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Presented by:

Dana Livingston

Jennifer S. Freel

Paper by:

Dana Livingston

Author contact information:

Dana Livingston

Alexander Dubose Jefferson &
Townsend LLP

515 Congress Ave., Suite 2350

Austin, TX 78701

dlivingston@adjtlaw.com

512.482.9304

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EN BANC REVIEW IN THE FIFTH CIRCUIT

By Dana Livingston

I. THE STATISTICS: SOBERING OR FASCINATING?

Counsel considering filing a petition for panel or en banc rehearing should be aware of the low chances of success.

	2012 ¹	2013 ²	2014 ³	2015 ⁴	2016 ⁵
En Banc Petitions filed ⁶	250	229	224	236	194
Denied	235	220	209	217	190
• <i>with a poll vote</i>	4 (1.7%)	9 (4.3%)	13 (6.2%)	14 (6.5%)	12 (6.2%)
• <i>without a poll vote</i>	231	211	196	203	178
Granted	7 (2.8%)	6 (2.6%)	3 (1.3%)	5 (2.1%)	6 (3.1%)
• <i>on Court's own motion with oral argument</i>	2	0	0	1	2
• <i>on Court's own motion without oral argument</i>	1	0	1	0	0
• <i>on motion of parties with oral argument</i>	4	5	2	3	3
• <i>on motion of parties without oral argument</i>	0	1	0	1	1
Disposed of by other means	6 (2.4%)	7 (3%)	9 (4%)	12 (5%)	4 (2.1%)

¹ UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK'S ANNUAL REPORT: JUDICIAL WORKLOAD STATISTICS FOR JULY 2011–JUNE 2012 at 29 encl. D (2012).

² UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK'S ANNUAL REPORT: JUDICIAL WORKLOAD STATISTICS FOR JULY 2012–JUNE 2013 at 29 encl. D (2013).

³ UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK'S ANNUAL REPORT: JUDICIAL WORKLOAD STATISTICS FOR JULY 2013–JUNE 2014 at 29 encl. D (2014).

⁴ UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK'S ANNUAL REPORT: JUDICIAL WORKLOAD STATISTICS FOR JULY 2014–JUNE 2015 at 30 encl. D (2015).

⁵ UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK'S ANNUAL REPORT: JUDICIAL WORKLOAD STATISTICS FOR JULY 2015–JUNE 2016 at 31 encl. D (2016).

⁶ The numbers in the chart above showing grants and denials are not only of petitions filed within each statistical year since a handful of petitions are pending at the open of each statistical year and a nearly equal number pending at the close of each statistical year:

	2012	2013	2014	2015	2016
Pending at beginning of statistical year	21	23	19	22	24
Still Pending as of close of statistical year	23	19	22	24	18

These numbers are mostly consistent with those a decade earlier, although slightly fewer en banc petitions were filed and slightly more were granted then: for the 12-month period that ended June 30, 2004, 192 petitions for rehearing en banc were filed, and the court granted 11 en banc rehearings, or 5.4% of the petitions filed.⁷ Regardless, the following statement from the Fifth Circuit’s Internal Operating Procedures remains true: compared to all the cases decided by the court, “[f]ewer than 1% of the cases decided by the court on the merits are reheard en banc.” I.O.P. FOLLOWING 5TH CIR. R. 35.

That statistic fails to tell the whole story. The three shaded rows in the chart above show the statistics of filed en banc petitions that got some traction at the court—either a grant, a poll, or a modification by the panel. The five-year average for petitions that got some traction is nearly 11% of the en banc petitions filed, which is relatively high given the extraordinary nature of en banc review. The charts at the end of this paper give a flavor of what issues garnered some en banc interest, even if not resulting in a grant.

II. REHEARING BY THE PANEL AND BY THE EN BANC COURT

A. Rehearing en banc

Currently, a majority of the circuit judges who are in regular active service and not disqualified may order that an appeal be heard or reheard en banc. FED. R. APP. P. 35(a). For the Fifth Circuit, a list of active-status judges (listed by seniority) and a list of senior-status judges (listed alphabetically) can be found here: <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/addressandphonelisting.pdf>.

1. Grounds

A petition for hearing or rehearing en banc, formerly called a “suggestion for en banc consideration,” is an extraordinary procedure to be used only for cases involving questions of exceptional importance or to secure or maintain uniformity of the court’s decisions. *See id.* As the Fifth Circuit Internal Operating Procedures describe, a petition for rehearing en banc “is intended to bring to the attention of the

⁷ UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, CLERK’S ANNUAL REPORT: JUDICIAL WORKLOAD STATISTICS FOR JULY 2003–JUNE 2004 at 18, 23 encl. D (2004).

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