of Supplemental Authorities.*** When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

FIFTH CIRCUIT RULE 28

28.1 Briefs - Technical Requirements. *The technical requirements for permissible typefaces, paper size, line spacing, and length of briefs are found in Fed. R. App. P. 32 and 5th Cir. R. 32.*

28.2 Briefs - Contents.

28.2.1 Certificate of Interested Persons. A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the first page of each brief before the table of contents or index, and which shall certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each such certificate shall also list the names of opposing law firms and/or counsel in the case.

(a) Each such certificate of counsel shall list all persons known to counsel to be so interested, on all sides of the case, whether represented by counsel furnishing the certificate or not. The burden is on counsel to ascertain and certify the true facts to the court.

(b) The certificate shall be in the following form:

(1) Number and Style of Case.

(2) The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

(Here list names of all such persons and identify their connection and interest.)

_____
Attorney of record for_____

28.2.2 Summary of Argument. In addition to the requirements of Fed. R. App. P. 28, the opening briefs of the parties shall contain a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed 2 and never 5 pages.

28.2.3 Record References. Every assertion in briefs regarding matter in the record shall be supported by a reference to the page number of the original record where the matter relied upon is to be found.

28.2.4 Request for Oral Argument. Counsel for appellant shall include in appellant's principal brief (as a preamble thereto) a short statement of the reasons why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee shall likewise include in appellee's brief a statement of why oral argument should or need not be had. The court will accord these statements due, though not controlling, weight in determining whether oral argument will be heard in the case. See Fed.R.App. P. 34(a) and (f) and 5th Cir. R. 34.2.

28.2.5 Statement of Jurisdiction. Each principal brief shall include a concise statement of the statutory or other basis of the jurisdiction of this court, containing citations of authority when necessary.

28.2.6 Standard of Review. In implementing Fed. R. App. P. 28(a)(6), appellant must include a statement of the standard of review for each contention, which statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues. For example, where the appeal is from an exercise of district court discretion, there shall be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be similarly indicated, e.g., that the district court erred in formulating or applying a rule of law; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under Fed. R. Civ. P. 52(a); or that there is a lack of substantial evidence in the record as a whole to support the factual findings of an administrative agency; or that the agency's action, findings, and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. § 706(2). Appellee's brief need not state the standard of review unless appellee believes appellant has incorrectly stated it.

28.3 Brief - Order of Contents. The order of contents of the brief, as governed by Fed.R.App.P. 28 and this rule, shall be as follows:

(a) Certificate of interested persons, if required.

(b) Statement regarding oral argument.

(c) Tables of contents and citations.

(d) Statement of jurisdiction.

(e) Statement of issues.

(f) Statement of the case.

(1) Course of proceedings and disposition in court below.

(2) Statement of facts.

(g) Summary of the argument.

(h) Argument, including standards of review.

(i) Conclusion.

(j) Certificate of service.

(k) Certificate of Compliance. (5th Cir. R. 32.2.7(c))

28.4 Supplemental Briefs. *While the rules do not permit the filing of supplemental briefs without leave of court, there will be some occasions, particularly after a case is orally argued or submitted on the summary calendar, in which the court will call for supplemental briefs on particular issues. Also, where intervening decisions or new developments should be brought to the court's attention, counsel may direct a letter, not a supplemental brief, to the clerk with citations and succinct comment. See Fed. R. App. P. 28(j). If a new case is not reported, copies of the decision should be appended. The letter should be filed in 4 typewritten copies, with service on opposing counsel.*

28.5 Briefs in Cross-Appeals. *Fed. R. App. P. 28(h) provides that in a case with a cross-appeal the plaintiff below will be considered the appellant for the purposes of the briefing and appendix rules. However, it is more common practice for counsel to agree that the party filing the first notice of appeal should file the opening brief, and that within 30 days thereafter, the party filing the second notice of appeal should file a single brief containing both the argument as an appellant and the response to the opening brief. The first appellant then has 30 days thereafter to file a response. The usual reply brief time then applies.*

28.6 Signing the Brief. *All pleadings, motions, and briefs must be signed by an attorney or a party appearing pro se. This rule stems from Fed. R. Civ. P. 11, which requires signatures. The signing of documents is important because it constitutes a certificate by the attorney or party that he or she has read the pleading or brief. This is particularly important for briefs, to insure that counsel or the party signing the brief has read the brief and checked it to insure it complies with the rules. The requirement is interpreted broadly, and the attorney of record may designate another person to sign the brief for him or her. Where counsel for a particular party reside in different locations, it is not necessary to incur the expense of sending the brief from one person to another for signature.*

I.O.P. - Miscellaneous Brief Information

(a) Pro Se Briefs - Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel.

(b) Acknowledgment of Briefs - The clerk does not acknowledge the filing of briefs unless counsel or a party makes a special request.

(c) Sample Briefs and Appendices - Upon request, the clerk will loan sample briefs and appendices that comply with the form prescribed for printed briefs or briefs prepared by word processor and appendices. Postage fees may be required before the materials are sent.

(d) Checklist Available - A copy of the checklist used by the clerk in examining briefs is available on request.

FRAP 29. BRIEF OF AN AMICUS CURIAE

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for a later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

FIFTH CIRCUIT RULE 29

29.1 Time for Filing Motion. *One wishing to file an amicus curiae brief should move to do so within 15 days after the filing of the principal brief of the party whose position as to affirmance or reversal the amicus brief will support. The proposed brief should accompany the motion. This time was established by the court to provide for maximum utilization of the provisions of Fed. R. App. P. 28(i).*

29.2 Contents and Form. *Briefs filed under this rule shall comply with the applicable Fed. R. App. P. provisions and with 5th Cir. R. 28, 31, and 32, except that with respect to Fed. R. App. P. 28(a) and 5th Cir. R. 28.2, the amicus brief should, in complying with 5th Cir. R. 28.2.1, state only the interest of the amicus curiae, and the amicus brief need not contain a statement of the issues, statement of the case, request for oral argument or, statement of jurisdiction. The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed therein. Any brief not in conformity herewith may be stricken, on motion or sua sponte.*

29.3 Length of Briefs. *Unless otherwise permitted by the court, the amicus brief shall be in the form prescribed by 5th Cir. R. 32 and shall not exceed 5,000 words, exclusive of the parts excluded from the word count in 5th Cir. R. 32.2.7(b)(3).*

I.O.P. - The word limit on amicus curiae briefs in 5th Cir. R. 29.3 is effective for cases where the briefing notice was issued on or after August 1, 1997, under the new 5th Cir. R. 32.2. Amicus briefs are limited to 5,000

words or, for briefs in monospaced typeface, 465 lines of text. Briefs prepared under a word or line limit must be accompanied by a certificate of compliance prepared in accordance with 5th Cir. R. 32.2.7(c).

Amicus briefs that contain 10 or fewer pages presumptively meet the type-volume limits and do not require a certificate of compliance.

29.4 Denial of Amicus Curiae Status. *After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court.*

I.O.P. - See 5th Cir. R. 31.2 for time for filing.

