

## **Answers To Common Questions Concerning Fifth Circuit Procedures**

### **1. What happens when an appeal is received in your court?**

Our court receives electronic notice when a notice of appeal is filed in the district court. We receive notice of agency appeals by mail, or when attorneys file the appeal through Pay.gov. After receiving notice, we open the appeal and assign a case number that includes the calendar year filed and five digits that indicate the originating court or case type.

Northern Texas Cases are 10000 series (such as 19-10001)

Southern Texas (Houston Only) Cases are 20000 series (such as 19-20001)

Louisiana Cases are 30000 series (such as 19-30001)

Southern Texas (Other than Houston), Eastern Texas Cases are 40000 series (such as 19-40001)

Western Texas Cases are 50000 series (such as 19-50001)

Mississippi and agency cases are 60000 series cases (such as 19-60001)

Death Penalty cases are 7000 series cases (such as 10-70001)

Once docketed, an attorney in the Clerk's Office conducts an initial jurisdiction review, and if we determine that jurisdiction is defective, we expedite the case for review (normally within 45 days) by a three-judge panel, and possible dismissal. If there is no obvious jurisdictional issue, we obtain a certified record on appeal and proceed to briefing.

### **2. When does a judge first see a case?**

Judges first see an appeal when called upon to resolve administrative matters, or as part of the screening or merits panel.

If issues (such as non-dispositive motions) arise before briefing is completed, we assign the appeal to a single judge or a panel to handle the matters. Once a judge or panel is assigned to handle administrative matters for the appeal, they handle all subsequent administrative matters, until the case is assigned to the screening panel.

When briefing is completed, we assign the case to a three-judge screening panel to determine whether oral argument is necessary. If the judges agree oral argument is not required, the panel issues an opinion based upon the briefs. If any judge on the screening panel believes argument should be heard, the panel returns the case to the Clerk's Office and the Clerk puts the case on the oral argument calendar, where an oral argument panel will decide the case. (See the I.O.P. following 5<sup>th</sup> Cir. R. 34.13 for a description of the screening process.)

Note, once the screening/merits panel receives the case, that panel may also act on administrative matters.

### **3. How long does it take for the court to decide an appeal? What takes up most of that time?**

For the period July 1, 2018 through June 30, 2019, our court's processing times for all appeals was as follows:

- From the Notice of Appeal in the district court until the last brief filed in our court: 4.9 Months
- From the last brief until final disposition in case without oral argument: 5.3 Months
- From submission to panel in cases without oral argument until Final Disposition: 0.7 Months
- From oral argument hearing to final disposition: 1.2 Months
- From Notice of Appeal to final disposition (average for all appeals): 9.1 Months
- Notice of Appeal to final disposition for orally argued appeals: 13.9 Months

### **4. What is the procedure for assigning cases to judges? How are caseload imbalances among judges addressed?**

For each court year (July 1 through June 30), a computer program creates random panels to perform the jurisdictional review, screening, oral argument, and administrative matters functions. Throughout the year, we randomly assign cases to these panels.

A locally developed program called PANLOG assigns cases to individual judges for single judge matters, and to three-judge motions panels and screening panels.

Each panel is assigned a counter, which we advance when we assign a case to that panel, giving the panel credit for the action. The program automatically assigns the next case to the panel with the lowest value counter, and randomly amongst panels that may have the same counter value. This balances the workload for all panels and judges.

Our procedures were designed precisely to prevent imbalances in the case assignments.

### **5. How long has this procedure been in place? What methods were used before then?**

The Clerk's Office has used these same procedures for over 40 years. The only change has been that we automated the process in the last decade. Prior to PANLOG, for example, a rotational paper log was utilized.

### **6. How often must judges sit for argument? How are visiting judges appointed?**

Active judges must sit for oral argument seven weeks each year, so the oral argument computer program assigns these judges to serve on oral argument panels seven times each year. The

program schedules senior judges to sit for the number of sessions they designate, normally two or three sittings per year, although senior judges can request to sit up to seven sittings.

