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Rehearing and En Banc Practice in Fifth Circuit

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Winning may not be everything, but losing has little to recommend it.[1]

To accept defeat . . . is to be liberated from it.[2]

INTRODUCTION

You should've won. But you lost. Now what?

I offer this primer as a resource for the hopefully rare occasion that you lose in the Fifth Circuit. This primer gathers information from various sources, both general and specific to our Circuit, to help you decide whether to accept defeat or keep fighting (in the Fifth Circuit, at least). As you'll see, in the vast majority of cases, accepting defeat, fair or not, is best for you and your client. This primer may be helpful in explaining that reality to your client. And if you want to keep fighting, this primer will help you put your best foot forward.

BACKGROUND

To best understand the rules surrounding panel rehearing and en banc consideration as well as the factors you should consider in deciding whether to engage either process, it is helpful to first understand the procedures' origins.

I. The Problem: Finality vs. Fallibility

Anyone designing a system of procedure for dispute resolution must confront the problem of finality. To solve the problem of finality, the designer must strike a balance between the competing demands of efficient decision-making on the one hand and the desire, on the other, to do the most complete justice possible. The availability of appeal itself reflects that balance.

Any court with the power of "final" judgment must also be careful and acknowledge the possibility that mistakes happen and that its original decisions may not always be the

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[1] Senator Dianne Feinstein.

[2] Bruce Lee as Li Tsung, *in Longstreet: The Way of Intercepting the Fist* (ABC television broadcast Sept. 16, 1971).

best possible decisions. But not so careful that its judgments never become final—courts must establish standards to single out those cases in which reconsideration will be profitable to the system.

II. The Solution: Limited Rehearing

At common law, courts could vacate or modify a judgment or decision during the term of court in which it was entered.[3] The term "rehearing" likely originated in equity practice—for a time, no court or other body sat above the Chancery, so no writ of error was available, and so rehearing was the only method to correct an error. In equity, until the Chancellor affixed the Great Seal, rehearing upon rehearing upon rehearing was available.

The common law and Chancery practices birthed rehearing practice in federal appellate courts. Originally, each federal court established rules and standards for rehearing on its own. And at the beginning of the 20th century, the question of en banc rehearing surfaced, as Congress provided that some circuits would have more than three judges.[4] Initially, the Ninth Circuit held that federal law did not permit courts to sit en banc.[5] The Third Circuit disagreed, and its view prevailed in the Supreme Court and in Congress.[6] The Supreme Court later held that the courts of appeals are free to develop their own procedures for en banc review.[7]

In 1967, the Supreme Court promulgated the Federal Rules of Appellate Procedure, which standardized much of the rehearing process. Rule 35 governs en banc procedures; Rule 40 governs panel rehearing.

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[3] *See Hudson & Smith v. Guestier*, 11 U.S. (7 Cranch) 1 (1812).

[4] The Evarts Act created the modern federal courts of appeals. The Act's namesake, William M. Evarts, played the foil for a classic lawyer joke by Mark Twain. *See Banquet Hall Orators*, N.Y. TIMES, Dec. 5, 1886, at 4 (Punchline: "Doesn't it strike this company as a little unusual that a lawyer should have his hands in his *own* pockets?").

[5] *Lang's Est. v. Comm'r of Internal Revenue*, 97 F.2d 867, 869 & n.2 (9th Cir. 1938).

[6] *Comm'r of Internal Revenue v. Textile Mills Sec. Corp.*, 117 F.2d 62, 67–71 (3d Cir. 1940) (en banc), *aff'd*, 314 U.S. 326 (1941); 28 U.S.C. § 42(c). In *Allen v. Johnson*, the Fifth Circuit concluded that senior judges could sit en banc. 391 F.2d 527 (5th Cir. 1968) (en banc).

[7] *W. Pac. R.R. Corp. v. W. Pac. R.R Co.*, 345 U.S. 247, 250–51 (1953).

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