FRAP 30. APPENDIX TO THE BRIEFS

(a) ***Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies.*** The appellant must prepare and file an appendix to the briefs which must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant must serve and file the appendix with the brief. Ten copies of the appendix must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court requires the filing or service of a different number by local rule or by order in a particular case**.**

(b) ***Determination of Contents of Appendix; Cost of Producing.*** The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross appellants and cross appellees.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

(c) ***Alternative Method of Designating Contents of the Appendix; How References to the Record May Be Made in the Briefs When Alternative Method is Used*.** If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time each brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where the page begins. Or if a party desires to refer in a brief directly to pages of the appendix, that party may serve and file typewritten or page proof copies of the brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed the party shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

(d) ***Arrangement of the Appendix.*** At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

(e) ***Reproduction of Exhibits*.** Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

(f) ***Hearing of Appeals on the Original Record Without the Necessity of an Appendix.*** A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

FIFTH CIRCUIT RULE 30

30.1 Appendix/Record Excerpts - Appeals from District Courts, the Tax Court, and Agencies. *Appeals from district courts and the Tax Court shall be on the original record. Record excerpts shall be filed in lieu of the appendix prescribed by Fed. R. App. P. 30. Petitions for review or enforcement of agency orders shall be governed by 5th Cir. R.30.2.*

30.1.1 Purpose. The record excerpts are intended primarily to assist the judges in making the screening decision on the need for oral argument and in preparing for oral argument. Counsel need excerpt only those

parts of the record that will assist in these functions. The court has access to the entire original record when deciding the case.

30.1.2 Filing. Four copies of excerpts of the district court record, as detailed in paragraphs 30.1.4 and 30.1.5 hereof, must accompany the appellant's brief. The appellant shall serve a copy of the excerpts on counsel for each of the parties separately represented and on any other party proceeding pro se. With its brief, the appellee may submit additional record excerpts consistent herewith.

30.1.3 Prisoner Petitions Without Representation by Counsel. Because the court will have before it the entire record when making its decision, it is not mandatory for prisoners without counsel to prepare and file record excerpts.

30.1.4 Mandatory Contents. The record excerpts must contain copies of the following portions of the district court record:

(a) The docket sheet;

(b) The notice of appeal;

(c) The indictment in criminal cases;

(d) The verdict of the jury in all cases;

(e) The judgment or interlocutory order appealed;

(f) Any other orders or rulings sought to be reviewed;

(g) Any relevant magistrate judge's report and recommendation; and

(h) Any supporting opinion or findings of fact and conclusions of law filed, or transcript pages of any such delivered orally.

30.1.5 Optional Contents. The record excerpts may also include those parts of the record, referred to in the briefs, which might assist in achieving the stated purposes, including:

(a) Essential pleadings or relevant portions thereof;

(b) The parts of the Fed. R. Civ. P. 16(e) pretrial order relevant to any issue on appeal;

(c) Any jury instruction given or refused that presents an issue on appeal, together with any objection and the court's ruling, and any other relevant part of the jury charge;

(d) Findings and conclusions of the administrative law judge, if the appeal is of a court order reviewing an administrative agency determination

(e) A copy of the relevant pages of the transcript when the appeal challenges the admission or exclusion of evidence or any other interlocutory ruling or order; and

(f) The relevant parts of any written exhibit (including affidavits) that present an issue on appeal.

30.1.6 Length. The optional contents of the record excerpts shall not exceed 40 pages unless authorized by the court.

30.1.7 Form. The record excerpts shall be:

(a) Prefaced by a numbered table of contents, with citation to the record, beginning with the lower court docket sheet;

(b) On letter-size, white paper, reproduced by any process that results in a clear black image, with care being taken to reproduce fully the document filing date column on the docket sheet;

(c) Tabbed to correspond to the numbers assigned in the table of contents;

(d) Bound so as to expose fully the filing date columns and allow the document to lie reasonably flat when opened, with a durable white cover which conforms to Fed. R. App. P. 32(a), except that it shall be denominated "RECORD EXCERPTS.

The documents that constitute the record excerpts need not be certified, but if the clerk's "filed" markings are either absent or not clearly legible, the accurate filing information should be typed or written thereon.

30.2 Appendix - Agency Review Proceedings. *Petitions for review of orders of an administrative agency, board, commission or officer shall proceed on the original record on review, without the requirement of the appendix prescribed by Fed. R. App. P. 30.*

(a) If a certified list of documents comprising the record is filed in lieu of the formal record, petitioner shall prepare and file with the court and serve on the agency, board, or commission a copy of the portions of the record relied upon by the parties in their briefs, to be suitably covered, numbered, and indexed and filed within 21 days from the date of filing of respondent's brief.

(b) Except in review proceedings covered by 5th Cir. R. 15.3, at the time of filing petitioner's brief, petitioner shall file separately 4 copies of any order sought to be reviewed and any supporting opinion, findings of fact, or conclusions of law filed by the agency, board, commission, or officer.

FRAP 31. FILING AND SERVICE OF A BRIEF

(a) ***Time for Serving and Filing Briefs.*** The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) ***Number of Copies to Be Filed and Served.*** Twenty-five copies of each brief must be filed with the clerk, and two copies must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented.

(c) ***Consequence of Failure to File Briefs*****.** If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

FIFTH CIRCUIT RULE 31

31.1 Briefs - Number of Copies. *Only 7 copies of briefs shall be filed in all cases.*

31.2 Briefs - Time for Filing Briefs of Intervenors or Amicus Curiae. *In order to provide for maximum utilization of the options permitted by Fed. R. App. P. 28(i), the time for filing the brief of the intervenor or amicus is extended until 15 days after the filing of the principal brief of the party supported by the intervenor or amicus. For purposes of Fed. R. App. P. 31(a), the time for filing the next brief shall run from that date.*

31.3 Briefs - Time for Mailing or Delivery to a Commercial Carrier. *Appellant's brief must be sent to the clerk not later than 40 days after the date of the briefing notice. Pursuant to Fed. R. App. P. 26(c), appellee has 33 days from the date of the certificate of service to place the brief in the mail 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) must be shown at the conclusion of the brief and must be dated. See 5th Cir. R. 39.2 for limitations on recovery of certain mailing and commercial delivery costs.*

31.4 Briefs - Time for Filing Briefs of Parties.

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 -- including initial extensions and extensions that can be granted by the clerk -- 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. Rules.

(a) A request for extension should be made as soon as it is reasonably possible to foresee the need for the extension. The request shall be received by the clerk at least 7days before the due date (including Saturdays, Sundays, and holidays as provided in Fed. R. App. P. 26(a)), unless the movant demonstrates, in detail, that the facts that form the basis of the motion either did not exist earlier or were not, or with due diligence could not have been, known earlier.

(b) Before requesting an extension, the movant must contact all other parties to determine whether the request 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 a Level 2 or Level 3 extension (as defined in 5th Cir. R. 31.4.3):

(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 three levels of extensions: a Level 1 extension of 1-30 days from the original due date; a Level 2 extension of 31-60 days from the original due date; and a Level 3 extension of more than 60 days from the original due date.

31.4.3.1 Level 1 Extensions. The clerk is authorized to grant, deny, or take other appropriate action for the court on unopposed Level 1 extensions. The court prefers that the 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. Instead of acting on the request, the clerk may refer it to the court.

If the request is opposed, it shall be made only by written motion setting forth why there is good cause. The motion shall state the initial due date, whether any other extension has been granted, the length of the requested extension, and which parties have expressed opposition. Opposed extensions may be acted upon only by the court.

31.4.3.2 Level 2 Extensions. The clerk is authorized to grant, deny, or take other appropriate action for the court on unopposed 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. The movant must demonstrate diligence and substantial need and must show in detail what special circumstances exist that make a Level 1 extension insufficient. Instead of acting on the motion, the clerk may refer it to the court. Opposed extensions may be acted upon only by the court.

31.4.3.3 Level 3 Extensions. Level 3 extensions shall be acted upon only by the court and are greatly disfavored. They will be granted only under extraordinary circumstances and for the most compelling reasons.