We permit active judges to designate two months they do not want to sit, and the program randomly assigns these judges to sit in seven of the remaining 10 months. We permit senior judges to choose when they want to sit, so the program assigns them to panels in the months they designate.

Senior judges, by statute, must perform at least  $\frac{1}{4}$  of the work of an active judge to continue to receive full pay. They may, at their discretion, do this with oral argument sittings, by deciding cases on the summary (no oral argument) calendar, or a combination thereof. If they elect to participate in oral argument sittings, they are assigned to a panel like a regular active judge, except they can choose the months they wish to sit. Several of our senior judges carry a full workload, despite having taken senior status.

If anything precludes us from having sufficient judges available for a panel in a given month, we use a visiting judge to create the panel. The Chief Judge invites visiting judges on an as needed basis.

## **7. How do you assign cases to oral argument panels?**

If we will have 5 panels sitting during a court session, the calendar clerk identifies the next 100 cases that will be heard, using the court's instructions regarding processing (see Fifth Circuit R. 47.7.)

The following categories of cases are given preference in processing and disposition: appeals in criminal cases, habeas corpus petitions and motions attacking a federal sentence, proceedings involving recalcitrant witnesses before federal courts or grand juries under 28 U.S.C. Section 1826, actions for temporary or preliminary injunctive relief and any other action if good cause is shown. All other cases are calendared for hearing in accordance with the court's "first-in first-out" rule. Unless the court assigns special priority, the oldest cases in point of time of availability of briefs are ordinarily calendared first for hearing.

To ensure complete objectivity in the assignments of judges and the calendaring of cases, the calendaring clerk is insulated from the panel creation process and does not know which judges are sitting when distributing cases to the panels. After identifying the 100 cases, the calendar clerk assigns 20 cases to each of the five panels. Again, this employee does not know which judges are sitting that month (that information is restricted to key court employees) or the composition of any of the panels. The clerk first balances the calendars for each panel by case type (civil vs criminal) so that each panel has an equal number of civil and criminal appeals. Once the assignments are completed, another employee who is aware of each panel's membership determines if a case has been assigned to a judge who is recused. If that occurs, the calendaring clerk (again, without knowledge of the identity of the panels) randomly assigns that matter to

another panel and replaces it with a randomly selected similar type case from the receiving panel's assigned cases.

If during that five-panel sitting the court were to hear a case with significant public interest, we would assign that case to a panel by lot. We identify the panels as 1-5 and write those numbers on five pieces of paper and place them in a container, and the Clerk draws a piece of paper from the container, and the case is then assigned to that panel. Our practice is to video record this drawing as proof of randomness.

**8. How do you prevent the same judges from serving together repeatedly on the same panel?**

First, we create new panels each court year. Second, the program weights factors to ensure panels mix experienced and newer judges and avoids repeating identical panel memberships.

**9. Do you assign cases to judges who have special expertise or knowledge?**

No. We assign cases randomly.

**10. Can judges decline to take a case for reasons other than conflict of interest? If a judge declines a case, how is it reassigned?**

Judges handle all assigned cases unless recused. It is possible that due to illness or respite a judge might not participate, but I am unaware of any judge declining to participate in a case for any reason other than a conflict recusal situation.

**11. How are cases distributed among the others when one or more judges are unavailable?**

For all panels except the oral argument panel, the computer program assigns judges to serve as backup judges in case a member of the panel is unavailable. We “pull in” the backup judge as required.

If a judge is unable to attend oral argument, he or she can still participate in the case by reading the briefs and listening to the oral argument digital recording. If a judge heard the argument but is unable to participate in the decision (for example, due to death), the court could still act, if the two remaining judges agree on the outcome. The court would then issue the opinion as a quorum, with a footnote. If the two remaining judges are evenly split, or if the absence occurred before the case was submitted following argument, the panel would return the case to the Clerk, who would assign it to another oral argument panel randomly. In some cases, counsel might have to reargue the case.

**12. What are my chances of getting oral argument?**

Criminal cases have the least chance of oral argument and private civil cases, especially bankruptcy cases, the greatest.