The motion shall state the initial due date, whether any other extension has been granted, the length of the requested extension, and whether the motion is opposed. The motion shall disclose facts that establish that with due diligence, and giving priority to the preparation of the brief, it is not reasonably possible to file the brief timely. Factual statements shall be set forth with specificity. In cases in which a party may be in custody, the motion must state the custodial status, including the status of any bail.

31.4.4. Extensions for Reply Briefs. All extensions of time for filing reply briefs are greatly disfavored, as 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.

FRAP 32. FORM OF BRIEFS, THE APPENDIX AND OTHER PAPERS

(a) ***Form of Briefs and the Appendix.*** Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/6 inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8 ½ by 11 inches and type matter not exceeding 6 ½ by 9 ½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(b) ***Form of Other Papers.*** Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 ½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

FIFTH CIRCUIT RULE 32

32.1 Printed Briefs*. Briefs prepared by a commercial printing process must comply with Fed. R. App. P. 32 and the length limitations of Fed. R. App. P. 28(g).*

32.2 Form of Brief Prepared by Typewriter or Word Processor.

32.2.1. Reproduction.

(a) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(b) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(c) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

32.2.2. Cover. Except for filings by unrepresented parties, every brief must have front and back opaque covers of durable quality. In addition to the requirements of Fed. R. App. P. 32, the front cover of a brief must contain:

(a) The number of the case centered at the top;

(b) The title of the brief, identifying the party or parties for whom the brief is filed; and

(c) The name, office address, and telephone number of counsel representing the party for whom the brief is filed.

32.2.3. Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

32.2.4. Paper Size, Line Spacing, and Margins. The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than 2 lines long may be indented and single-spaced. Headings and footnotes may be single spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

32.2.5. Typeface. Either a proportionally spaced or a monospaced face may be used.

(a) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger for text and 12-point or larger for footnotes.

(b) A monospaced face may not contain more than 10½ characters per inch for text or no more than 12½ characters per inch for footnotes.

32.2.6. Type Styles. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

32.2.7. Length.

(a) Page Limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with 5th Cir. R. 32.2.7(b) and (c).

(b) Type-volume Limitation.

(1) A principal brief is acceptable if: it contains no more than 14,000 words; or, it uses a monospaced face and contains no more than 1,300 lines of text.

(2) A reply brief is acceptable if it contains no more than half of the type-volume specified in 5th Cir. R. 32.2.7(b)(1).

(3) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation. A "Brief of Appellees/Cross-Appellants" and a "Reply Brief of Cross Appellees/Appellants" are considered principal briefs for purposes of the page length and word-volume length limitations.

(c) Certificate of Compliance. A brief submitted under 5th Cir. R. 32.2.7(b) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The form of the certificate will be available from the clerk's office and must state either the number of words in the brief or the number of lines of monospaced type in the brief. In addition, the preparer must identify the name and version of the word-processing system used and must agree to furnish the court an electronic

version of the brief upon request. A material misrepresentation may result in striking the brief and in sanctions against the person signing the brief.

32.2.8. Motions for Extra-Length Briefs. A motion for leave to file a brief in excess of the page length or word-volume limitations must be filed at least 7 days in advance of the due date of the brief. The court looks upon motions to exceed the page length or word-volume limitations 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.

32.2.9. Signing. Every brief (originals and copies) shall be signed by at least 1 attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party.

32.2.10. Rejection of Briefs. Unless every copy of a brief conforms to this rule, 5th Cir. R. 28, and to all provisions of Fed. R. App. P. 32, the clerk will file the brief as required by Fed. R. App. P. 25 but is authorized to return all nonconforming copies. An extension of 10 days is allowed for resubmission in a conforming format. Failure to submit a conforming brief within 10 days is reason for rejection of the brief. 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 brief, may submit it to a single judge, who can reject the brief and direct that it be returned unfiled. Failure to submit a conforming brief may result in imposition of sanctions.

32.2.11. Color of Covers of Briefs in Cross-Appeals.

In cross-appeals the color of the covers of briefs shall be as follows:

Brief for Appellant - Blue

Brief for Appellee-Cross-Appellant - Red

Brief for Cross-Appellee and Reply Brief for Appellant - Red

Reply Brief of Cross-Appellant - Gray

I.O.P. - Form of Appendix - See 5th Cir. R. 30.

FRAP 33. APPEAL CONFERENCES

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.

I.O.P. - See 5th Cir. R. 15.3.5.

FRAP 34. ORAL ARGUMENT

(a) ***In General; Local Rule.*** Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) ***Notice of Argument; Postponement.*** The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

(c) ***Order and Content of Argument.*** The appellant is entitled to open and conclude the argument. Counsel may not read at length from briefs, records, or authorities.

(d) ***Cross and Separate Appeals.*** A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross appeal, the party who first files a notice of appeal, or in the event that the notices are filed on the same day the plaintiff in the proceeding below, shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(e) ***Non-appearance of Parties.*** If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(f) ***Submission on Briefs.*** By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) ***Use of Physical Exhibits at Argument; Removal.*** If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

FIFTH CIRCUIT RULE 34

34.1 Docket Control. *In the interest of docket control, the chief judge may from time to time appoint a panel or panels to review pending cases for appropriate assignment or disposition under this rule or any other rule of this court.*

34.2 Oral Arguments. *Oral argument shall be allowed in all cases except those unanimously determined by a three-judge panel of the court to fall in 1 of the 3 categories specified by Fed. R. App. P. 34(a). Those cases will be placed on the summary calendar for decision without oral argument. Those cases to be orally argued will be calendared by the clerk based upon the court's calendaring priorities. Counsel for each party must present oral argument unless excused by the court for good cause shown. The oral argument docket will show the time the court has allotted for each argument. If counsel for all parties indicate pursuant to paragraph .3 of this rule that oral argument is not necessary, the case will be governed by Fed. R. App. P. 34(f).*

34.3 Submission Without Argument. *A party who desires to waive oral argument in a case noticed for oral argument must file a motion for permission to waive in advance of the date set for hearing.*

34.4 Number of Counsel To Be Heard. *Not more than 2 counsel will be heard for each party on the argument of a case, and the time allowed may be apportioned between counsel in their discretion.*

34.5 Expediting Appeals. *The court may, on its own motion or for good cause shown on motion of either party, advance any case for hearing, and prescribe an abbreviated briefing schedule.*

34.6 Continuance of Hearing. *After a case has been set for hearing, it may not be continued by stipulation of the parties or their counsel, but only by an order of the court on good cause shown. Engagement of counsel in other courts will not be considered good cause.*

34.7 Recording of Oral Arguments. *No cameras, tape recorders, or other equipment designed for the recording or transmission of visual images or sound may be present or used during oral argument; provided, however, that with the advance approval of the presiding judge, counsel may arrange, at their own expense, for a qualified court reporter to be present to record and transcribe oral argument. If it is the usual practice of such court reporter to do so, the reporter may make and utilize a sound recording for the sole purpose of preparing an accurate transcript, then must immediately destroy or erase the recording without making it available to counsel, a party, or any other person for any purpose. The court records oral argument for its exclusive use and does not make the tapes, or copies or transcripts thereof, available to counsel, the parties, or any other person.*

34.8 Criminal Justice Act Cases. *The court expects court-appointed counsel to present oral argument. Presentation of oral argument by an associate attorney not appointed under the act will only be allowed under the most pressing and unusual circumstances, upon advance authorization.*

34.9 Checking In with Clerk's Office. *As provided on the calendar, on the day of hearing counsel should first check in with the clerk 30 minutes in advance of the convening of court to confirm with the courtroom deputy the name of the attorney or attorneys who will present argument for each party and how the argument time will be divided between opening and rebuttal. All counsel in the fourth and fifth cases on the docket heard in New Orleans have the privilege of checking in by telephone, but must report in person to the clerk's office within one hour after court convenes. On the last day of the New Orleans session, all attorneys must report in person to the clerk's office 30 minutes before court convenes.*

34.10 Submission Without Argument. *When a case is placed on the oral argument calendar, a judge of the court has determined that oral argument would be helpful in that particular case. Therefore, requests of the parties to waive oral argument are not looked upon with favor, and counsel may be excused only by the court for good cause shown. See 5th Cir. R. 34.3.*

If appellant fails to appear in a criminal appeal from conviction, the court will not hear argument from the United States.

34.11 Time for Oral Argument. *The time for oral argument will be indicated on the printed calendar. Most cases are allowed 20 minutes to the side. The word "side" refers to parties in their position on appeal. Where in doubt, the clerk's office should be consulted.*

34.12 Additional Time for Oral Argument. *Additional time for oral argument is sparingly permitted. Requests for additional time for oral argument should be set forth in a motion or letter to the clerk filed well in advance of the oral argument.*

34.13 Calling the Calendar. *Usually the court will not call the calendar unless there are some special problems requiring attention. The court proceeds to hear the cases in the order in which they appear on the calendar.*

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. 34, supplemented as above.

(a) Screening is performed by judges of the court with assistance from the Office of Staff Attorney. When the last brief is filed, a case is generally sent to the Office of 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 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 not only that the case does not warrant oral argument, but 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 still routed to the next 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, the case is disposed of by that judge's screening panel under the summary calendar procedure.

Decision Without Oral Argument - When all panel members agree that oral argument of a case is not needed, the clerk is advised that the case has been placed on the summary calendar. The decision of the court usually accompanies the notice to the clerk. The assignment of a case to the summary calendar does not mean that it is considered to be an appeal of less importance than oral argument calendared cases.

Court Year Schedule - A proposed court schedule for an entire year is prepared by the clerk and then 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.

Judge Assignments

Panel Selection Procedure - Based on the number of weeks each active judge is to sit 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. Judge assignments are performed by the scheduling proctor and clerk, but this information is not disclosed within the clerk's office until the calendars of cases are actually prepared and approved.

Preparation and Publishing Calendars

General - Calendars of cases are prepared by the clerk under calendaring guidelines established by the court. Calendars are prepared for the number of sessions (usually between 3 and 5) scheduled for a month. However, information about the names of the panel members is not disclosed within the clerk's office until the calendars of cases for the month are actually prepared.

Calendaring by Case Type - The clerk balances the calendars by dividing the cases evenly among the panels by case type so that each panel for a particular month has more or less an equal number of different types of litigation for consideration.

Preference Cases - The categories of cases listed in 5th Cir. R. 47.7 will be given preference in processing and disposition. To assist the clerk in implementing this rule, any party to a civil appeal or review proceeding requiring priority status should notify the clerk and cite the statutory support for the preference.

Non-Preference Cases - All other cases are calendared for hearing in accordance with the court's "first-in first-out" rule. Absent special priority assigned by the court, those cases that are oldest in point of time of availability of briefs are ordinarily calendared first for hearing.

Calendaring for Convenience of Counsel - For the New Orleans sessions, cases with non-local lawyers are scheduled in the first positions on the calendar whenever possible for their convenience in making early departure accommodations.

Number of Cases Assigned - Unless special provision is made, a regular session of a panel of the court will hear 5 cases per day for 4 days, Monday through Thursday.

Advance Notice - The court seeks to give 60 days advance notice to counsel of assignment of cases for oral argument.

Forwarding Briefs to Judges - Immediately after formal issuance of the calendar and upon release of the names of the panel members, the clerk forwards to the panel members copies of the briefs for the cases set on the calendar

Pre-Argument Preparation - It is the invariable practice of the judges to read all briefs prior to oral argument.

Identity of Panel - The clerk may not disclose the names of the panel members for a particular session until 1 week in advance of the session.

Oral Argument

Presenting Argument - Counsel should prepare their oral arguments with the knowledge that the judges have already studied the briefs. Reading from briefs, decisions, or the record is not permitted except in unusual circumstances. Counsel should be prepared to answer questions by the court. The court will consider a motion

to extend the time allotted for argument if questions by the court have prevented completion of counsel's argument.

Lighting Signal Procedure - The courtroom deputy will keep track of the time with the use of lighting signals:

(a) Appellant's Argument - A green light signals the beginning of the opening argument of appellant. Two minutes prior to the expiration of the time allowed for opening argument, the green light goes off and a yellow light comes on. When the time reserved for opening has expired, the yellow light goes off and a red light comes on. If counsel proceeds after the red light, time will be deducted from the rebuttal period.

(b) Appellee's Argument - The same procedure as outlined above for appellant is used.

(c) Appellant's Rebuttal - A green light signals commencement of time; a red light comes on when the time expires. No yellow caution light is used for this argument.

Case Conferences and Designation of Writing Judge - At the conclusion of each day's arguments, a conference is usually held on the cases heard by the panel. A tentative decision is reached and opinion writing is assigned by the presiding judge. There is no pre-argument assignment of opinion writing. Judges do not specialize. Assignments are made to equalize the workload of the entire session.

FRAP 35. DETERMINATION OF CAUSES BY THE COURT IN BANC

(a) ***When Hearing or Rehearing In Banc Will Be Ordered.*** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) ***Suggestion of a Party for Hearing or Rehearing In Banc*.** A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) ***Time for Suggestion of a Party for Hearing or Rehearing In Banc; Suggestion Does Not Stay Mandate.*** If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such a petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(d) ***Number of Copies*.** The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

FIFTH CIRCUIT RULE 35

35.1 Caution. *As is noted in Fed. R. App. P. 35, en banc hearing or rehearing of appeals is not favored. Among the reasons for this is that each request for en banc consideration must be studied by every active judge of the court and hence is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the certificates required of them in 35.2.2 below. The court takes the view that, given the extraordinary nature of suggestions for en banc consideration, it is fully justified in imposing sanctions of its own initiative under, inter alia, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the suggestions, the represented party, or both, for manifest abuse of the procedure.*

35.2 Form of Suggestion. *Twenty copies of every suggestion of en banc consideration, whether upon initial hearing or rehearing, shall be filed. The suggestion shall not be incorporated in the petition for rehearing before the panel, if one is filed, but shall be complete in itself. In no case shall a suggestion of 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 suggestion of en banc consideration shall contain the following items, in order:*

35.2.1 Certificate of interested persons required for briefs by 5th Cir. R. 28.2.1.

35.2.2 If the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel, as applicable:

(a) I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

[citing specifically the case or cases]

(b) I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

[set forth each question in one sentence]

_____
*Attorney of record for*_____

Counsel are reminded that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of Fed. R. App. P. 35(a).

35.2.3 Table of contents and citations;

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A suggestion of en banc consideration must be limited to the circumstances enumerated in Fed. R. App. P. 35(a).

35.2.5 Statement of the course of proceedings and disposition of the case;

35.2.6 Statement of any facts necessary to the argument of the issues;

35.2.7 Argument and authorities. These shall 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.

35.2.8 Conclusion;

35.2.9 Certificate of service; and

35.2.10 A copy of the opinion or order sought to be reviewed. The opinion or order shall be bound with the suggestion as an appendix and shall not be marked or annotated.

35.3 Response to Suggestion. *No response to a suggestion for en banc consideration will be received unless requested by the court.*

35.4 Time and Form - Extensions. *Any suggestion for rehearing en banc must be received in the clerk's office within the time specified in Fed. R. App. P. 40. Counsel should not request extensions of time except for the most compelling reasons. Printing delays will not be considered sufficient justification for extensions, as clear and legible reproduced copies of typewritten petitions are authorized in the form prescribed by Fed. R. App. P. and 5th Cir. R. 32.*

35.5 Length. *A suggestion for en banc consideration shall not exceed 4,000 words, exclusive of the parts excluded from the word count in 5th Cir. R. 32.2.7(b)(3), without permission of the court.*

35.6 Determination of Causes En Banc and Composition of En Banc Court. *A cause shall be heard or reheard en banc when it meets the criteria for en banc set out in Fed. R. App. P. 35(a), and if a majority of the circuit judges who are in regular active service order that the appeal or other proceedings be heard or reheard en banc. For purposes of en banc voting under 28 U.S.C. § 46(c), the term "majority" is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service.*

The en banc court shall 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.

I.O.P.

Suggestion for Rehearing En Banc

Length of Suggestions for En Banc Consideration - The word limit on suggestions for en banc consideration in 5th Cir. R. 35.5 is effective for appeals where the briefing notice was issued on or after August 1, 1997, under the new 5th Cir. R. 32.2. Suggestions for en banc consideration are limited to 4,000 words or, for suggestions in monospaced typeface, 370 lines of text. Briefs prepared under a word or line limit must be accompanied by a certificate of compliance prepared in accordance with 5th Cir. R. 32.2.7(c).

Suggestions for en banc consideration that contain 8 or fewer pages presumptively meet the type-volume limits and do not require a certificate of compliance.

Extraordinary Nature of Suggestions for Rehearing EnBanc - A suggestion for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court or Fifth Circuit precedent. Alleged errors in the determination of state law, or in the facts of the case (including sufficiency of the evidence), or in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

The Most Abused Prerogative - Suggestions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. While such suggestions are filed in about 5% of the cases decided, fewer than 1% of the cases decided by the court are reheard en banc; and frequently rehearings granted result from a request for en banc reconsideration by a judge of the court initiated independent of any petition.

Handling of Petition by the Judges

Panel Has Control - Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a suggestion for rehearing en banc does not take the case out of the plenary control of the panel deciding the case. A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.

Requesting a Poll - Within 10 days of the filing of the suggestion, any active judge of the court or any member of the panel rendering the decision, desiring that the case be reheard en banc, may notify the writing judge (the senior active Fifth Circuit judge if the writing judge is a non-active member) to this effect on or before the date shown on the clerk's form that transmits the suggestion. This is also notice that in the event the panel declines to grant rehearing, an en banc poll is desired.

After such notice, if the panel decides not to grant the rehearing, it notifies the chief judge, who then polls the court by written ballot on whether en banc rehearing should be granted.

Requesting a Poll on Court's Own Motion - Any active member of the court or any member of the panel rendering the decision may request that the active members of the court be polled on whether rehearing en banc should be granted, whether or not a suggestion for rehearing en banc has been filed by a party. This is ordinarily done by a letter from the requesting judge to the chief judge with copies to the other active judges of the court and any other panel member.

Polling the Court - When a request to poll the court is made, each active judge of the court casts a form ballot and sends a copy to all other active judges of the court and any senior Fifth Circuit judge who is a panel member. The ballot form indicates whether the judge voting desires oral argument if en banc is granted.

Negative Poll - If the vote on the poll is unfavorable to the grant of en banc consideration, the writing judge is so advised by the chief judge. In this event, the panel originally hearing the case then enters the appropriate order.

Affirmative Poll - If a majority of the judges in regular active service vote for en banc hearing or rehearing, the chief judge instructs the clerk as to the appropriate order to be entered. This order indicates that a rehearing en banc with or without oral argument has been granted, and specifies a briefing schedule for the filing of supplemental briefs.

Every party must then furnish to the clerk 20 additional copies of every brief the party previously filed.

No Poll Request - If, after expiration of the specified time for requesting a poll, the writing judge of the panel has not received a request from any active member of the court, or other panel member, without further notice, may take such action as it deems appropriate on the suggestion. However, in its order disposing of the case and the suggestion, the panel must enter an order denying suggestion for rehearing en banc showing no poll was requested by any judge.

FRAP 36. ENTRY OF JUDGMENT

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

FRAP 37. INTEREST ON JUDGMENTS

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

FRAP 38. DAMAGES AND COSTS FOR FRIVOLOUS APPEALS

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

FRAP 39. COSTS

(a) ***To Whom Allowed*****.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) ***Costs For and Against the United States*****.** In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) ***Costs of Briefs, Appendices, and Copies of Records.*** By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

(d) ***Bill of Costs; Objections; Costs to Be Inserted in Mandate or Added Later*****.** A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) ***Costs on Appeal Taxable in the District Courts*****.** Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the briefs, appendices, or record excerpts shall be taxed at a rate not higher than $0.25 per page, including cover, index, and internal pages, for any form of reproduction costs. The cost of the binding required by 5th Cir. R. 32.3.2 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, 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.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *Bills of costs and any objections thereto must be received in the clerk's office within the respective times set forth in Fed. R. App. P. 39(d). See 5th Cir. R. 26.1.*

FRAP 40. PETITION FOR REHEARING

(a) ***Time for Filing; Content; Answer; Action by Court if Granted.*** A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may

make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) ***Form of Petition; Length.*** The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

FIFTH CIRCUIT RULE 40

40.1 Copies. *A copy of the opinion or order sought to be reviewed shall be bound with the petition for rehearing as an appendix and shall not be marked or annotated. If the party contemporaneously files a suggestion for rehearing en banc and appends a copy of the opinion or order as required by 5th Cir. R. 35.2.10, it is not necessary to append a copy to the petition for panel rehearing.*

40.2 Petition for Panel Rehearing. *A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not to be used for reargument of the issue previously presented or to attack the court's well-settled summary calendar procedures. Petitions for rehearing are reviewed by panel members only. Four copies of all petitions for rehearing shall be filed.*

40.3 Length. *A petition for rehearing shall not exceed 4,000 words, exclusive of the parts excluded from the word count in 5th Cir. R. 32.2.7(b)(3).*

I.O.P. - The word limit in 5th Cir. R. 40.3 is effective for appeals where the briefing notice was issued on or after August 1, 1997, under the new 5th Cir. R. 32.2. Petitions for rehearing are limited to 4,000 words or, for petitions in monospaced typeface, 370 lines of text. Petitions prepared under a word or line limit must be accompanied by a certificate of compliance prepared in accordance with 5th Cir. R. 32.2.7(c).

Petitions containing 8 or fewer pages presumptively meet the type-volume limits and do not require a certificate of compliance. **See I.O.P. following 5th Cir. R. 35.**

40.4 Time for Filing. *A petition for rehearing must be received in the clerk's office within the time prescribed in Fed. R. App. P. 40(a).*

I.O.P. - Necessity for Filing - It is not necessary to file a petition for rehearing in the court of appeals as a prerequisite to the filing of a petition for certiorari in the Supreme Court of the United States.

FRAP 41. ISSUANCE OF MANDATE; STAY OF MANDATE

(a) ***Date of Issuance.*** The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) ***Stay of Mandate Pending Petition for Certiorari.*** A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the Clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.

FIFTH CIRCUIT RULE 41

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 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. *A mandate once issued shall not be recalled except to prevent injustice.*

41.3 Effect of Granting Rehearing En Banc. *Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and judgment of the court and to stay the mandate.*

41.4 Issuance of Mandate in Expedited Appeals. *The clerk shall issue the mandate forthwith in any expedited appeal of a criminal sentence, unless instructed otherwise by the court.*

I.O.P. - In the absence of a motion for stay or a stay by operation of an order, rule, or procedure, mandates will be issued promptly on the 8th day after the expiration of the time for filing a petition for rehearing; or after entry of an order denying the petition. As an exception, and by court direction, the clerk shall immediately issue the mandate upon the court's entry of a dismissal for failure to prosecute an appeal or for lack of jurisdiction, or following orders denying mandamus, or in such other instances as the court may direct. The original record and any exhibits will be returned to the clerk of the district court with the mandate.

FRAP 42. VOLUNTARY DISMISSAL

(a) ***Dismissal in the District Court.*** If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.

(b) ***Dismissal in the Court of Appeals.*** If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed 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 enter an order of dismissal and issue a copy of the order as the mandate.*

42.2 Frivolous and Unmeritorious Appeals. *If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.*

42.3 Dismissal for Failure To Prosecute.

42.3.1 In direct criminal appeals, habeas cases, and cases filed pursuant to 28 U.S.C. § 2255 and other prisoner matters proceeding in forma pauperis, the following action shall be taken if appellant fails to file a brief or otherwise fails to comply with rules requiring processing the appeal to hearing:

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

42.3.1.2 Appeals without Counsel. The clerk shall issue a notice to appellant that upon the expiration of 15 days from the date thereof the appeal may be dismissed for want of prosecution, unless prior to that date the default is remedied. If the default is remedied within that time, the clerk shall not dismiss the appeal. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution.

42.3.2 In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the court, the clerk shall enter an order dismissing the appeal for want of prosecution.

42.3.3 In all instances of failure to prosecute an appeal to hearing as required, the court may take such other action as it deems appropriate.

42.3.4 A copy of an order dismissing an appeal for want of prosecution shall be issued to the clerk of the district court as the mandate.

42.4 Dismissals Without Prejudice. *In acting on a motion under 5th Cir. R. 27.1.7 to stay further proceedings, the clerk may enter such appeals or agency review proceedings as dismissed without prejudice to the right of reinstatement of the appeal within 180 days from the date of dismissal. Any party to such an appeal desiring reinstatement of it, or an extension of the time within which reinstatement of it may be sought, shall notify the clerk in writing within the time period allowed for reinstatement. This procedure will not apply in those instances where the stay is sought pending a decision of this court in another case, a decision of the Supreme Court, or a stay on the court's own motion. If the appeal is not reinstated within the period fixed, the appeal shall be deemed dismissed with prejudice. However, an additional period of 180 days from the date of dismissal will be allowed for applying for relief from a dismissal with prejudice which resulted from mistake, inadvertence, or excusable neglect of counsel or a pro se litigant.*

FRAP 43. SUBSTITUTION OF PARTIES

(a) ***Death of a Party.*** If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

(b) ***Substitution for Other Causes.*** If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) ***Public Officers; Death or Separation From Office.***

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in an official capacity that public officer may be described as a party by the public officer's official title rather than by name; but the court may require the public officer's name to be added.

FRAP 44. CASES INVOLVING CONSTITUTIONAL QUESTIONS WHERE UNITED STATES IS NOT A PARTY

It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.

FRAP 45. DUTIES OF CLERKS

(a) ***General Provisions.*** The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing

and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(b) ***The Docket; Calendar; Other Records Required*****.** The clerk shall maintain a docket in such form as may be prescribed by the Director of the Administrative Office of the United States Courts. The clerk shall enter a record of all papers filed with the clerk and all process, orders and judgments. An index of cases contained in the docket shall be maintained as prescribed by the Director of the Administrative Office of the United States Courts.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

(c) ***Notice of Orders or Judgments*****.** Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) ***Custody of Records and Papers*****.** The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be taken from the clerk's custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

FIFTH CIRCUIT RULE 45

45.1 Location. *The office of the clerk shall be maintained in the city of New Orleans, Louisiana.*

45.2 Release of Original Papers. *The clerk may release original records or papers without a court order for a limited time for purposes of printing, or upon request of a party or counsel, to facilitate preparation of a brief in a pending appeal.*

45.3 Office To Be Open. *The office of the clerk shall be open for business on all days except Saturdays, Sundays, officially designated federal holidays, and Mardi Gras.*

I.O.P. - Office hours are from 8:00 a.m. to 5:00 p.m. central time Monday through Friday.

(a) The Clerk's Office welcomes telephone inquiries from counsel concerning rules and procedures. Telephone No. (504) 589-6514.

(b) In emergency situations arising after normal office hours, or on weekends, you may call the main office number shown above. An automated attendant will provide an option which will connect you to the emergency duty deputy.

FRAP 46. ATTORNEYS

(a) ***Admission to the Bar of a Court of Appeals; Eligibility; Procedure for Admission*****.** An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation.

I, _____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) ***Suspension or Disbarment*****.** When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) ***Disciplinary Power of the Court Over Attorneys*****.** A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

FIFTH CIRCUIT RULE 46

46.1 Admission and Fees. *In order to be admitted and continue to practice before this court, attorneys must have and maintain a valid underlying license to practice law issued by an American governmental licensing authority. Admission is governed by Fed.R.App. P. 46 and this rule. Each attorney shall pay to the clerk an admission fee as may be fixed from time-to-time by court order which shall be transferred to the Library Fund. An attorney who is appointed by the court to represent an appellant in forma pauperis and an attorney who appears on behalf of the United States must have all other qualifications for admission, but shall be admitted to practice in this court without payment of an admission fee.*

46.2 Suspension or Disbarment. *In addition to Fed. R. App. P. 46(b), attorneys may be suspended or removed from the roll of attorneys permitted to practice before this court if the appropriate law licensing authority withdraws or suspends the attorney's license to practice law, or the license to practice lapses.*

46.3 Entry of Appearance. *Attorneys admitted to the bar of this court shall enter their appearance in each case in which they participate at the time the case is docketed or upon notice by the clerk. A form for entry of appearance will be provided by the clerk. In addition to other pertinent information, such form shall require counsel to cite all pending related cases and any cases on the docket of the Supreme Court, or this or any other United States Court of Appeals, which involve a similar issue or issues. Counsel shall update such information at the time of briefing. Counsel shall also indicate on the form whether the appeal is in a category of cases requiring preference in processing and disposition as set out in 5th Cir. R. 47.7.*

I.O.P. - Disciplinary Action - Fed. R. App. P. 46(b) and (c) govern the procedures to be followed to invoke disciplinary action against any member of the bar of this court for failure to comply with the rules of this court, or for conduct unbecoming a member of the bar.

Duties of Court Appointed Counsel - The Judicial Council of the Fifth Circuit has adopted a plan under the Criminal Justice Act that details the duties and responsibilities of court appointed counsel. A copy of this plan is available upon request to the clerk.

An appointed counsel may claim compensation for services furnished by a partner or associate within the maximum compensation allowed by the act. However, the court expects court-appointed counsel to take the lead in the preparation of the brief and to present oral argument, if argument is allowed. Claims by associate counsel for in-court services and travel expenses incurred in connection therewith cannot be allowed unless such partner or associate is appointed under the Criminal Justice Act on advance motion and approval by the court.

FRAP 47. RULES OF A COURT OF APPEALS

(a) ***Local Rules.***

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order. A local rule shall be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals shall send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) ***Procedure When There Is No Controlling Law.*** A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

FIFTH CIRCUIT RULE 47

OTHER FIFTH CIRCUIT RULES

47.1 Name, Seal and Process.

(a) Name. The name of this court is "United States Court of Appeals for the Fifth Circuit."

(b) Seal. The seal of this court shall contain the words "United States" on the upper part of the outer edge; and the words "Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Fifth Circuit" in two lines in the center, with a dash beneath.

(c) Writs and Process. Writs and process of this court shall be under the seal of the court and signed by the clerk.

47.2 Sessions. *Sessions of the court shall be held in each of the states constituting the circuit at least once each year. Sessions may be scheduled at any location having adequate facilities. On motion of a party or on the court's own motion, the court may reassign the hearing of any appeal to another place of sitting or time.*

47.3 Circuit Executive, Library, and Staff Attorneys.

(a) Circuit Executive. The Office of the Circuit Executive shall be maintained at New Orleans, Louisiana. The circuit executive shall act as Secretary of the Judicial Council of the Fifth Circuit, provide administrative support to the court, and perform such other duties as may be assigned by the judicial council or the chief judge.

(b) Library. A public library shall be maintained at New Orleans, Louisiana, which shall be open during hours fixed by the court. Books and materials may not be removed from the library without permission of the librarian. Other libraries may be maintained at such places in the circuit as the court may designate.

(c) Staff Attorneys. A central staff of attorneys shall be maintained at New Orleans, Louisiana, to perform such research and record analysis as may be from time to time assigned by the court.

47.4 Bankruptcy Appeals.

47.4.1 The Federal Rules of Appellate Procedure and these rules apply to all appeals from United States Bankruptcy Courts to this court.

47.4.2 If all counsel stipulate in writing to a direct appeal to this court from the Bankruptcy Court pursuant to 28 U.S.C. § 1293(b), the stipulation shall be filed with the notice of appeal. If a notice of appeal has previously been filed in the same matter, but the appeal has not yet been docketed in the court to which the appeal has been taken, the filing of a direct appeal shall also have the effect of a stipulation of dismissal of that earlier appeal, and the bankruptcy judge shall dismiss the earlier appeal, subject to its reinstatement if the appeal to this court is dismissed on the ground that the judgment, order, and decree appealed from was not final.

47.4.3 An appeal, once docketed in the district court or with the clerk of the appellate panels, should such panels be authorized, may not be transferred to this court without the written approval of the district judge or appellate panel.

47.5 Publication of Opinions.

47.5.1 Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion shall be published if it:

(a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

(c) Explains, criticizes, or reviews the history of existing decisional or enacted law;

(d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(e) Concerns or discusses a factual or legal issue of significant public interest; or

(f) Is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.

47.5.2 Publication Decision. An opinion shall 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. The panel shall reconsider its decision not to publish an opinion upon the request of any judge of the court or any party to the case. The opinion shall then 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.

47.5.3 Unpublished Opinions Issued Before January 1, 1996. Unpublished opinions issued before January 1, 1996*, are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion 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 such an unpublished opinion is cited in a brief, motion or other document being submitted to the court, a copy shall be attached to each copy of the brief, motion or document.*

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, provided that, if cited in a brief, motion or other document being submitted to the court, a copy of the unpublished opinion shall be attached to each copy of the brief, motion or document. The first page of each such unpublished opinion shall bear the following legend:*

Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

47.5.5 Definition of "Published." An opinion shall be 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 be published and the opinion has been issued.

**Effective date of amended Rule.*

47.6 Affirmance Without Opinion. *The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5th Cir. R. 47.6." or "ENFORCED. See 5th Cir. R. 47.6."*

47.7 Calendaring Priorities. *The following categories of cases will be given preference in processing and disposition: (1) appeals in criminal cases, (2) habeas corpus petitions and motions attacking a federal sentence, (3) proceedings involving recalcitrant witnesses before federal courts or grand juries under 28 U.S.C. § 1826, (4) actions for temporary or preliminary injunctive relief, and (5) any other action if good cause therefor is shown. [Fed. R. App. P. 45(b) and 28 U.S.C. § 1657].*

47.8 Attorney's Fees.

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 for whom compensation is sought. In the absence of such records, no time expended will be considered in the setting of 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 make reasonable efforts to advise counsel of the existence of this rule, but whether or not counsel has been advised, ignorance of this rule shall not, standing alone, be deemed grounds for an exception. If the reasonableness of the hours claimed on the basis of time records becomes an issue, the applicant shall voluntarily 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).

(a) Applications to the Court of Appeals. An application to this court for an award of fees and expenses pursuant to 28 U.S.C. § 2412(d)(1)(B) shall identify the applicant and the proceeding for which an award is sought. The application shall show the nature and extent of services rendered in this court and that the applicant has prevailed, and shall identify the position of the United States or an agency thereof in the proceeding that the applicant alleges was not substantially justified. The party applying shall submit the required information on Form A.O. 291, available from the clerk of court.

(b) Petitions by Permission. A petition for leave to appeal pursuant to 5 U.S.C. § 504(c)(2) shall be filed with the clerk of the court of appeals within 30 days after the entry of the agency's order, with proof of service on all other parties to the agency's proceedings.

(c) The petition shall 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 be submitted without further briefing and oral argument unless otherwise ordered.

(d) All papers may be typewritten. An original and 3 copies shall be filed with the court.

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

(f) Appeals/Petitions to Review. Appeals and petitions to review otherwise contemplated by the Equal Access to Justice Act may be filed pursuant to the applicable statutes and rules of the court.

47.9 Rules for the Conduct of Proceedings Under the Judicial Conduct and Disability Act, 28 U.S.C. § 372(c).

See separately published Judicial Council of the Fifth Circuit Rules Governing Complaints of Judicial Misconduct or Disability effective April 15, 1993 as amended through November 22, 1996.

47.10 Rule Governing Appeals Raising Sentencing Guidelines Issues - 18 U.S.C. § 3742.

47.10.1 Scope of Rules. These rules govern procedures in appeals raising sentencing issues taken pursuant to 18 U.S.C. § 3742(a) or (b). These cases will proceed in the same manner and under the general rules of court governing other appeals and will not be given special expedited treatment over other criminal cases not raising the sentencing issue, except as hereinafter specified.

47.10.2 Motion to Expedite. For short sentence cases of 1 year or less in which defendant is in custody pursuant to the sentence appealed, a party may file a motion to specially expedite the appeal upon a showing of irreparable harm. The motion shall set out (a) when the trial transcript can be prepared and made available and (b) how soon thereafter appellant can file a brief. The court disfavors bifurcation of issues concerning sentencing from those issues involving the conviction.

47.10.3 The Appellate Record.

(a) Oral Reasons for Imposition of Sentence. The oral statement of reasons of the district court for imposition of a sentence as required by 18 U.S.C. § 3553(c), as amended, shall be reduced to writing, filed, and incorporated in the record on appeal.

(b) Transcript of Sentencing Proceedings. In addition to the requirements of Fed. R. App. P. 10(b) and 5th Cir. R. 10.1 for ordering the transcript of trial proceedings, appellant shall be required to order a transcript of the entire sentencing proceeding (excluding the oral statement of reasons for sentencing of the district court) if a sentencing issue under 18 U.S.C. § 3742 will be raised on appeal.

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

(d) Presentence reports filed in this court as part of a record on appeal will be treated as matters of public record except to the extent that the report, or a portion of the report, has been sealed by order of the district court.

(e) Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, shall file a motion to that effect in the court of appeals, setting forth with particularity the reasons why access to such information is necessary to the appeal. Counsel must return the copy of the presentence report made available, without duplication. Counsel should avoid disclosure of confidential matters in their public filings.

FRAP 48. MASTERS

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

OTHER INTERNAL OPERATING PROCEDURES

Judicial Council - The judicial council established by 28 U.S.C. § 332 is composed of 19 judges - the chief circuit judge, nine circuit judges, and nine district judges. The chief circuit judge and the active circuit judge next in seniority serve permanent terms. All other council members serve for staggered three-year terms. The council meets on call of the chief circuit judge pursuant to statute.

Judicial Conference - Pursuant to 28 U.S.C. § 333, the chief circuit judge may summon biennially or annually the federal judges of the circuit to a conference, at a designated time and place, for the purpose of considering the state of business of the courts and advising means of improving the administration of justice within the circuit. A copy of the court's rule for representation and active participation of the members of the bar of the circuit is available from the clerk or circuit executive.

Lawyers Advisory Committee - The court is assisted in its rule-making function and in the drafting of these Internal Operating Procedures by a committee composed of 2 lawyers from each state in the circuit. These lawyers are appointed for staggered terms by the chief judge upon recommendation of the circuit judges from that state. Their terms are for 3 years. They examine and comment upon suggested rule and procedure changes.

Recusal or Disqualification of Judges

(a) Grounds - Judges may recuse themselves under any circumstances considered sufficient to require such action. Judges shall disqualify themselves under circumstances set forth in 28 U.S.C. § 455, or in accordance with Canon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States.

(b) Procedure

(1) Administrative Motions - If a judge who is the initiating judge recuses himself or herself from considering, or is disqualified to consider an administrative motion, he or she will notify the clerk, who will advise the recused judge of the next initiating judge and request that the file be sent to that judge.

(2) Summary Calendar Cases - The same procedure is followed as above, except that the substitute or backup judge is called upon, as the court's practice is that cases are not ordinarily disposed of on the merits by only 2 judges.

(3) Hearing Calendar Cases - Prior to the formal publication of the court calendar, each judge on the panel is furnished with a copy of the 5th Cir. R. 28.2.1 certificate of interested persons for each judge's advance study to determine whether recusal or disqualification is appropriate in any of the cases.

(c) If a judge recuses himself or herself, or is disqualified, he or she immediately notifies the other members of the panel, and arrangements are made for a substitute judge.

SPECIAL PANELS AND CASES REQUIRING SPECIAL HANDLING

Corporate Reorganization - Chapter 11

The first appeal is handled in the usual manner. Counsel shall state in their briefs whether the proceeding is likely to be complex and protracted so that the panel can determine whether it should enter an order directing that it will be the permanent panel for subsequent appeals in the same matter. If there are likely to be successive appeals, a single panel may thus become fully familiar with the case thus making the handling of future appeals more expeditious and economical for litigants, counsel and the court. (For the rule regarding direct appeals in bankruptcy matters see 5th Cir. R. 47.4).

Criminal Justice Act Plan - The court has adopted a plan and guidelines under the Criminal Justice Act. Copies are available from the clerk.

Certified Records for Supreme Court of the United States - While Sup. Ct. R. 19.1 provides for the filing of the record at the time a petition for certiorari is docketed, the policy of that Court is to discourage the filing thereof unless "the record is deemed essential to a proper understanding of the case." Therefore the clerk's office does not prepare a certified record unless specifically requested by counsel. However, if certiorari is granted, a certified record will automatically be prepared. (See generally Sup. Ct. R. 12.7, 16.2, and 19.4).

Building Security

(a) Reasons for Building Security - The purpose of these rules is to minimize interference with and disruptions of the court's business, to preserve decorum in conducting the court's business and to provide effective security in the John Minor Wisdom United States Court of Appeals Building and garage located at 600 Camp Street, New Orleans, Louisiana. These entire premises are called The Building.

(b) Security Personnel - The term "Security Personnel" means the U.S. Marshal or Deputy Marshal, Court Security Officer, or a member of the Federal Protective Service Police.

(c) Carrying of Parcels, Bags, and Other Objects - Security Personnel shall inspect all objects carried by persons entering The Building. No one shall enter or remain in The Building without submitting to such an inspection.

(d) Search of Persons - Security personnel may search the person of anyone entering The Building or any space in it. Anyone who refuses to permit such a search shall be denied entry.

(e) Unseemly Conduct.

(1) No person shall:

(2) Loiter, sleep or conduct oneself in an unseemly or disorderly manner in The Building;

(3) Interfere with or disturb the conduct of the court's business in any manner;

(4) Eat or drink in the halls of The Building or in any courtrooms;

(5) Block any entrance to or exit from The Building or interfere in any person's entry into or exit from The Building.

(f) Entering and Leaving - All persons shall enter and leave courtrooms only through such doorways and at such times as shall be designated by the Security Personnel.

(g) Spectators - The entrance and departure of spectators to or from courtrooms shall be subject to the directions of the presiding judge. Spectator seating in any courtroom may be designated by the U.S. Marshal. Spectators excluded because of lack of seating and spectators leaving the courtroom while court is in session or any recess shall not loiter or remain in the area adjacent to the courtroom.

(h) Cameras and Electronic Equipment - No person shall introduce or attempt to introduce any type of camera, recording equipment, or other type of electrical or electronic device into The Building without the permission of the court.

(i) Weapons - Except for Security Personnel, no person shall be admitted to or allowed to remain in The Building with any object that might be employed as a weapon unless authorized in writing by the court to do so.

(j) Enforcement - Security Personnel shall enforce these security provisions and any other provisions the court might implement. Attorneys and parties who violate these provisions are subject to, inter alia, contempt proceedings and sanctions.

APPENDIX OF FORMS

FORM 1. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the
_____ District of _____

File Number _____

A.B., Plantiff	}	
	}	
v.	}	
	}	Notice of Appeal
	}	
C.D., Defendant	}	

Notice is hereby given that _____(here name all parties taking the appeal)_____, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the_____Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of , 19__.

(s)_____

Attorney for_____

Address:_____

* See Rule 3(c) for permissible ways of identifying appellants.

FORM 2. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A DECISION OF THE UNITED STATES TAX COURT

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner	}	
	}	
v.	}	Docket No._____
	}	
Commissioner of Internal	}	
Revenue, Respondent	}	

Notice of Appeal

Notice is hereby given that _____(here name all parties taking the appeal)_*_____hereby appeal to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 19____ (relating to _____).

(s)_____

Counsel for_____

Address:_____

* See Rule 3(c) for permissible ways of identifying appellants.

FORM 3. PETITION FOR REVIEW OF ORDER OF AN AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals
for the _____ Circuit

A.B., Petitioner	}	
	}	
v.	}	Petition for Review
	}	
XYZ Commision,	}	
Respondent	}	

_____(here name all parties bringing the petition)*_____hereby petition the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 19___.

(s)_____
Attorney for Petitioners

Address:_____

* See Rule 15.

FORM 4. AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

United States District Court for the
_____ District of _____

United States of America	}	
	}	
v.	}	No. _____
	}	
A.B.	}	

Affidavit in Support of Motion to Proceed
on Appeal in Forma Pauperis

I, _____ being first duly sworn, depose and say that I am the _____, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

_____

SUBSCRIBED AND SWORN TO before me this _____day of _____, 19___.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
District Judge

FORM 5. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT OR A BANKRUPTCY APPELLATE PANEL

United States District Court for the
_____ District of _____

In re	}	
_____,	}	
Debtor	}	
	}	
_____,	}	
Plaintiff	}	File No._____
	}	
v.	}	
	}	
_____,	}	

Defendant }

Notice of Appeal to
United States Court of Appeals
for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 19__[here describe the judgment, order, or decree] _____.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____
Attorney for Appellant

Address: _____

_____